

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. 1909 of 2004

**SRA HOLDINGS LIMITED
SYNTHETIC RESINS & ADHESIVES (INTERNATIONAL) LIMITED
HANDY EQUIPMENT COMPANY LIMITED
HANDY LEASING LIMITED
ARESTECH LIMITED & MICHAEL ROMANY**

PLAINTIFFS

AND

**RBTT MERCHANT BANK LIMITED
VICTOR HERDE (RECEIVER)**

DEFENDANTS

BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES

Appearances:

**Dr. Claude Denbow S.C. and Ms. Donna Prowell for the Plaintiffs
Mr. Christopher Hamel-Smith S.C. and Mr. Johnathon Walker
for the Defendants**

JUDGEMENT

This application began as a contested ex parte application for an injunction to restrain the second Defendant acting or continuing to act as a receiver/manager over the business of the 1st to 5th Plaintiffs and /or selling and/or disposing and/or in any manner whatsoever controlling and or dealing with the business and or assets of the said Plaintiffs. After hearing arguments the learned Judge refused to grant the ex parte injunction sought, ordered that

the application be heard inter parties and gave directions for the filing of affidavits. It is this inter parties application which is now before me.

THE FACTS

Simply put the facts are as follows:

The 1st Plaintiff is a holding company for the 2nd to 5th Plaintiffs. The 6th Plaintiff is the managing director of the 1st to 5th Plaintiffs. In November 1999 and April 2000 the Plaintiffs obtained certain loan facilities from the first Defendant by way of the creation and issue of certain fixed rate bonds. These bonds were created and secured by way of a Trust deed entered into by the first Plaintiff and the first Defendant who is described in the document as the trustee for itself and for the bondholders. Each transaction was secured by a series of debentures, the personal guarantee of the 6th Plaintiff, a charge on shares, security over certain contracts insurance policies and accounts and the creation of a sinking fund into which a portion of the money borrowed was deposited and then charged in favour of the first Defendant and the bondholders. There is no evidence of the issue of any bonds by the 1st Defendant. On the 9th July 2004 the Plaintiffs were in arrears of interest payments for the period August 2002 to May 2004 on both transactions. By a letter dated the 9th July 2004 the first Defendant demanded from the 1st to 5th Plaintiffs all outstanding interest payments by 4 p.m. on the said 9th July 2004. By a letter of the same date the Plaintiffs responded to the demand advising that there were sufficient funds in the sinking fund and requesting that the first Defendant have recourse to the

sinking fund to satisfy their demands. At 5.00 pm on the 9th July 2004 the second Defendant was appointed receiver/manager of the 1st to 5th Plaintiffs by the 1st Defendant and the said Plaintiffs were notified accordingly.

The Plaintiffs' case in a nutshell is:

1. There is no evidence that there are any bondholders apart from the first Defendant that being the case the first Defendant is sole beneficial owner of the shares and since a person cannot hold property as the sole beneficial owner and as a trustee both the legal and beneficial interests merge. As a result the trust either never came into existence or ceased almost immediately after coming into existence. There being no trust the Defendants are unable to rely on the trust document or its provisions.
2. Alternately by reason of the provisions of the trust deed and the charge of shares and in the circumstances of the request by the Plaintiff that the first Defendant have recourse to the sinking fund to meet the Plaintiff's liabilities with respect to the payment of interest the first Defendant was under an obligation to have recourse to the right of set off in the contract documents and accordingly this breach of the provisions of the loan nullifies the demand for the payment of the outstanding interest and renders it incapable of being used as a basis of an appointment of a receiver/manager.
3. The first Plaintiff being a holding company there can be no appointment of a receiver/manager over its assets and since all the appointments provide for the appointment of the receiver/manager over the undertaking of the first Plaintiff as well as over the assets of the 2nd to 5th Plaintiffs and for the

receiver/manager to be the agent of the first Plaintiff the whole transaction
i.e. the appointment of the 2nd Defendant as receiver/manager is bad.

It was conceded by Counsel for the Defendants that there was in fact no power in the first Defendant to appoint the second Defendant a receiver/manager of the operations of the first Plaintiff and an undertaking was given that such appointment would be revoked by a certain date and time. The Defendant while making the concession referred to above and accepting that where the legal and equitable interest lie in the same person a merger occurs does not necessarily admit that on the facts no trust exists but submits that even if it does neither this fact nor the fact that the appointments refer to the appointment of the receiver/manager as agent of the 1st Plaintiff invalidates the covenants contained in the deed and they remain valid and enforceable. The Defendant further submits that on a true construction of the contract documents there is no obligation on the 1st Defendant to set off the outstanding interest against monies held in the sinking fund neither is there any right of the Plaintiffs to such a set off with respect to the period in respect of which the interest is due.

THE LAW

At this stage the Court is required to determine whether there is a serious question to be tried and if there is to consider whether damages are an adequate remedy or as stated in the case of **Evans Marshall & Co Ltd v Bertola SA [1973] 1 WLR349** and adopted in the local Court of Appeal decision of **Jetpak Services Ltd. v BWIA International Airways Ltd. (1998) 55 WIR 362** “is it just in all the circumstances that the Plaintiff should be confined to his remedy in damages?” If it is not just then

the Court is required to consider the balance of convenience or as stated in the more recent cases the “balance of the risk of doing an injustice” and in circumstances where all else seems to be evenly balanced the Court is then required to take such measures as are calculated to preserve the status quo.

IS THERE A SERIOUS QUESTION TO BE TRIED?

Much of the argument in the case proceeded on this question Counsel for the Defendant urged me to determine the issues of law and find that there was no serious question to be tried.

In arriving at a decision under this head I must bear in mind that it is not my function at this stage to try to resolve conflicts of evidence as to the facts or to difficult questions of law which call for a detailed and mature consideration that is for the trial judge.

The question to be determined here is two fold firstly has there has been raised issues of law which call for a detailed and mature consideration and which ought in the circumstances be left for the trial judge’s determination or ought the court at this stage to seek to determine the issues of law raised by the Plaintiff as has been urged by the Defendant and secondly what is the threshold test? In the case of *East Coast Drilling and Work over Services Ltd. V Petroleum Co. of Trinidad and Tobago* (2000) 58 WIR 351 the Court of Appeal held the view that although the appellant’s case was no higher than arguable given that the consequences of withholding the injunction were likely to be disastrous to the appellant while if granted the consequences could be mitigated to a tolerable level by the respondent accordingly

was granted the injunction. This approach of course involves making a finding as to the balance of the risk of doing an injustice.

IS IT JUST IN ALL THE CIRCUMSTANCES THAT THE PLAINTIFF'S
REMEDY SHOULD BE CONFINED TO A REMEDY IN DAMAGES?

Is the remedy in damages adequate or available to the successful party to meet the injury incurred by it? In other words will an award in damages adequately compensate the successful party and if so can the losing party pay these damages? On the one hand while it is clear that if successful the first Defendant would be able to pay their damages the Plaintiffs submit that damages would not be an adequate remedy for various reasons including their fear that the receiver, as he is empowered to do by virtue of his appointment, may sell the businesses. On the other hand the Defendants submit that there has been no loss to the company of any goodwill or trade reputation either on the part of their customers or of their suppliers indeed it is the Defendants submission that the second defendant has put in place mechanisms which will ensure proper management of the company including the payment of its day to day suppliers and have put evidence to this effect before the Court. The question here is whether the Plaintiffs given their default in the payment of the sums due to the first Defendant can in fact honour the undertaking in damages they would be required to make if the injunction is granted. It must be noted that all the assets of the 2nd to fifth Plaintiffs have already been pledged to the first Defendant as security for the loan. And there is as well a charge over the shares of the 1st Plaintiff and a personal guarantee of the 6th Plaintiff.

The Balance of the risk of doing an injustice.

By far the most difficult issue to determine is this one. Will the risk of injustice be greater if the injunction were granted or if it were not? If the injunction is granted the Plaintiffs will regain the control of their businesses in circumstances where they have been unable for some time to meet their contractual liabilities to the first Defendant and in circumstances where the injection of capital, long promised by the Plaintiffs has not yet materialized. On the other hand if the injunction is not granted and the company may be sold or be put out of business by the 2nd Defendant.

In all the circumstances of the application before me I am of the view that there are issues of law which require a mature and detailed consideration and which in the circumstances ought to be left to the trial judge, if only on the question of the interpretation and legal effect of the document referred to as the trust deed. In any event on the basis of the East Coast case I find that at least an arguable case has been shown by the Plaintiffs and that the real risk to the Plaintiffs is the possibility that the first Defendant may sell and or dispose of the businesses. Further the consequences of withholding an injunction preventing the 2nd Defendant from selling and/or disposing of the businesses of the 2nd to 5th Plaintiffs would be disastrous to the Plaintiffs and if granted capable of being mitigated to a tolerable level by the Defendant. As well the continued input of the 2nd Defendant in the day to day running of the companies should to my mind assist in ensuring that the 2nd to 5th Plaintiffs undertaking in damages is a real one.

In the circumstances I propose to grant an injunction restraining the 2nd Defendant from selling and/or disposing of the businesses of the 2nd to 5th Plaintiffs and I invite Counsel to address me on the terms of such an injunction.

Unless otherwise persuaded I am prepared to deem this action fit for early trial treat the summons for the injunction as a summons for directions and give directions for pleadings and the hearing of this action.

Dated this 11th day of August 2004

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Judith A.D. Jones
Judge