

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 29 of 2015

BETWEEN:

GEORGE ARTHURTON

Employee

And

LIAT (1974) LTD.

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

Appearances:

Mr. Kendrickson Kentish and Mr. Kyle Kentish of Lake & Kentish, Attorneys-at-Law for the Employee.

Mrs. Stacy Richards-Roach of Richards & Company, Attorneys-at-Law for the Employer

2020: July 13
2020: July 17

DECISION

Brown, P;

Introduction

1. The Employee / Applicant, having filed a claim of unfair dismissal, has noted that the Employer has ceased most of its commercial operations and is insolvent. He is fearful that an "impending" insolvent liquidation will result in his inability to realize the fruits of any judgment or award which may be made in his favour.
2. Accordingly, by an Application without Notice filed on July 1, 2020 the Employee/ Applicant applied for an Order that, inter alia:

"...



2. An injunction be granted restraining the Employer, whether by itself, its servants, agents or otherwise from dissipating assets to the value of \$165,000.00 pending the trial of this matter;

3. Further or Alternatively, that the Employer do within 7 days give security for the Employee's damages on the Claim herein in the amount of \$165,000.00

... "

The Opposing Cases

3. In his Affidavit in Support, the Employee refers to: reports in the electronic media that the Employer would be liquidated. In particular; he referred to one article quoting the Prime Minister of Antigua and Barbuda as saying that the airline would be liquidated. The Employee also referred to the letters to (a) the pilots' union informing them that the Employers "financial situation is dire", and (b) the employees informing them that the stakeholders are considering liquidation.

4. As to its assets in this jurisdiction, the Employee deposes that the primary ones are:

" ...

(a) 3 aircrafts registered in its name and mortgaged to the Caribbean Development Bank

(b) Leased aircrafts

(c) Ground transportation vehicles

(d) Office furniture and equipment

... "

5. The Employee's application is premised on the prospect that liquidation before the trial would render any judgment in his favor unenforceable. In that regard paragraph 14 of his affidavit reads:

"14. I am advised by Counsel and do believe that if the Employer decides to take the course of action as proposed before the trial and without putting up any security for any judgment I may obtain, any such judgment would be impossible to enforce. Accordingly, I am gravely concerned that my right to enforce a judgment if successful at trial would be compromised without some interim protection from this Honourable Court."

6. On those bases the Employee urged the Court to make a freezing order setting aside the sum of \$165,000.00 as security for damages.
7. Based on the submissions filed, it is obvious that both Counsel fully appreciate the draconian nature of and the settled criteria governing the grant of freezing orders, which have been judicially described as being like nuclear weapons to be launched only as measures of last resort.
8. In his submissions, learned Counsel for the Employee, Mr. Kendrickson Kentish established the backdrops for the consideration of the application. In particular, he quoted the dictum of Shanks J in his judgment given in St. Lucia Claim No. 758 of 2002 **National Contractors Limited v. GPEC International Limited et al** as follows:

" ... the claimant must show (1) that it has a good arguable claim... (2) that there is a real risk that if the order is not granted any judgment (or award) will remain unsatisfied because the defendant has dissipated its assets. The third requirement to be satisfied before the Court will grant the order is that it is just and convenient in all the circumstances of the case that the order should be granted..."

9. Naturally, learned Counsel relied on the Employee's affidavit and submitted that all of the three requirements have been satisfied. He placed much emphasis on the Employee's deposition regarding the Employer's financial status and its "impending liquidation".
10. In her submissions, learned Counsel for the Employer, Mrs. Stacy Richards-Roach, conceded that on the totality of his evidence the Employee met the threshold of establishing a good arguable case. However, she emphasized that the second requirement is for the Employee to present "solid evidence" to establish that in the absence of a freezing order, there is a real risk that the Employer will "unjustifiably" dispose of its assets so that any judgment against it would remain unsatisfied.
11. In making that particular submission, learned Counsel highlighted the paucity of the Employee's evidence. He deposed that the Employer "may be insolvent" and that the shareholders are "contemplating" liquidation. In highlighting the limited evidence, Counsel cited the leading textbook, **Commercial Injunctions** 6th Edition by Steven Gee QC as well as three Court of Appeal decisions: **Midas Merchant Bank v Bello** [2002] EWCA Cw 1496 (All England Official transcripts 1997-2008); **Stuart A Lockhart v. Caribbean Developers (Antigua) Limited et al** Claim No ANU HCV 2011/0001; and **Humphrey M. Blackburn v. LIAT (1974) Ltd** ANU LTAP 2017/0001.

12. In reliance on the assertions of **Steven Gee**, Counsel pointed out that the probability of insolvency does not justify the Employee's application for the grant of a freezing order.
13. Mrs. Richards-Roach also relied on the **Lockhart case**, in which it was held that "the probability of insolvency does not justify the granting of Mareva relief or a freezing injunction. Being short of money is not to be equated with an intention to dissipate assets. Moreover, the mere fact that an actual or feared conduct would risk the claimant's ability to enforce a judgment or award does not in every case mean that a freezing order must be granted. the conduct must be **unjustifiable**".
14. On behalf of the Employer, Counsel also pointed out that more recently in the **Blackburn case**, the Court of Appeal dismissed the applicant's application for security for damages because (a) the insolvency of the respondent was not a good basis for such an order, and (b) the factual nature of the case rendered such an order inappropriate.
15. Finally, in her submissions Learned Counsel noted that the Employee had given no understating as to damages which he would be obliged to pay in the event that he is successful and it is later revealed that the freezing order was wrongly granted.

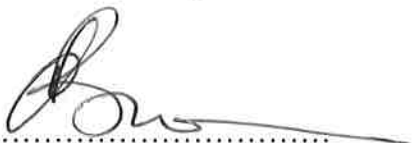
Findings and Conclusion

16. Although there is common ground between the parties that the Employee has a good arguable case, and has produced limited general evidence regarding the Employer's insolvency and the prospects of an impending liquidation, he has failed to adduce the required "solid evidence" to prove that there is a real risk of the Employer's "unjustifiable" disposal of its assets.
17. This Court is aware that the Employer has been susceptible to cash flow challenges for perhaps as many as 20 years, if not more, of its 46 years of operations. The continuing suspension of those operations since March 2020 which has left the company in a dire financial situation is not in dispute. The state of affairs is largely influenced by the type and ownership of its main assets, which, according to the Employee, are comprised of 3 aircrafts mortgaged to the Caribbean Development Bank and other aircrafts leased from other third parties.
18. In the circumstances, apart from any other debts which it may have in the ordinary course of business, the Employer is bound to have continuing significant financial obligations to the Bank and the lessors. Given the state of

affairs, there is likely to be some justifiable disposal of assets. That apart, there is no solid evidence of a real risk of any unjustifiable dissipation of its assets. As opposed to justifiable disposal, the Employee has not satisfied the Court that the Employer is actively pursuing or intends to engage in any unjustifiable disposal of its assets.

19. It is noteworthy that the Parliament has recently passed into law an important amendment to the Companies Act 1995 which will have the potential effect of allowing the Employer to be rehabilitated, reorganized or restructured instead of going directly into liquidation.
20. As stated by Remy J in the **Lockhart case**, for the relief of a freezing order to be granted it must be "just and convenient" to do so. In that regard, The Industrial Court Act establishing this Court provides that the Court must have regard for equitable principles when exercising its jurisdiction. In particular, the Court must have regard not only for the interests of persons directly involved in a dispute but it must also have regard for the "community as a whole". Accordingly, this Court must act in accordance with equity and good conscience and take into account what it deems to be in the best interests of members of the general public who have relied on the Employer over the past 46 years.
21. In the final analysis, taking judicial notice of its historic role in providing crucial inter-island transportation, its prolonged and continuing cash flow issues, the current pandemic, the recent amendment to the Companies Act, and the overall factual matrix before me, I find that the balance of convenience favors the Employer.
22. For the reasons stated above, Employee's application is hereby dismissed with no order as to costs.

Dated this 17th day of July 2020


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Charlesworth O. D. Brown
President

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