IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E516/99

BETWEEN			AMALGAMATED COMMODITIES LTD.	PLAINTIFF
A	N	D	MAURICE BEAN	1ST DEFENDANT
A	N	D	RICE WAREHOUSE LTD.	2ND DEFENDANT
A	N	D:	UNITED AMALGAMATED CO.LTD.	3RD DEFENDANT

Raphael Codlin for the plaintiff instructed by Raphael Codlin and Co. Attorneys-at-law.

John Graham and Christopher Malcolm for the 1st and 2nd defendants instructed by Patterson and Graham Attorneys-at-law.

The 3rd defendant never entered on appearance and was not represented.

HEARD: January 19, 20, 2000

February 2, 8, 9, 2000

May 9, 10, 2000 and

October 19, 2000

RECKORD, J.

This is a summons for a Mareva injunction by the plaintiff claiming that

1. The 1st defendant, Maurice Bean hand over to the plaintiff, to keep in safe custody, Pajero jeep, registered 1396BG which

was given to the first defendant by the plaintiff in settlements of the first defendant's claim.

2. The first and second defendants be restrained from dealing in anyway whatsoever, in account number 90816, in the Bank of Nova Scotia, Hagley Park Branch, or in any branch of this bank in which funds are hellion any other account of accounts, in the name of the first and second defendants or either of them;

3. That the first and second defendants each deliver to the plaintiff a list of the assets of each defendant, or the defendants or by any other person or persons an behalf of the defendants.

4. That the first and second defendants be restrained from parting with any assets being held by them or either proceeds belong to Amalgamated Commodities Ltd.

5. Alternatively, that the first defendant keep in safe custody the said Pajero motor vehicle mentioned in 1 above, as it was when it was Delivered to the first defendant on the 4th of November.

An application by way of a summons by the 1st and 2nd defendants was heard at the same time to vary mareva injunction that the order made on December 15, 1999, by the Honourable Miss Justice Kay Beckford be varied in the following terms:

a. That the 2nd defendant be permitted to pay its reasonable business debts as set out in the affidavit of Maurice bean sworn to on the 4th day of January2000 and filed here in.

THE PLAINTIFF'S CASE

The plaintiff is a limited liability company with offices at 4 Fourth Street, New Port West, engaged in the business of purchasing bagged rice from abroad and selling same by wholesale to clients in Jamaica.

Sometime in 1997 the plaintiff having employed the 1st defendant as its general manager, instructed him to sell rice and collect payments and lodge all payments into the accounts of the plaintiff at the Bank of Nova Scotia, Hagley Park Branch in Kingston.

In the terms of 1st defendant's contract of employment he was not supposed to engage in any activity that would interfere with his fiduciary duties to the company and he was certainly not entitled to set up any business in competition with that of the plaintiff or to open any warehouse to sell the company's product without the company's knowledge and approval.

Mr. Bert Rouwers, the assistant manager of the company, in his affidavit of the 9th of December 1999 deponed that he had regular meetings with Mr. Bean in 1999 and discussed with him company policy as well as business strategy and an all these occasions Mr. Bean represented to him that the company's affairs were being conducted in accordance with company guidelines and that there was no departure from these guidelines. Due to the competitive nature of marketing rice in Jamaica the management of the company became aware that it would be difficult to generate handsome profits.

The loss-gap suffered after the middle of 1999, continued to widen to the point where the company decided to close its warehouse and to re-organise its marketing strategy in Jamaica. This would involve making the position of general manager redundant. Mr. Bean was informed.

On the 4th of November, 1999, a meeting was held with Mr. Bean and Mr.

Arendonk of the management team. At that meeting management took the decision to terminate Mr. Bean's service forthwith and to pay him for whatever he was entitled to as severance benefits. In a act of blind generosity the company decided to :

1. payment for Mr. Bean's apartment for the rest of November, 1999;
2. to give him a pajero motor vehicle in lieu of his severance pay.

This was done solely on the representation by Mr.Bean that he had discharged his duties honestly and faithfully in accordance with the company's guidelines.

Before Mr. Bean left he went to Montego Bay on the 27th October, 1999, along with Mr. Rouwers to enquire into the account of one Paul Barrett a client which showed he was owing the company over $3 million. Mr. Bean told him that Mr. Barrett was making unfulfilled promises to pay. At no time did Mr. Bean tell him that he had employed Mr. Barrett as a servant of the company to sell rice on behalf of the company. Mr. Bean led Mr. Rouwers to a warehouse in Montego Bay, which he identified as the place where Mr. Barrett had his business. The warehouse was empty and Mr. Barrett was not seen.

Sometime after returning from Montego Bay Mr. Rouwers contacted Mr. Barrett only to learn from him that Mr. Bean had employed him as a servant of the company in Montego Bay. Mr. Bean had instructed him to open a warehouse there and he was required to pay $50,000.00 per month for the warehouse. This was not only against company's policy, but was not authorised on the part of Mr. Rouwers and was kept as a secret from the management of the company. Mr.

Bean had instructed Mr. Barrett that after selling rice for the plaintiff company, he was to deposit payments from those sales into an account in the name of Rice Warehouse Limited, (the 2nd defendant). Account no. 90816 in the Bank of Nova Scotia, Hagley Park Branch.

Mr. Barrett handed Mr. Rouwers some eleven copies of lodgment vouchers showing lodgments to that account over the period May to August, 1999, totalling over $1.9 million.

Further checks with other clients recorded in the accounts kept by Mr. Bean revealed that they did not owe the sums shown but in fact owed considerably lesser sums. From his investigation a sum in excess of $12 million due to the plaintiff company had not been accounted for by Mr. Bean.

Mr. Rouwers exhibited document from the Registrar of Companies which reveal that Rice Warehouse Ltd., the 2nd defendant, was incorporated in January, 1999 with Maurice Bean and Donald Patterson as directors. Also that United Amalgamated Company Limited (the 3rd defendant) showing particulars of directors of that company to be Morris (sic) Bean and Jacquline Cain in a return dated the 19th of August 1997 and signed M. Bean.

Mr. Rouwers fears that Mr. Bean who once lived in Guyana, if not restrained, will leave the jurisdiction of this court taking the plaintiff's assets with him to Guyana. Mr. Bean has opened a rice warehouse at 3rd Street, New Port West and is importing rice from Guyana and Surinam and distributing it through the 2nd defendant, Rice Warehouse Ltd..

Mr. Rouwers exhibited the copy of a cheque dated October 15, 1999, drawn on the account of the 2nd defendant for the sum of $519,350.00 and payable to Amalgamated Commodities Ltd. The payment on this cheque was stopped at the bank by Mr. Bean and the plaintiff never received the benefit of this payment.

The evidence of Mr. Paul Barrett supports that of Mr. Rouwers in several material particulars. In his affidavit of the 17th of January, 2000, he deponed that Mr. Bean employed him in January, 1999, to Rice Warehouse to sell rice in Montego Bay. That Mr. Bean on the 23rd of January, 1999 brought a trailer load of Rice to him in Montego Bay. As he was not expecting it, he had not made any arrangement to store the rice so he contacted his friend Mr. Emmanuel Olasema, who, after meeting Mr. Bean, rented him a warehouse for $50,000.00 per month. He started selling rice from there until 23rd October, 1999 when the business was closed. During this period he had received several containers of rice from Amalgamated Commodities Ltd. Mr. Bean had directed him to lodged payments, firstly to Amalgamated Commodities Ltd. account No. 082619, at the Bank of Nova Scotia Jamaica Ltd. Hagley Park Branch; secondly, to account No. 19934012 at Citybank, New Kingston and account No. 90816 at Hagley Park Branch Bank of Nova Scotia Jamaica Ltd. (to Rice Warehouse). He had made lodgments totalling $9,270,464.00 over the period the warehouse was operated.

Mr. Olasema also deponed that he rented his warehouse to Mr. Bean for $50,000.00 per month and that it was he Mr. Bean who paid him the 1st month's rent in cash.

CASE FOR DEFENCE

In response to the allegations of the plaintiff, Mr. Bean in his affidavit of the 4th of January, acknowledges that he is the managing director of the 2nd defendant. He also acknowledge that between March 1997, to 4th November, 1999, he was the general manager of the plaintiff company. Her admits that he gave instructions for the incorporation of Rice Warehouse Ltd., the 2nd defendant, and set out the circumstances under which he gave those instructions. In paragraph 12, he admits that in normal circumstances it would be inappropriate for him to set up another business which would be involved in the sale and distribution of rice. However, apart from being an advisor to Rice Warehouse, he played no part in the day to day management of that company prior to 4th November, 1999. He denied that he opened any warehouse in Montego Bay and has never sold any of the company's products without company approval. He also denies that he employed Paul Barrett on behalf of the plaintiff. Mr. Barrett always was a customer carrying on business on his own account.

In paragraph 23 of his affidavit Mr. Bean said that the prospect of brisker sale of rice in the Montego Bay area seamed like a god-send so he went to Montego Bay with a forty foot container of rice "to implement the agreement which had been made between Paul Barrett and Amalgamated". Eventually Mr. Barrett rented a warehouse from Mr. Olasema where the rice was stored but only after he had gauranteed payment on behalf of Amalgamated.

All payments for rice sold were to be lodged at the Bank of Nova Scotia Jamaica Ltd. Hagley park Road. Due to poor quality of rice, there was a fall off of

sales. He had discussion with Mr. Arendonk and it was agreed for him to repackage and sell the rice under a new brand name. 'Rice Warehouse.' He instructed Mr. Barrett that all payment by cheques were to be made to Rice Warehouse and lodged into the account of Rice Warehouse. Mr. Bean supplied a long list showing amounts lodged to Rice Warehouse Limited over the period March 18,1999, to October, 22, 1999 as also amount lodged into the account of the plaintiff over the said period. He denied mis-appropriating any of the plaintiff's money. He admits forming the two companies, the 2nd and 3rd defendants. The 3rd defendant "never really get off the ground and the plan to sell rice through that company was abandoned. Any sum paid to that company was promptly paid over to the plaintiff".

Mr. Bean admits that he lived in Guyana for about five years, but had no intention of returning to live in Guyana neither does he intend to remove any of his assets from the jurisdiction. He admits that the 2nd defendant did draw a cheque for the sum of $519,000.00 in favour of the plaintiff but that this was drawn in error and payment was stopped.

Due to the freezing of the accounts of the 2nd defendant, that company had not been able to discharge its debts.

SUBMISSIONS

Both the plaintiff's and defendants' Attorneys-at-law, submitted their final arguments in writing. To briefly summerize Mr. Codlin's submission he said,

(1) That although the plaintiff had mentioned that the 2nd defendant had failed to account for interest gained between time of lodgment in its

account and time it paid over into the account of the plaintiff, neither the 1st nor the 2nd defendants has commented upon this;

That the 1st defendant's attorney admitted that "less than a million dollars have not be accounted for;"

That there has been no challenge to the allegations made by the plaintiff against the 2nd defendant;

That the 1st and 2nd defendants have shown no source from which the sum of $674,000.00 could be spent on behalf of the 2nd defendant in the month of December,1999.

That the assets of the 2nd defendant have not been disclosed (see paragraph 3 of the plaintiff's summons dated 4th January, 2000.

Mr. Codlin submitted that where it appears that the debt is due, the court has jurisdiction to grant an interlocutory judgment so as to prevent the defendant from disposing of the assets. The test being that the plaintiff need only to show that it has a good arguable case. **(See the Supreme Court Practice (1985) pages 457, 458 and 459).** It is just, reasonable and equitable that the relief sought by the plaintiff against the defendants ought to be granted.

DEFENDANTS SUBMISSIONS

Counsel for the defendants listed points which a plaintiff seeking a mareva injunction should bear in mind. See the **Third Chandris Shipping Corp. vs. Unimarine S.A. (1979) 2AER, 972, 984, 985.** Enough particulars of the plaintiff's case should be given to enable the court to assess its strength and

what enquiries have been made of the defendant's business, the location of his known assets and its circumstances.

In this case the 1st defendant has pointed out that the first defendant's employment was never delimited by a written contract and that there were no clear terms of reference that governed the employer/employee relationship.

Counsel admits that the second defendant was incorporated as a limited liability company and was involved in the sale and distribution of rice on the local market. He also admits that the first defendant was a director. The allegations of fraud have been denied on the part of the first and second defendants. They did not act fraudulently neither did they misappropriate the funds of the plaintiff to their own use and benefit.

With reference to the witness Paul Barrett, Mr. Rouwers indicated that Mr. Barrett was employed as a servant of the plaintiff. However, Mr. Barrett in his own affidavit, said he was employed by the first defendant, and later in the said affidavit, that he was employed by the plaintiff – see paragraph 19, 20 and 21. Counsel submitted that this affidavit clearly leaves much doubt as to the role of Paul Barrett and his involvement with the plaintiff. The inconsistency leaves him with no credibility. He further submitted that the affidavit of Mr. Olasema is of very limited value in this case.

With reference to the defendants case, counsel said that though he resided in Guyana for a period of five years, he has no intention of returning nor did he have any intention of removing any assets out of the jurisdiction. He referred to circumstances under which the second defendant was incorporated.

The affidavit of C. Riley and Raymond Jack confirm the sums they owed to the plaintiff which conflicts with the evidence of Mr. Rouwers.

In the absence of clear and sufficient evidence the allegation of fraud cannot be maintained which is a matter to be determined at trial. On a balance of convenience there is no sufficient evidence on which a court may feel satisfied that a remedy as draconian as a mareva injunction should be extended. The court cannot be satisfied that there is a need for such injunction.

CONCLUSION - THE LAW

For guidelines to this form of remedy **see Supreme Court Practice (1985) paragraphs 457, 458 and 459.**

In what circumstances the jurisdiction be exercised?

> "If it appears that the debt is owing and there is danger that the debtor may dispose of his assets so as to defeat it before the judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets."

The plaintiff should give some grounds for thinking that the defendant has assets here.

The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgement or award is satisfied. **The extent of mavera injunction and limitations**:- It may require the defendant to disclose the value, nature and whereabouts of these assets and pending trial, to deliver up motor vehicles in his possession **(see U.K. Ltd. vs. Lambert (1982) 3 AER. 237. C.A.**

ON THE FACTS

No affidavit has been filed for or on behalf of the 2nd defendant. No explanation has come from it as to interest earned before it transferred payments to the plaintiff.

On his affidavit the 1st defendant guaranteed the payment of Paul Barrett's rental of $50,000.00 per month. This was never disclosed to the plaintiff.

In paragraph 27 of his affidavit, Mr. Bean in explaining why Mr. Barrett was required to make lodgment to the 2nd defendants account rather than to the plaintiff's, stated

> "That the arrangement was made in this way because Paul Barrett was not previously known to me, he did not have the money required to pay for the rice on a cash on delivery basis....."

This is the same Paul Barrett whom he said he did not know before, yet he guaranteed payment of his rent of $50,000.00 per month on behalf of the plaintiff.

The 1st defendant also formed the 3rd defendant company without the plaintiff's knowledge or permission. Although its operation may have been short-lived, no explanation has been offered as to any interest earned from sums lodged to its account.

The evidence supplied by the plaintiff is overwhelmingly in favour of granting the injunction sought. A great injustice would be suffered by the plaintiff if the court were to refuse its application.

The 1st defendant's explanation as to the circumstances he formed the 2nd and 3rd defendants is at best spurious.

I am satisfied from all the affidavit evidence that the plaintiff has established that the 1st defendant would remove the assets from the jurisdiction so as to render them untraceable or unavailable. Accordingly, there shall be orders in terms of paragraphs 1, 2, 3, and 4 of the plaintiff's summons dated 4th January, 2000.

With respect to the 1st and 2nd defendants' application to vary the order made by Miss Justice Beckford, this was varied by the court on the 20th of January, 2000, in terms as set out in the affidavit of Mr. Bean sworn to on the 4th of January, 2000.

Costs to be costs in the cause.