In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)

2020: No. 132

BETWEEN:

NOESIS CONSULTING LIMITED

Plaintiff

- and -

SATURN SOLAR DEVELOPMENTS LTD.

Defendant

RULING

Ex parte mareva injunction, Plaintiff's agreement to discharge injunction, application for indemnity costs

Date of Hearing: **29 June 2021**
Date of Ruling: **5 July 2021**

Appearances: **Jaymo Durham, Amicus Law Chambers Ltd., for the Plaintiff**

Kevin Taylor, Walkers (Bermuda) Limited, for the Defendant

RULING of Mussenden J

Introduction

1. This matter first came before me by the Plaintiff's Ex Parte Summons dated 15 June 2021 in respect of an application for an order for a Mareva injunction against the Defendant in respect of its assets. The application for the injunction was supported by the First Affidavit of Tara Timmins sworn 9 June 2021 ("**Timmins 1**") together with its Exhibit "NCL-1" and a Supplemental Affidavit of Tara Timmins sworn 18 June 2021 ("**Timmins 2**") together with its Exhibits "NCL-1 – NCL-13".

2. On 18 June 2021, after an ex parte hearing on notice, based on the submissions of counsel for the Plaintiff Mr. Durham, I granted the injunction. Counsel for the Defendant Mr. Taylor was present but made no submissions in respect of the application. I had intended for the hearing to be an inter partes hearing, however Mr. Durham understood the hearing to be an ex parte hearing on notice, then communicated that understanding to Mr. Taylor. Therefore, the matter proceeded on the basis of an ex parte hearing on notice with the inter partes hearing to be held as soon as possible thereafter, namely 29 June 2021.

3. On 25 June 2021 the Defendant electronically filed the First Affidavit of Douglas Wagner sworn 25 June 2021 along with its Exhibit "DWW-1", its skeleton argument and a bundle of authorities.

4. On 28 June 2021 the Court was informed at 5:19pm by email from the Defendant that "*The Plaintiff has agreed that the injunction granted on 18 June 2021 should be discharged, with immediate effect.*" Therefore, the parties would attend the hearing on 29 June 2021 in respect of the Defendant's application for costs. In respect of opposing the application for costs, the Plaintiff relied on the Third Affidavit of Tara Timmins sworn on 29 June 2021 ("**Timmins 3**") together with its Exhibit "TT3-1".

5. On 29 June 2021 I granted the order to discharge the injunction. I reserved my Ruling on the application for costs which I now issue.

Background

6. The Plaintiff is a contracting firm, engaged in the supply of construction services.

7. The Defendant is a project management company and a general contractor.

8. The Plaintiff and Defendant entered into two agreements as follows: (a) by a first contract dated 13 May 2019 "the Interconnect Contract", for the Plaintiff to supply and install a submarine combined power and fibre optic cable from the switchgear at "The Finger" in St. David's to the cable vault at the helipad in St. George's and a similar cable from that vault to the BELCO substation at the new L.F. Wade airport; and (b) by a second contract dated 13 May 2019 "the Solar Farm Contract", for the Plaintiff to construct and for the Defendant to support the build of a 6MW Solar Photovoltaics Facility at The Finger ("**the Solar Farm**").

9. Disputes have arisen between the parties and the Plaintiff filed and served a Specially Indorsed Writ of Summons issued 10 May 2021 claiming damages in the amount of $1,347,386.17 ("**the Claim Amount**"). The Defendant has not yet filed a Defence as the Plaintiff had agreed to the Defendant's request dated 27 May 2021 for an extension of time to file the Defence on or before 19 July 2021.

The Plaintiff's Application for an Injunction on 18 June 2021

10. At the start of the hearing in response to the Court querying about the position of the Defendant for the hearing, Mr. Taylor stated words to the effect that his client was aware of the application and they had discussed it but in terms of their approach, he did not have settled instructions. Further, in response to the Court querying whether the parties had had any discussions about an imminent June sale of the Solar Farm, Mr. Taylor stated words to the effect that the parties had not had discussions, that there was a very good reason why they had not had discussions and he was hesitant to say anything further.

11. The basis for the Plaintiff's application for an injunction was based on an article written by a journalist of the Bermuda daily newspaper the Royal Gazette, that was published on 7 June 2021 ("**the RG Article**") which reported on remarks made by the Minister of Finance in the House of Assembly on a prospective purchase of the Solar Farm. That article was the only document in the exhibit to Timmins 1. The article made various statements including "*A solar farm set up at the airport could be bought by the Bermuda Infrastructure Fund (BIF) for $9.1 million later this month, MPs heard on Friday. ... Curtis Dickinson [the Minister of Finance] said "The fund has signed a letter of intent to acquire the project for $9.1 million and is expeditiously working towards definitive documents and commissioning of the project. The deal is expected to close in June 2021. He added that the developer, Saturn Power, had signed an agreement with Belco to sell the electricity produced at the site for 20 years. The solar farm, an array of 24,000 panels on a disused runway, was hoped to be up and running by the end of last year. ...*"

12. On the basis of that article, the Plaintiff applied for an injunction on various grounds including: (a) that there appeared to be an imminent sale due to be closed in June 2021 of the Solar Farm for which a Writ action had begun in respect of disputes between the parties; (b) the Solar Farm could possibly be the only asset belonging to the Defendant in Bermuda; (c) the Defendant was a company whose sole licensed purpose in Bermuda was to develop the Solar Farm; (d) once the Solar Farm was sold then there was no further purpose for the Defendant to be in Bermuda; (e) the Defendant had requested on 27 May 2021 from the Plaintiff an extension to file a Defence on or before 19 July 2021, and such a request was concerning in light of the purported sale of the Solar Farm, which had only came to light by way of the RG Article on 7 June 2021; (f) the proceeds of any sale could be removed from Bermuda; and (g) the Plaintiff, if successful on the Writ action, could be faced with difficulty in getting the Defendant to satisfy a judgment. In light of these grounds, there was a real risk of the dissipation of the Defendant's assets and consequently an injunction was required to prohibit the Defendant from dissipating its assets to any amount less than the Claim Amount.

13. Mr. Durham, in making his application, submitted that he was giving the Court full and frank disclosure and identifying various factors in favour of the Defendant. I was directed to the case of *O'Mahony v Horgan* [1995] IESC 6 which sets out the five criteria to be taken into account in considering whether an injunction of the type sought, generally known as a mareva injunction, should be granted. I was also directed to the case of *Locabail International Finance Limited v Dimitrios Manos and Transway (Chartering) SA* [1988] Bda LR 26 which cites several factors in relation to the dissipation of assets.

14. At the hearing, I granted the injunction for several reasons as set out below and later on I signed the Order for the injunction:

> *"First, I am satisfied that the Plaintiff has given full and frank disclosure to the Court of all material matters.*
>
> *Second, the Plaintiff has provided details of the particulars of claim as set out in the Specially Indorsed Writ. I am satisfied that there is a good arguable case on the three main claims as set out in the Writ.*
>
> *Third, there is the asset of the solar farm in the jurisdiction.*
>
> *Fourth, I am satisfied that there is a risk of the assets being removed or dissipated. The affidavit evidence shows that the Minister of Finance has informed the House of Assembly of the purchase of the solar farm for $9.1 million dollars to be completed this month. The Plaintiff submits that the company was formed for the purpose of commissioning the solar far and then providing services to Belco long term. The company has not been established in Bermuda for a long period of time. If the solar farm is sold then the company will not have a further purpose in Bermuda. There is a risk that that the proceeds of the sale would be removed from Bermuda as well as the company winding up as it will no longer have a purpose in Bermuda. In my view, if the Plaintiff were successful in its case, which is not likely to be determined a year or so from now, then there is a real risk that the judgment or an award in favour of the plaintiff would remain unsatisfied.*

Fifth, the Defendant gives an undertaking in damages, in case he fails."

The Defendant's Application to Discharge the Injunction on 29 June 2021

15. On 29 June 2021 the Defendant was due to apply for discharge of the injunction. However, the Court was informed late on 28 June 2021 that the Plaintiff had agreed that the injunction be discharged with immediate effect. The Defendant's evidence and written submissions outlined several reasons why the injunction should be discharged including the following: (a) the Plaintiff had failed to comply with its duty of full and frank disclosure to the Court; (b) the Defendant did not own the Solar Farm and therefore could not sell it; (c) even if the Defendant had owned and then sold the Solar Farm, the Plaintiff had failed to discharge the burden of evidencing a solid case that there was a real risk of dissipation of assets; (d) the Plaintiff knew or should have known, had it done proper research, that the Defendant did not own the Solar Farm based on the Defendant's license to operate in Bermuda and earlier correspondence between the parties; (e) there was no real urgency for a hearing such that the Defendant could not have done proper research to ascertain which entity did in fact own the Solar Farm rather than rely on the hearsay in the RG Article; and (f) the Plaintiff rushed to make an ill-founded and misconceived application on an incorrect basis.

The Defendant's Application for Indemnity Costs

16. As a result of the discharge of the injunction, the Defendant now applies for costs on an indemnity basis to be paid forthwith for the reasons set out above for the discharge of the injunction as well as other significant reasons. First, Mr. Taylor submits that during the ex parte hearing, Mr. Durham implied that there was a dishonest motive on behalf of the Defendant when it was suggested that the request for an extension to file a Defence was connected to the imminent sale of the Solar Farm. The twist was that the Solar Farm would have been sold and the assets dissipated before the Defence was filed. Mr. Taylor took great umbrage on that particular conduct by the Plaintiff and/or its Counsel in leading the Court to believe it had to make the order for the injunction because of alleged dishonesty on the part of the Defendant.

17. Second, Mr. Taylor submits that in the Subcontractor Agreement dated 13 May 2019 between the parties, there was at Section 39 a Disputes clause ("**Disputes Clause**") that stated that the parties "*will endeavor in good faith to resolve any dispute that arises between [the parties] regarding the application or interpretation of any provision of the Agreement*." However, despite the Disputes Clause, the Plaintiff never sent a letter before action or otherwise engaged the Disputes Clause, but commenced proceedings in Court.

The Plaintiff's Reply to the Application for Indemnity Costs

18. The Plaintiff objects to any costs being granted against it and submits that each party should bear its own costs for several reasons. First, Mr. Durham submits that once the Summons and supporting affidavit was served on the Defendant, it had two full days to reply to the Plaintiff, possibly with a one-line sentence, to the effect that it did not own the Solar Farm, thus negating the need for an application to be made. Second, the Defendant had actual knowledge of the ownership of the Solar Farm but left the Plaintiff to "*at best, guess who owned the solar farm*". Third, counsel for the Defendant sat through the hearing and said nothing about the fact that the Defendant did not own the Solar Farm thus defeating the Overriding Objectives of enabling the Court to deal with cases justly, saving expense and the requirement for parties to help the court to further the overriding objectives. Fourth, the Defendant, knowing that it could easily have informed the Plaintiff that it did not own the Solar Farm, continued to make further preparations for the application to discharge thus racking up further unnecessary costs to both parties. Fifth, Mr. Durham submits that the Plaintiff did send a letter before action to the Defendant and had adhered to the spirit of the Disputes Clause.

The Defendant's Reply

19. Mr. Taylor replied to the Plaintiff's reply submissions that: (a) once the Defendant had received the Plaintiff's Summons and affidavit evidence that it had no obligation to inform the Plaintiff that it did not own the Solar Farm or to clarify anything to the Plaintiff; and

(b) it was clear that the Plaintiff was operating on a "*at best, guess*" basis, which was not the standard required when applying for a mareva injunction – it was for the Plaintiff to know on what basis he was coming to the Court for an injunction.

20. At the end of Mr. Taylor's reply, I directed him to Timmins 1 paragraph 5 where Mr. Timmins was asserting a belief that the Defendant's only local asset was the Solar Farm and its sale would deprive the Plaintiff of a means of enforcement. I queried Mr. Taylor as to what obligation did the Defendant have, on the basis that Mr. Durham was now saying the Defendant had two days before the hearing to inform the Plaintiff that there was no basis for an injunction as the Defendant did not own the Solar Farm. Mr. Taylor replied generally that there was no obligation on a respondent to an application for an injunction to do anything on the basis that the onus is on the applicant to get it right, by properly investigating the matter and to make full and frank disclosure to the Court. He added that the onus does not shift to a respondent because the applicant may have gotten it wrong.

The Law on Indemnity Costs

21. The legal principles governing the Court's jurisdiction and discretionary powers to award costs and indemnity costs are well established.

22. RSC O. 62/3(4) provides:

> *"The amount of his costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis where… unless it appears to the Court to be appropriate to order costs to be taxed on the indemnity basis."*

23. RSC O. 62/12 outlines the distinction between costs on a standard basis and costs on an indemnity basis. Simply put, a standard basis allows for a reasonable amount of all reasonable costs to be allowed by the Registrar in the course of a taxation. However, for an indemnity costs order, the successful party is entitled to 100% of all reasonable costs incurred.

24. The learned Justice Mr. Richard Ground (as he then was) made the following remarks about indemnity costs in *DeGroote v MacMillan* [1991] Bda LR 27 [p.4]:

> *"... I consider that an award of indemnity costs, as against a defendant, should be reserved for exceptional circumstances, involving grave impropriety going (to) the heart of the action and affecting its whole conduct."*

25. *DeGroote* was cited by Bell J (as he then was) in *Phoenix Global Fund Ltd v Citigroup Fund Services (Bermuda) Ltd* [2009] Bda LR 70, both of which were later cited by the Court of Appeal in *American Patriot Insurance v Mutual Holdings* [2012] Bda LR 23. In the leading judgment of the Court Evans JA stated:

> *"In our judgment, it would be wrong to say that indemnity costs should be ordered in every case where fraud is proved, but equally wrong to suggest that they can only be ordered when the proceedings have been misconducted by the losing party. Both "the way the litigation has been conducted" and the "underlying nature of the claim" (per Kawaley J in Lisa SA v Leamington and Avicola at para 6) may be relevant in determining whether or not the circumstances are such as to make an indemnity costs order just."*

Analysis on the Defendant's Application for Costs

26. In my view, the Defendant should have its costs on the standard basis up to the end of the ex parte on notice hearing on 18 June 2021 but not beyond for several reasons.

Reasons why the Defendant should have its costs on the standard basis up to the end of the ex parte on notice hearing on 18 June 2021

27. First, it seems to me that before issuing the Summons, the Plaintiff could have sought the clarification of the Defendant as to ownership of the Solar Farm. There was already correspondence between the parties in respect of the existing litigation and no basis to

suggest that the Defendant would not provide clarification. A simple first step would have been to write to the Defendant citing the remarks by the Minister of Finance and requesting whether the Defendant intended to dispose of the Solar Farm in light of the litigation that had already commenced. The answers, if forthcoming, would have likely informed the Plaintiff that the Defendant did not own the Solar Farm.

28. Second, as it turns out, it was unwise to rely on the Royal Gazette's journalist's account of what the Minister of Finance said in the House of Assembly as the primary basis for the injunction. A journalist' article is not authority and neither is the daily newspaper despite the best intentions and mandate to report the news. A thorough analysis of the statements in the article should have been carried out and there should have been some extensive due diligence to find supporting evidence of the purported sale of the Solar Farm. I do note that the Plaintiff did perform some due diligence as to the names of the Directors of the Defendant and its Memorandum of Association from the Registrar of Companies.

29. Third, there was documentation available to the Plaintiff or that could have been obtained to assist it in determining if the Defendant was the owner of the Solar Farm, whether there was a pending sale and the future of the Defendant in Bermuda. The Plaintiff could have done more research work to arm itself with a proper factual basis to determine whether to apply for an injunction or not.

30. Fourth, although I have taken the view that the Defendant could have taken very simple steps to avoid the need for a hearing for the application for an injunction, I am of the view that the Defendant should have its costs for attending the ex parte hearing on the basis that it was reasonable for the Defendant to attend to hear the full application in order to make any consequential decisions.

<u>Reason why the Defendant should not have costs after the ex parte hearing on 18 June 2021</u>

31. Fifth, Mr. Taylor submits that he had no obligation to do or clarify anything for the Plaintiff once he received the Summons and affidavit evidence as set out above. I disagree. In my view, this was not a case where the Defendant needed to keep his powder dry for some

later stage or to sit in silence in the ex parte hearing holding the trump card close to his chest only to be played prior to the inter partes hearing. I note that at the start of the 18 June 2021 hearing, when I canvassed Mr. Taylor about the Defendant's position, he replied along the lines that he had discussed the application with his client, they had not settled their instructions, there was a good reason why there had been no discussions between the parties and he was hesitant to say more. Based on those answers, it is clear to me that at all material times it was known to the Defendant that it did not own the Solar Farm.

32. In my view, Counsel are expected to heed the Overriding Objectives and in respect of RSC 1A Overriding Objective do the following: 1A/1 (2) assist the Court in dealing with cases justly, 1A/1(2)(b) save expense; 1A/1(2)(d) ensure that a case is dealt with expeditiously and fairly; and 1A/3 abide the requirement to help the Court to further the overriding objective. In turn, the Court must: 1A/4(1) further the Overriding Objective by actively managing cases which includes 1A/4(2)(a) encouraging the parties to cooperate with each other in the conduct of the proceedings; 1A/4(2)(b) identifying the issues at an early stage; 1A/4(2)(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others; and 1A/4(2)(f) helping the parties to settle the whole or part of the case.

33. In light of the facts and the Overriding Objectives, in my view, it would be most unfair to grant costs to the Defendant for the period after the ex parte hearing in respect of its ongoing preparation for the application to discharge. Simply put, those costs of preparing for and attending the 29 June 2021 hearing for the application to discharge the injunction were not necessary in all the circumstances. It seems to me that it was perfectly reasonable in this case for the Defendant, on receipt of the Plaintiff's Summons and affidavit evidence, to inform the Plaintiff what it had always known, that it did not own the Solar Farm. It is most likely that such information would have had the same effect as when the Plaintiff later received the Defendant's affidavit evidence and skeleton argument and agreed the discharge of the injunction, namely that it should not proceed with the application for an injunction in the first place, thus saving costs to both parties.

Reason why the Defendant should not have indemnity costs

34. Sixth, in respect of the application for indemnity costs, I do not agree with the Defendant's request for costs on an indemnity basis. I am of the view that in applying the principles in *DeGroote*, in the present there are no "*exceptional circumstances, involving grave impropriety going to the heart of the action and affecting its whole conduct"*. The heart of the matter was the issue of a dissipation of an asset purportedly owned by the Defendant. In my view, the Plaintiff came before the Court armed with some information, which unfortunately for it was not complete and accurate and as I have stated already, could have been supplemented with better information which may have obviated the need for an application in any event. In my view, a statement by the Minister for Finance to the House of Assembly in respect of the purchase of a significant asset was a reasonable start to the application, subject to further due diligence as I have already stated.

35. Mr. Taylor's main contention was that Mr. Durham had implied to the Court that there was dishonesty on the part of the Defendant by asking for an extension to file its Defence. However, in my view, Mr. Durham laid out the Plaintiff's case based on several factors that would have been convincing if the Solar Farm had been owned by the Defendant. Also, Mr. Durham laid out the risk of dissipation of the assets based on the information that he had before him along with supporting case law on the issues. In respect of the issue of the request for an extension of time to file the defence, the language that he used in his written submissions were that the circumstances "... *gives rise to a suspicion of an intention to avoid a judgment being levied against their only asset*" and in oral submission he used the language " ... *this raised concern ...*". In my view, Mr. Durham did not go so far as to accuse the Defendants of dishonesty, rather he identified cause for concern of the circumstances. Therefore, I am not persuaded that the use or context amounted to "*grave impropriety*" by the Plaintiff and further that the Plaintiff's submission did not affect the "*whole conduct*" of the matter.

Conclusion

36. For the reasons above, I decline the Defendant's application for costs to be awarded on an indemnity basis.

37. I direct that in respect of the Plaintiff's Summons dated 15 June 2021 that costs shall follow the event in favour of the Defendant against the Plaintiff on a standard basis for the period up to the end of the ex parte on notice hearing on 18 June 2021 only, to be taxed by the Registrar if not agreed.

38. I direct that the parties bear their own costs in respect of the hearing of 29 June 2021.

Dated 5 July 2021

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HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT