

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

COMMERCIAL DIVISION

CLAIM NO. SLUHCM2025/0003

BETWEEN:

CARIB INVEST CAPITAL LIMITED

Applicant

and

MERIDIAN CONSTRUCTION COMPANY LIMITED

Respondent

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Mr. Kenroy Justin, for the Applicant

Mrs Natalie Augustin, for the Respondent

2025: April 9
May 8

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]** The application before the Court is for injunctive relief pursuant to Part 17 of the Civil Procedure Rules (Revised Edition) 2023 (“the CPR”). It is premised on rules 17.1(1)(b), 17.2(1)(b) and 17.2(3).

[2] The applicant seeks the following orders:-

- (1) that the respondent be restrained from removing the following assets from its project site and from the jurisdiction:
 - (a) Liebherr 120 HC Tower Crane;
 - (b) Wheel Excavator (Komatsu PW160-8); and
 - (c) Dump Truck registration number TK8428.
- (2) further or other relief as the case may require.
- (3) costs.

[3] In summary the grounds of the application are that:

- (1) The applicant and the respondent entered into a contract dated 8th August 2022 for provision of engineering, procurement and construction works by the respondent, for erecting a commercial building on behalf of the applicant ("the contract").
- (2) The building is described as Hotel Courtyard by Marriott, Pointe Seraphine, St. Lucia, with a pool and tanks located at Block N 0849F, Parcel N 147.
- (3) Under article 3 of the contract time was deemed to be of the essence, and the completion date was set at 16 months from the commencement date.
- (4) The parties agreed to extend the time for completion to 30th March 2024.
- (5) Under article 89 of the contract, the respondent would be liable for delay damages for failing to complete the project by the agreed date. Such damages was capped at 10% of the contract price of USD\$9,120,000.00
- (6) By September 2024 the respondent had not completed the works, and the applicant claims to be entitled to delay damages in the sum of USD\$912,000.00
- (7) The respondent has failed to fulfil the contract by refusing to correct defects and completing the contractual works, and is also liable for breach of contract.
- (8) The applicant has settled all amounts due to the respondent and is not in a position to set-off the delay damages from the contract price.
- (9) All assets and/or property of substantive value belonging to the respondent in this jurisdiction are moveable, which includes the equipment referenced in the application.
- (10) The respondent is a foreign based entity with no ties to this jurisdiction and came into the country to execute the contract. Further the respondent intends to leave the country once the contract is concluded, and is imminently set to remove the assets from the project site to its home country of the British Virgin Islands.
- (11) It is necessary to obtain the orders sought in the interests of justice, so that the respondent is prevented from moving the assets out of the applicant's reach in the likely event that enforcement is necessary against the respondent, for a judgment in favor of the applicant.
- (12) The equipment was purchased with the understanding that it would be available for completion of the project and removal from the site or the jurisdiction may result in more costly delays and expense.

(13) There is a serious issue to be tried between the parties, damages will not be an adequate remedy, the applicant is in a position to give an undertaking in damages and the balance of convenience favours granting the injunction, as the applicant would suffer more harm if the respondent is allowed to flee, when compared to the harm which the respondent might suffer if ordered to keep the equipment in the country. Further, the respondent came to own the equipment because of assistance from the applicant, which means the respondent previously operated its business without this equipment.

The Issue

- [4] The sole issue for the Court's consideration is whether the applicant should be granted a freezing order, restraining the respondent from removing the equipment from the applicant's project site or from the jurisdiction.

The Evidence

The Applicant's Affidavit in Support

- [5] The application is supported by an affidavit of Ventzislav Ivanov (Mr Ivanov), director of the applicant. He deposed that the applicant and respondent entered into the contract¹ which required that the works be completed within 16 months of the commencement date, which was no later than 8th December 2023. The respondent was unable to complete the project by that date, leading to an agreed extension to 30th March 2024². The respondent failed to complete the project by the extended date, which triggered the penalty clause for delay damages. The applicant was compelled to advance payments directly to the respondent's subcontractors to cover sums owed by the respondent and endeavored to assist with paying salaries of the respondent's workers on the site. A balance of USD\$257,995.00 remains due to the respondent based on the contract price.

¹ See exhibit 'VI1'

² See exhibit 'VI2'

- [6] Mr Ivanov stated that while performing the works, the respondent informed the applicant that essential equipment was required which it did not possess. It was agreed that the applicant would purchase the equipment, and the respondent would reimburse the applicant for same.³ This included the crane, manlift, formwork and lifting jacks, which was repaid in full by the respondent. The applicant also assisted the respondent with purchasing additional equipment to maintain progress, which included the wheel excavator and dump truck, on the strict understanding that (1) the equipment would be used to complete the project, (2) the respondent was responsible for reimbursing the applicant for same and (3) the necessary transfers of ownership would be completed once full payment was received. The respondent made payments toward the wheel excavator and dump truck, and a balance remains outstanding.
- [7] Mr Ivanov said that the respondent has not only delayed the project but also delivered sub-standard work which is not fit for purpose. The deficiencies were brought to the attention of the respondent⁴ however, on 6th February 2025 the applicant received correspondence stating that the respondent did not intend to complete the contract.⁵ Mr. Ivanov stated that as the respondent has no permanent ties to St. Lucia, and no other property or business here. If the equipment is removed from the jurisdiction, enforcing any future judgment will become impractical or impossible. The applicant stated that the equipment is also essential to completion the project.

The Respondent's Affidavit in Answer

- [8] The respondent's project manager Carl Loubon (Mr Loubon) deposed an affidavit in which he disputes the applicant's entitlement to the relief sought. He stated that:
- (1) there is no serious issue between the parties as the contract has been substantially completed; the equipment was acquired by way of instalments which were set-off against the contract price; and the reason cited as possible dissipation of assets is unjustified;
 - (2) there is no allegation of dishonesty by the applicant against the respondent to give rise to a valid fear of risk of dissipation;

³ See exhibit 'VI3'

⁴ See exhibit 'VI5' for the list of defects

⁵ A breach for which the applicant intends to pursue legal action for contractual damages.

- (3) if, on a substantive claim, judgment is given in favour of the applicant, such judgment can be enforced against the respondent in any of the regional jurisdictions where it or its subsidiaries operate;
- (4) the respondent has not taken any steps nor does it have any intention of taking steps to dissipate assets for the purpose of frustrating enforcement; and
- (5) the applicant has not given an undertaking in damages.

- [9] Mr Loubon referenced various articles in the contract which he considered important, but were not referenced by the applicant. For instance, articles 67(1) and 69(1) which require that written notice be given for invoking the penalty clause, article 90(1) which concerns the consequences of incidents of force majeure, article 93(9) on prohibition of the applicant's use of the respondent's goods upon termination of the contract, and articles 98-100 concerning referral of disputes to arbitration for final resolution.
- [10] He denied that delays were caused by the respondent, and attributed delays on the project to unforeseen and external factors such as a shortage of concrete, sand and steel, shipping restrictions, water restrictions during a period of drought and concrete batching plant and equipment breakdowns. He said these factors were beyond the respondent's control, and the applicant was kept abreast of all issues encountered throughout the process⁶. He noted that the applicant appeared to have been satisfied with the information furnished by the respondent regarding delays. He stated that the parties had no dialogue concerning invoking the penalty clause, and any such penalty could only take effect from 21st January 2025 when written notice was given by the applicant, as opposed to 1st April 2024 (expiry of the extended completion date).
- [11] He disputed the applicant's claim of defective work, stating that all concerns had been addressed by the time the application was filed, with final approvals being provided by the applicant on 10th March 2025⁷. Mr Loubon further asserted that the cash flow difficulties encountered on the project were linked to the applicant's inability to settle interim payment applications. This impacted the respondent's ability to make timely payments to suppliers and subcontractors, resulting in incremental work stoppages and subsequently to the

⁶ See exhibits 'CL1' and 'CL4'

⁷ See exhibit 'CL7' for final inspection report

applicant having to make direct payments to the respondent's suppliers, contractors and employees.⁸ The sum of US\$222,132.56 remains outstanding to the respondent, despite the fact that the contract contains no retention clause.⁹

[12] Mr Loubon stated that the respondent was the owner of the assets, as the applicant had purchased the equipment and the amounts were deducted from the contract price, with a balance of US\$22,594.96 still due to the applicant for the excavator and dump truck. This sum is to be deducted from the final balance payable to the respondent by the applicant. Further, the respondent submitted a bid to undertake the completion works for the project¹⁰ and alternatively offered to rent the crane to the applicant. Neither offer was accepted, so the respondent considered that its association with the project had concluded and informed the applicant that the crane would be demobilized, removed from the work site and repositioned for use on another project outside of Saint Lucia. Mr Loubon asserted that the applicant's sole purpose for filing the application is to deny the respondent the ability to deal with its property as it wishes. He noted that article 93(9) of the contract prohibits the applicant from using the respondent's goods if the applicant terminates the contract.

[13] In concluding, he stated that the application is unjustified, as there is no real risk of asset dissipation. He emphasized that the respondent has substantial ties to Saint Lucia, and is affiliated to a local company (of similar name) which has operated in Saint Lucia for the past 4 years and has substantial assets in this jurisdiction. He urged that the application be dismissed, with costs to the respondent.

The Applicant's Affidavit in Reply

[14] In response Mr Ivanov stated that the applicant had disclosed serious triable issues. Although several issues have been resolved since the application was filed, certain tasks still awaited execution¹¹ and the main issue was in relation to completion and enforceability of the penalty clause which he maintained was fully enforceable in the circumstances.

⁸ See exhibits 'CL2', 'CL5' (Email from Percy Rhoden to George Vassilev dated 4th March 2025) and 'CL8'

⁹ See exhibit 'CL10'

¹⁰ See exhibit 'CL9'

¹¹ Completion of the top slab of the tanks and premises in the pool area and submission of the as-built survey of the construction

- [15] In response to the respondent's contention that it or its affiliate has substantial assets in the jurisdiction, Mr Ivanov stated that the respondent is a separate entity from Meridian Construction Company (Saint Lucia) Limited. Thus, the respondent may not rely on the assets or previous work of that entity for its presence in this jurisdiction, and has given no indication of any substantial assets in Saint Lucia in its own name.
- [16] He denied the respondent's claim that external factors had caused the delay, and stated that the drought and resulting water restrictions were implemented on 21st May 2024, nearly two months after the extended completion date had passed, and was irrelevant to the delays. On the issue of subcontractor equipment breakdown, Mr Ivanov said that a critical concrete pour was scheduled for 28th March 2024 just two days before the revised deadline which he attributes to poor planning on the part of the respondent, given that the project was already far behind schedule.¹² With respect to cement shortage he acknowledged that a regional supply issue was raised on 1st February 2024 which lasted about ten days. He stated that these matters did not justify the respondent's overall delay, which extended well beyond the extended completion date. Furthermore, given the nature of the construction industry, contractors are expected to plan for such disruptions and to adopt mitigation strategies, especially given the existence of a penalty clause in the contract.
- [17] Regarding financial difficulties, he denied that the applicant was responsible for delayed payments, and said that arrangement was for a lump-sum contract, however the respondent neglected to make proper financial arrangements to ensure it could deliver. He provided a payment schedule as proof that the applicant consistently made payments to the respondent, and stepped in to pay subcontractors directly when the respondent failed or was unable to do so.¹³ He stated that this financial intervention was purely to maintain progress on the project, and was not as an admission of liability or obligation.
- [18] Mr Ivanov strongly disputed the respondent's claims of ownership of the assets, but accepted that the respondent had made payments toward them. He explained that the equipment was brought into the country under a special customs regime which prohibited

¹² See exhibit 'V17'

¹³ See Exhibit 'V18'

its sale or removal without the applicant and Customs express approval. He further stated that the applicant was within its right to withhold passing property rights because of its claims against the respondent.

The Applicable Rules

- [19] The application is made pursuant to CPR 17.1(1)(b) which provides that the court may grant interim remedies including an interim injunction. Having reviewed the relief sought, I am of the view that the application should properly have been made pursuant to CPR 17.1(1)(j) for a freezing order. This rule provides that the court may grant interim remedies including an order (referred to as a “freezing order”) restraining a party from (i) dealing with any asset whether located within the jurisdiction or not; and (ii) removing from the jurisdiction assets located there.
- [20] CPR 17.2(1)(b) states that order for an interim remedy may be made at any time, including before a claim has been made.
- [21] CPR 17.2(3) provides that the court may grant an interim remedy before a claim has been made only if (i) the matter is urgent; or (ii) it is otherwise necessary to do so in the interests of justice.
- [22] CPR17.4(2) states that unless the court otherwise directs, a party applying for an interim order under this rule must undertake to abide by any order for damages caused by the granting or extension of the order.
- [23] The threshold for granting conventional freezing orders is well established. The Court must be satisfied that: (i) the applicant has a good arguable claim; (ii) there is a real risk that a respondent will dispose of its assets in such a manner that a judgment against it will go unsatisfied; and (iii) the applicant has demonstrated that it is just and convenient to make the order sought. These limbs are conjunctive and all three must be satisfied, to succeed.¹⁴

¹⁴ See *Nimenea Maritime Corporation v Trave GmbH & Co* (“the Neidersachsen”) [1983] 1 WLR 1412; *Multibank FX International Corporation v Von Der Hyte SA* BVIHCVAP2021/0009 (delivered 23rd February 2023, unreported); *Sancus Financial Holdings Limited et al v Chad Christopher Holm* BVIHCMAP2023/0024 (delivered 28th March 2025, unreported).

Good Arguable Case

[24] Counsel for the applicant submitted that the applicant has a strong and well-supported claim for breach of contract, arising from the respondent's failure to complete the works by the extended completion date of 30th March 2024. He contends that the works were delivered over a year late, and still remain incomplete. The alleged causes for delay such as water restrictions, equipment breakdown, concrete shortage, and financial hardship raised by the respondent are irrelevant as (i) they occurred after the extended completion date, (ii) were foreseeable, and (iii) were unsupported by evidence. Counsel says communication dating back to May 2023 showed that it was repeatedly emphasized that time was of the essence. The respondent's failure to meet the extended completion date, with no formal request for a further extension, would have immediately triggered delay damages under article 89 of the contract. Counsel relied on the case of **Ashtrom Anguilla Ltd v Flag Luxury Properties (Anguilla) LLC et al**¹⁵ to say that the applicant's case meets the threshold of a good and arguable case, and is more than barely capable of serious argument."

[25] Conversely, Counsel for the respondent argued that there is no serious issue to be tried as the applicant was aware and kept abreast of the supply chain and other challenges faced by the respondent. Further, whether expressly or by its actions, the applicant sanctioned extensions as provided in the contract. Counsel relied on the case of **Clifford Wardally v Lou Mayo**¹⁶ to support the proposition that a freezing injunction cannot be used to obtain security for a judgment that the applicant expects to get, sometime in the future. Additionally, article 69¹⁷ required that the applicant give written notice of its intention to invoke the payment of delay damages, which was never done.

Discussion

[26] It is trite that the threshold for establishing a good arguable case is not a high one. An applicant must satisfy the court that its case is more than barely capable of serious

¹⁵ Claim No. AXAHCv2009/0091 (delivered 21st September 2009, unreported) at paragraphs [17] – [19], [22]

¹⁶ [1997] ECLR 8

¹⁷ Art 69(1) - If the Contracting Authority considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the contract he shall give written notice and particulars to the Contractor.

argument, but it need not necessarily be one that the judge believes has a better than 50% chance of success.¹⁸ There is no requirement that proceedings in which the judgment is sought should have already commenced, in order to establish a good arguable case. It has been said that it is sufficient, if the court is satisfied, with a sufficient degree of certainty that the right to bring proceedings will arise and that proceedings will be brought.¹⁹ The applicant must show a plausible claim that merits further investigation.

[27] The application is heavily premised on article 89²⁰ of the contract, which imposes liquidated damages for delay, if the respondent fails to complete works by the completion date or any agreed extension. Under this article liquidated damages of 0.1% per day of the contract sum, capped at 10% of the accepted contract price, is payable for every day between the time for completion and the date stated in the taking over certificate. The evidence reveals that initial completion date was extended by mutual agreement to 30th March 2024. It is not disputed that the respondent did not achieve completion by that date, and no further extension was requested or agreed by the parties. The respondent says that the delay was due to events beyond its control, and the applicant has not invoked the penalty clause in the manner required by the contract, and that final approvals were obtained on 10th March 2025. What this amounts to is a dispute over who or what factors account for delays on the project, whether the applicant has properly invoked the clause for delay damages, whether the respondent is liable for liquidated damages for delays.

[28] These facts support the finding that the applicant has a good arguable case, which it is able to pursue by way of arbitration based on the terms of the contract. Counsel for the applicant says that plans are afoot to commence this process, but no evidence of this was provided. Articles 98 to 102 of the contract sets out a dispute resolution process during the duration of the contract, which culminates in arbitration as the avenue for final adjudication of disputes. Article 102 states that disputes shall be finally settled under the Rules of Arbitration of the

¹⁸ Supra note 14

¹⁹ Julian Svirsky et al v Arman Oyekenov BVIHCP2021/0040, BVIHCP2021/0046 and BVIHCP2022/0005 (delivered 8th November 2023) at paragraph 1 of the headnote

²⁰ "Art 89(1) - If the contractor fails to comply with the time for completion pursuant to article 3, the contractor shall subject to article 69 pay delay damages to the contracting authority for this default. These damages....."

International Chamber of Commerce, by three arbitrators appointed in accordance with these Rules, and the arbitration shall be conducted in the language for communications.

- [29] The respondent's explanations and challenge to the penalty clause, while relevant for final determination, would not negate the existence of a prima facie case by the applicant. The Court is not required to engage in a mini trial at this stage to ascertain the relative strength of the applicant's case, beyond the fact that it is a plausible one, which merits investigation. In the circumstances, it can be said that the applicant has a good arguable case.

Risk of Dissipation

- [30] Counsel for the applicant submits that the respondent is a foreign company based in the British Virgin Islands and intends to relocate its assets for use on jobs overseas, as communicated to the applicant and confirmed in its affidavit evidence. Counsel stated that the respondent has been open about its intention to remove the equipment from the jurisdiction, which is demonstrative of a real risk of dissipation of its only known assets (the crane, excavator and dump truck), within the jurisdiction. This Counsel says, will render any future judgment nugatory. In support of this contention Counsel cited the case of **Mobil Cerro Negro Ltd v Petroleos de Venezuela SA**²¹ where it was held that the risk of dissipation must involve a risk of impairing the claimant's ability to enforce a judgment or award. There it was said that the test is whether, on the assumption that the claimant has shown at least 'a good arguable case', the court concludes on the whole of the evidence before it, that the refusal of a freezing order would involve a real risk that a judgment or award in favour of the applicant would remain unsatisfied.²²
- [31] Counsel further argued that the respondent has a poor record of settling creditors which resulted in the applicant having to pay the respondent's subcontractors and employees directly. He also noted that the respondent has failed to show that it owns any substantial assets in the jurisdiction, which could be used to satisfy a likely judgment. The evidence of

²¹ [2008] 2 All ER (Comm) 1034

²² Supra note 19 at paragraph 37

financial distress coupled with the respondent's intention to remove the assets from the jurisdiction, which is meant to defeat the applicant's claim, presents a real risk that a judgment or award in favour of the applicant would remain unsatisfied if the only substantial assets are removed.

[32] Counsel for the respondent submitted that the assets which are the subject of this application belong to the respondent. The crane was purchased in St Marteen and imported it into Saint Lucia under the applicant's concessions, but ownership did not change from the respondent. Whilst the concession under which it was imported was that of the applicant, for use on the applicant's project, title to the crane has always been with the respondent. Counsel further says that the arrangement between the parties was that the applicant would purchase the crane and the cost be deducted by the applicant from the contract price. The applicant is aware that the crane cannot be removed from the jurisdiction unless it is released from the concession by Customs and there could be no fear that the crane is going to leave the jurisdiction imminently.

[33] Counsel resisted the assertion of an intention to dissipate assets or avoid the consequences of litigation, and argued that an important consideration is that dissipation of the assets must be for the sole purpose of frustrating a judgment. There must be a tangible risk of the respondent moving the equipment out of the jurisdiction, with the intent to evade a potential judgment. Counsel submitted that this is not the case here, based on the parties' dealings. Demobilization of equipment upon project completion is standard practice, and is not an indication of ill-intention in wanting to move the assets. The respondent is a regional construction company and in any event removal was ultimately contemplated under the contract. Counsel also submits that the respondent is a reputable regional contractor with ongoing projects and commercial ties within the jurisdiction, even before the applicant's project, such that the applicant's fears are speculative, and unsupported by evidence of dishonesty or concealment of assets.

[34] Concerning the applicant's assertion that the respondent has a record of delinquent payment to third parties which led to the applicant having to pay them on behalf of the respondent,

Counsel submitted that it was an arrangement between the parties, that the applicant would pay third parties on behalf of the respondent, and the contract sum reduced accordingly.

[35] Counsel further submits that the applicant is only seeking the freezing order to retain the respondent's assets, and the mere act of relocating construction equipment does not automatically imply an intention to evade potential liabilities.

[36] By way of reply submissions Counsel for the applicant submits that as the respondent disputes ownership of the equipment, there is nothing to prevent it from removing the equipment from the jurisdiction. While it is true that they should not be removed, it is not the case that they cannot be removed. The respondent has not provided evidence to show that it has sufficient assets locally or regionally. To rely on the assets of an affiliate company in the jurisdiction is unacceptable, as enforcement against the respondent cannot be undertaken against subsidiaries or affiliates. Thus, it is misleading to simply say that the respondent has substantial assets because of the presence of an affiliate company here.

Discussion

[37] The legal authorities all reiterate that the purpose of a freezing order is not to provide an applicant with security but to restrain a respondent from evading justice by disposing of assets otherwise than in the ordinary course of business, which will have the effect of making the respondent judgment proof.²³ The risk must be judged objectively, to the extent that it is clearly discernable from the evidence that a future judgment might not be met because of unjustifiable dissipation of assets.²⁴ The conduct in question must be inexcusable, and it must be shown that assets will be used otherwise than for normal and proper commercial purposes.²⁵

[38] The threshold is solid evidence which points to a real risk of **unjustifiable movement or disposal of assets**, resulting in dissipation. It is insufficient to simply say that assets may be moved or that a defendant is short of money. This does not equate to an intention to

²³ National Bank Trust v Yurov & Ors [2020] EWHC 100 (Comm) Males J at paragraphs 69-70

²⁴ Julian Svirsky et al v Arman Oyekenov supra

²⁵ Supra note 19 at paragraphs 40 - 41

dissipate assets.²⁶ To satisfy this burden the applicant must show that (i) the respondent is removing or is about to remove the assets, to avoid enforcement of a possible judgment, or (ii) that the respondent is otherwise dissipating or disposing of its assets, in a manner clearly distinct from its usual or ordinary course of business, so as to render the possibility of future tracing of assets remote, or impossible.²⁷

[39] In **Hurrell v Fitness Holdings Europe Ltd**²⁸, a first instance decision of the English High Court, the defendant company was in the process of selling its business and assets. The learned judge refused to grant an order freezing the proceeds of sale or the transaction itself, having accepted that the purpose of the transaction was to pay other creditors on the basis that the dealings with the assets was a legitimate and justifiable transaction to meet the defendant's financial obligations. Cooke J observed:

“In assessing the risk of dissipation, the court is concerned with the risk of dissipation which is unjustifiable, not with the use of the assets to pay genuine indebtedness to others.”

[40] The assets in question are the crane, excavator and dump truck, which are said to be the only known assets of the respondent in this jurisdiction. The respondent is a foreign company based in the British Virgin Islands and has stated its intent to remove the assets at the conclusion of the project. Mr Ivanov's evidence is that the respondent encountered delayed payments to subcontractors and employees, suggesting liquidity issues, which may cast doubt on the respondent's ability to satisfy a future judgment. However, the respondent has stated that it is in a financial position to satisfy any possible award against it. The applicant complains that the respondent has provided no evidence of other assets within the jurisdiction or of its ability to satisfy a money judgment post-removal of the assets from the jurisdiction. It must be noted that the respondent is not required to do so on this application.

[41] Conversely, the applicant has not adduced any solid evidence to suggest that the respondent would not honour a potential award/judgment. The removal of equipment from

²⁶ See *Ashtrom Anguilla Ltd. v Flag Luxury Properties (Anguilla) LLC et al* supra at paragraph [22]

²⁷ See *Liberty Club Limited v Grenada Technical and Allied Workers Union* GDAHCVAP2013/0010 (delivered 23rd May 2014, unreported) at paragraph 1 of Headnote

²⁸ Unreported, ECWA, 15 March 2002, Cooke J

the jurisdiction at the end of a contract is not indicative of a sinister intention to frustrate enforcement. Case law has established that it is not sufficient to simply rely on the movement of assets from the jurisdiction. What must be shown is an unjustifiable movement of assets which leads to dissipation. The respondent has not indicated an intention to sell the equipment, and has simply disclosed the intention to remove the assets from the jurisdiction for use on other projects.

[42] The evidence reveals that the respondent sourced the crane, whilst the applicant paid the purchase price and obtained concessions for importing it into the jurisdiction. It is not disputed that the respondent has fully reimbursed the applicant the sums paid for purchasing the crane and with respect to the excavator and dump truck there is a small balance still due to the applicant. The respondent says this amount is to be deducted from the balance owed to it from the contract sum. No documentation has been provided from the Transport Department to substantiate registered ownership of the excavator and dump truck. I consider the equipment to be tools of trade for which the parties had an understanding that they would become the property of the respondent by the end of the contract. The respondent says that the project is at an end and it needs to demobilize and move the equipment to another location for use on other projects.

[43] It is trite that removing the equipment from the jurisdiction could not amount to risk of dissipation, if removal is for the purpose of continuing the respondent's business and generating revenue. This can hardly be said to amount to solid evidence of risk of dissipation. I agree that a freezing order is not to be used as security for expected judgment. The Court may intervene if it is shown that the respondent is engaging in behavior which signals an unjustifiable movement of the equipment or is arranging its financial affairs in a manner to evade liability. This has not been established on the evidence. It is simply that the project is seemingly at an end, and the respondent wishes to move the assets, for continuation of its business.

[44] It is therefore unreasonable to conclude that the removal of the assets would severely impair or render nugatory any judgment for breach of contract or liquidated damages for delay. It is common ground that the equipment cannot be removed from the jurisdiction without the

consent of the applicant and Customs since the equipment was imported on concessionary terms, and the applicant is the beneficiary of the concession. In the circumstances the applicant has not presented any facts which amount to solid evidence of risk of unjustifiable dissipation of the equipment.

Just and Convenient/ Balance of Prejudice

- [45] Counsel for the applicant submitted that the balance of convenience favours maintaining the status quo by keeping the assets in the jurisdiction until the parties dispute is properly adjudicated. Counsel contends that it would be more inconvenient to reach outside the borders of the jurisdiction to enforce a judgment over assets to which the applicant presently retains title, when the equipment is already within the jurisdiction.
- [46] Counsel for the respondent submitted that granting a freezing order would effectively deny the respondent the opportunity and right to accept and commence other construction projects (locally or regionally), thereby resulting in losses to the respondent. Counsel argued that although the applicant claims loss due to delays, the applicant has taken no further steps to complete the project, since the respondent completed its part of the works. Counsel further contends that it would be unjust to immobilize the crane when the legitimacy of the applicant's claim remains highly contestable.
- [47] Counsel argued that the applicant is intent on freezing assets so that the respondent can be penalized from engaging in other projects. The purpose for removing the equipment is not to evade or frustrate the applicant from satisfying a judgment, and the respondent is not being dishonest by seeking to engage in other projects. Counsel says the respondent has adequate means to settle any claims, with sufficient assets locally and regionally, and has affiliates currently engaged in projects within the jurisdiction.
- [48] Counsel further submits that the applicant has not come to the court with clean hands, as it has not alluded to its failure to make payments to third parties as agreed, which gave rise to some of the delays complained of. Furthermore, no steps have been taken to commence

arbitration to ventilate and resolve the dispute. The basis for such drastic and draconian relief has not been established, as there has never been a threat of dissipation.

Discussion

[49] The law recognizes that a freezing order can have a serious adverse effect on a company's business. The ultimate question is whether it is just and convenient to grant such order, bearing in mind that it may have the nuclear effect of prohibiting the affected party from dealing with its assets in the course of its business undertakings. The Court must be satisfied that it is just and convenient to grant such order.²⁹

[50] The learned author of **Commercial Injunctions**³⁰ puts it this way :

"The court should be satisfied before granting the relief that the likely effect of the injunction will be to promote the doing of justice overall, and not to work unfairly or oppressively. This means taking into account the interests of both parties and the likely effects of an injunction on the defendant."

[51] Courts will always ensure that a freezing order does not operate oppressively and that a defendant will not be hampered in its ordinary business dealings any more than is absolutely necessary to protect a claimant from the risk of improper dissipation of assets. The equipment comprises tools of trade for which the parties had an understanding that they would become the property of the respondent by the end of the contract. The respondent says that the project is at an end and it needs to demobilize, to move the equipment to another location for use in its business. It is not disputed that there is a customs lien over all the equipment, which will have to be addressed if the equipment is to be removed from the jurisdiction.

[52] Although Counsel for the applicant says that removal of the equipment from the jurisdiction would be prejudicial to the applicant who still has a proprietary interest in the assets, it should be noted that the applicant is not in the position of a secured creditor, and has not

²⁹ Sancus Financial Holdings Limited et al v Chad Christopher Holm BVIHCMAP2023/0024 (delivered 28th March 2025, unreported) at paragraph [5] of headnote

³⁰ Steven Gee – Commercial Injunctions - Chapter 12 Section 12(v)

established a proprietary claim to the assets, having accepted that monies spent to purchase the crane has been reimbursed in full and substantially reimbursed for the excavator and dump truck. As mentioned earlier there is no documentary evidence or registered ownership of these assets. As such, the respondent may deal with them, in the ordinary course of business, as these assets would have been acquired by setting off payments over the course of the project.

[53] The greater degree of prejudice would be to the respondent, as the applicant's claim mainly concerns liquidated damages, and it has not been shown that the respondent is attempting to do anything other than seeking to use the assets for conducting business. The only reason advanced for removing the assets from the applicant's site is to engage in other construction projects. This could only serve to enhance the respondent's revenue earning ability to aid in discharging a judgment. Additionally, there is no evidence to support a finding that the respondent has engaged in behavior or conduct aimed at disposing the assets to put them beyond the reach of enforcement, or is arranging its affairs in a manner which is intended to evade liability. The effect of a freezing order would be to keep these assets disengaged and seated on the applicant's work site for an indefinite period.

[54] The applicant has failed to show any hardship beyond the inconvenience of possibly seeking enforcement outside the jurisdiction. On the other hand, the respondent would be prevented from utilizing the assets on projects within or outside the jurisdiction, to leverage their revenue earning capacity. The potential loss of revenue far outweighs any prejudice to the applicant, at this time. I therefore conclude that the balance of convenience or prejudice favours the respondent, and the applicant has not demonstrated that it would be just and convenient to grant a freezing order in these circumstances.

Conclusion

[55] It is the law that all three limbs of the test must be satisfied. As the applicant has not satisfied two of these limbs, namely risk of dissipation and the just and convenient threshold, the application inevitably fails, and must be dismissed.

[56] Upon hearing submissions from Counsel for the respective parties on costs to be summarily assessed and awarded to the respondent as the successful party, costs in the sum of \$9,000.00 was awarded.

[57] I therefore make the following orders:

1. The application is dismissed.
2. Cost is awarded to the respondent in the sum of XCD\$9,000.00, to be paid by the applicant.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar