

NMLCS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1995/C304

BETWEEN	CHISHOLM & CO. REALTY LTD.	PLAINTIFF
A N D	COMPTON, ELLIOTT ASHLEY LTD.	1ST DEFENDANT
A N D	THE MONEY INDEX	2ND DEFENDANT
A N D	MARK RICKETTS	3RD DEFENDANT

IN CHAMBERS

Miss Carol Davis for Plaintiff

Miss Ingrid Mangatal for Defendants

Heard: September 13, 18; October 4, 27; November 3;
December 20, 1995

HARRISON J. (AG.)

Application for Mareva Injunction

The plaintiff has filed a summons for a Mareva Injunction and is seeking the following orders:

1. That the 2nd and 3rd defendants be restrained whether by themselves their agents or howsoever otherwise from removing from the jurisdiction, disposing of and/or dealing with their assets within the jurisdiction until the trial of this matter or until further order, limited to \$800,000.00.
2. That the 2nd and 3rd defendants, their servants or agents be restrained from proceeding or from any dealings whatsoever with regard to the sale of the 2nd defendant, until trial of this matter or until further order.
3. That the 2nd and 3rd defendants produce to the plaintiff by affidavit, a list of his/its assets held within and outside of the jurisdiction.

In August 1995 an ex parte injunction was granted in terms of the above orders sought. The matter before me is now inter partes and having heard all the

evidence it must be decided whether or not the injunction granted should continue.

The plaintiff's claim

By agreement on or about the 15th day of July 1991, it was agreed that the plaintiff would lease its premises at 4 Caledonia Crescent, Kingston 5 in the parish of St. Andrew to the first and second defendants for a period of three years at a monthly rental of \$15,000.00. This lease was determined however by the defendants hence, the plaintiff has filed an action against the first and second defendants for losses and damages for breach of the lease agreement and against the third defendant for breach of guarantee of the obligations of the first and second defendants pursuant to the said agreement.

Affidavit evidence of the plaintiff

The plaintiff's application is supported by affidavits sworn to by James Chisholm, Managing Director of the plaintiff company. The relevant paragraphs of this affidavit sworn to on the 15th August, 1995 are as follows:

"....

5. That at the time the defendants took possession of the premises, the building and all fittings were in good order and repair, including inter alia 10 air conditioning units, globe-type glass shade, wooden credenza/cupboard units, door openers and closers, partitions, doors, floors, lighting fixtures, electrical circuits, walls, ceilings and security grills.
6. That on or about July 1994 the defendants terminated the agreement and left the premises, and I discovered that many of the fixtures and fittings were missing and/or damaged, and the buildings was damaged.
7. That on the day they vacated the said premises on or about 14th July, 1994 the defendants tore off and removed doors, partitions and security grills from the buildings, thereby damaging same.

8. That the items missing and/or damaged were as follows:

5 air conditioning units missing
3 air conditioning units damaged
1 Globe type glass shade missing
1 wooden credenza cupboard unit
1 electronic door opener missing
2 door closers missing
3 office partitions missing
11 doors missing
Floors, walls and ceilings damaged
Flourescent lighting fixtures and tubes missing
Electrical circuits damaged
Glass entrance door damaged beyond repairs
Steel hinges, locks, toilet paper holders, mirrors and other
sundry small items missing

11. In particular the defendants contended that they were the owners of four (4) air conditioning units, but the said units were not the ones purchased by my company since 1989. It was three (3) of these 1989 Quasar units, further Amana unit and another unit purchased before 1989 that were wrongfully removed by the defendants. I attach marked "JC 3" for identity documents showing my company's ownership of the units as aforesaid.

12. That on or about July 1995 I made enquiries at the Office of the Registrar of Companies, and I discovered that in October 1993 and June 1994 the 2nd defendant and the 3rd defendant as a director of the 2nd defendant had wrongfully pledged my company's goods in a bill of sale to the Jamaica Citizens Bank The defendants have valued the said goods at \$172,000.00 but this is an undervalue and I am advised as aforesaid and verily believe that the goods pledged by the defendants are valued at \$369,500.00.

13. That on or about July 1995 I discovered a newspaper article published by the Jamaica Herald in which it was reported that the 3rd defendant was seeking to sell the 2nd defendant company. I attach marked "JC 5" for identity a copy of the said newspaper report.

14. I am further informed by the Gleaner Co. Ltd. and verily believe that the 3rd defendant has now sold his house. Further between 1993 and May 1995 I was repeatedly advised by the 3rd defendant himself that he was travelling abroad to Florida to deal with business, and in the circumstances set out above I verily believe that the 3rd defendant intends to migrate and to leave Jamaica taking his assets with him out of the jurisdiction ..."

Miss Davis submitted that the plaintiff's affidavit evidence had more than satisfied the requirement of a good arguable case. She argued that the plaintiff's case related to a number of missing items [a substantial item concerned five missing air conditioning units] and damaged property which was rented to the defendants. She further submitted that the plaintiff had presented evidence based on a statement made by Mr. Earl DeRizzio, former Manager of the second defendant, that the plaintiff had acquired four (4) Quasar 18000 units by virtue of a rental agreement as a result of rent owed by the Jamaica Record Ltd. She further argued that the plaintiff claimed in the alternative for conversion as there was evidence before the Court to show that the defendant had converted the plaintiff's goods in a bill of sale to the Jamaica Citizens Bank.

As regards the risks of dissipation of assets within the jurisdiction, Miss Davis argued that it was admitted by the third defendant that the second defendant's assets were up for sale. She also argued that the third defendant was dissipating his assets since he had admitted selling his home and that he has not denied that all the business he has been associated with were not operating and that the first defendant was in fact not operating. She therefore submitted that the injunction should continue to remain in force until the trial of the plaintiff's action.

Affidavit evidence of the Defendants

The defendants filed an affidavit in response. This affidavit was sworn to on the 29th day of August 1995 by Mark Ricketts, the third defendant. The relevant paragraphs are as follows.

"

2. prior to the lease arrangements referred to in paragraph 3 of the plaintiff's affidavit the said premises were leased between 1988 to 1991 to the Jamaica Record Ltd., a limited liability company in which I was at the time a major shareholder and the Managing Director and Chairman. From the time of the leasing of the said premises to the said Jamaica Record Ltd., the premises were not in a good state of repair. The said Jamaica Record Ltd., put the plaintiff on notice that a number of matters needed repairing and replacing. However the plaintiff refused to effect these repairs and Jamaica Record thus had to do same themselves. In the latter part of 1988 or the early part of 1989 the first defendant with the plaintiff's permission occupied a portion of the premises leased to the Jamaica Record.
3. That as regards paragraph 5 of the plaintiff's affidavit, I deny that when the defendants took possession of the said premises they were in a good state of order or repair. Indeed, the buildings were old, sections of the roof and flooring were rotting and in bad shape. Security grills were lacking and there were seven (7) air conditioning spaces with six air conditioning units provided for our use, some of which were in need of replacement or repair. Several doorways had no doors. The defendants had to sand the floors, upgrade the air conditioning units and generally upgrade the state of repair to the said premises.
4.In or about 1992 when we asked for new air conditioners to replace the air conditioners which were old broken down, or inadequate the plaintiff told us to replace the units ourselves so we had to purchase three (3) upgraded units and one (1) replacement unit. In the back where an old central air conditioning unit was installed, we had to buy parts and pay the servicemen to fix it several times. The plaintiff eventually in 1993 provided us with one second hand unit.

We installed dividers to create more offices and to these dividers we attached doors. We ensured that these dividers or partitions were installed in such a way that they did not become fixtures and could easily be removed without causing damage to the plaintiff's premises upon removal.

...

5. ... As regards the plaintiff's allegation that it found fixtures and fittings missing and/or damaged and the building damaged, if this was so, no damage was as a result of the defendant's actions. As regards missing items the defendants only took what belonged to them.

6. ...the defendants admit that they moved security grills, partitions and doors but we say that all the things we removed belonged to us. Those things which were fixtures and which could have caused damage to the plaintiff's premises if an attempt was made to remove same .. we left, even though we bought and installed same.

...

8. ... As regards the items alleged missing, we state that we removed the following items all of which belonged to us:

- a) Four air conditioning units, three of which were upgraded units and one of which was a replacement unit.
- b) Two ply-wood office partitions and doors attached thereto. The said partitions were not nailed in, and the doors were attached to the partitions and not the walls of the plaintiff's premises. In addition, one partition which we had installed we decided to leave because we thought that its removal might have caused damage to the plaintiff's building.
- c) Doors attached to partitions and belonging to the defendants.
- d) Fluorescent lighting fixtures and tubes attached by the defendants in such a way that they were movable, and not fixtures and belonging to the defendants.

9. In or about 1989, the first defendant bought four air conditioning units. The first defendant needed the units to carry out its day to day functions at the said premises efficiently and in comfort and since the plaintiff refused to fix and/or to replace same despite being put on notice so to do, the 1st defendant was forced to replace same for its own use.

In or about 1992 three of the units purchased by the 1st defendant in 1989 and one other unit owned by the plaintiff needed replacing and/or upgrading. I discussed the matter with the plaintiff. The plaintiff's Mr. Chisholm told me to solve my own problem and I said I would upgrade and replace the necessary units but that if I did I would be taking same with me when I left.

I duly purchased four air conditioning units, three upgraded units and one replacement from Freezewell Aircondition Refrigeration & Electrical Installation Company - Donald Berry. Exhibited hereto are copies of the cheques in relation thereto marked "MR 1" for identification. Mr. Berry installed the four new units owned by the defendants, placing the replaced units in storage on the said premises.

That I crave leave to refer to the documents exhibited at paragraph 11 of the plaintiff's affidavit and Marked "JC 3" for identity. I state the four air conditioning units referred to in the document dated 15th July, 1994 signed by the former manager of the 1st and 2nd defendants Earl DeRizzio were purchased by the first defendant. They were never paid for in full by the plaintiff or at all. Indeed, I was the principal shareholder in the first defendant at all material times and the first time I knew that the first defendant was supposed to have used the air conditioning units to off set rent supposedly owing by the Jamaica Record in 1988-1989 was after we had vacated the premises in July 1994 and Mr. Chisholm claimed we had stolen items from his premises.

I never authorized or ratified any such arrangement and deny that such an arrangement existed. At the time of signing the document dated 15th July, 1994, Mr. DeRizzio and I were no longer working together as Mr. DeRizzio had resigned from the first and second defendants employ

10. ... when we were vacating the said premises I had Mr. Berry remove the four units belonging to the defendants and he left the plaintiff's old units on the premises

...

13. ... I state that the defendants did pledge the goods referred to in the Bill of Sale with Jamaica Citizens Bank ... However, the air conditioning units therein referred to are the units belonging to the defendants.

14. ... the second defendant's assets are indeed up for sale. As regards my house, I did not sell same. Same was a forced sale by the Jamaica Citizens Bank under powers of sale under a mortgage. I had to purchase equipment to fulfill a contract with the Government to provide school text books and I raise the money to purchase the equipment by way of a mortgage. As I had not yet been able to service the mortgage, since the programme had not yet commenced, the bank sold my house.

That I further refer to paragraph 14 of the Plaintiff's affidavit and state further that I have never had any conversation with the plaintiff in the manner alleged ... I find this allegation remarkable as I have no business in Florida, I do not even operate a bank account in Florida. From time to time I have to travel to Florida, New York, England and elsewhere to purchase supplies and equipment for my printing business Supreme Printers Ltd. operated at 2 Retirement Road, Jamaica and for commencement of school book programme. I travel to buy and bring back to Jamaica printing press, rollers and blankets, industrial bulbs for plate-burners and other items of equipment for my business here in Jamaica.

15. ... I have absolutely no intention of migrating or taking my assets out of the jurisdiction. Jamaica is my home country, my fixed place of abode and I have every intention of continuing to make what I hope will be a valuable contribution to the public, economic and social life of Jamaica whether or not I continue to operate the Money Index. Indeed I am currently under contract with the Government of Jamaica to provide text books to primary schools under a school book programme and I am printing various other publications in the printery. Further, I am currently engaged in and discussing contractual arrangements with newspapers to write articles for them on an indefinite and on-going basis ..."

From Miss Mangatal's point of view, she submitted that the plaintiff did not have a good arguable case. She contended that the plaintiff's case was implausible and based on inconsistent statements by different persons who were not even deponents. In highlighting some of these contradictions Miss Mangatal made reference to the evidence of the third defendant which states that the premises was leased to Jamaica Record Ltd in 1988. The plaintiff on the other hand claimed that the lease was signed in 1989 and the contra agreement speaks of rent owing by Jamaica Record from the 15th July, 1988. She therefore queried, if the Jamaica Record had moved to the premises in 1988 how could an agreement to set off rent only come about in 1989? She further queried why was the Jamaica Record owing six (6) months rent before the plaintiff brought the contra agreement into existence?

So far as the contra agreement is concerned, she submitted that Mr. DeRizzio who purported to have signed on behalf of the Jamaica Record Ltd. was neither director, manager, agent or employee of that Company. Furthermore, the third defendant had deposed that DeRizzio was not so authorised to act on behalf of the Jamaica Record. There was no dispute she says that the air conditioning units were purchased by and paid for by the first defendant. Furthermore, there was no evidence that that defendant had purchased them for the Jamaica Record Co. Ltd and neither was the first

defendant a party to this agreement. She contended that on the basis of Solomon v. Solomon (1897) A.C. 22, the agreement with Jamaica Record was not and cannot constitute or be interpreted as an agreement of the first defendant. Neither has the agreement been acknowledged, verified or confirmed in any document of the first defendant.

She submitted that these inconsistencies and equivocal statements do not make a good arguable case and the court should conclude that there is no merit for further investigation - see Eng Mee Young and Ors v. Velayutham P.C Cases 1875 - 1990 p. 479.

With respect to the risk of dissipation of assets or removal of assets from the jurisdiction, Miss Mangatal argued that the plaintiff had equated selling one's assets with dissipation. The evidence according to her has revealed that one of the defendant's assets was sold by the bank in order to satisfy a mortgage commitment. There was on the other hand, not one shred of evidence otherwise to show that the defendants were selling assets with intent or design to avoid judgment. It was finally submitted that the defendants ought not to be punished for lack of business sense or for movement from one business enterprise to another.

The Law

In Jamaica Citizens Bank Ltd v. Dalton Yapp (un-reported) S.C.C.A. 82/93 delivered February 14, 1994, Rattray P., stated as follows:

- "1. The Mareva Injunction is an appropriate and useful instrument to be utilised when there is danger that the debtor may dispose of his assets so as to defeat the debt before payment [Denning L.J. in Mareva International Bulkcarriers (1980 1 All. E.R. 213)].
2. The applicant for the Mareva has to meet two tests to the satisfaction of the judge:
 - A) on a preliminary appraisal he must establish a "good arguable case, in the sense of a case which is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50% chance of success." [Mustill J in Ninemia (supra) p. 404]. This is a minimum which the plaintiff must show in order to "cross the threshold", in other words, as I understand it, to get a foot in at the door, so as to access the entrance chamber of further consideration.

- B) having got to first base, so to speak on (a), he must establish the risk or danger that the assets sought to be frozen by the injunction and in respect of which the restraining jurisdiction of the Court is being prayed against the defendant will be dissipated outside the reach of the Court by the Defendant thus depriving the plaintiff of the fruits of his judgment.

I am further guided by the principles formulated by Lord Denning and Lawton L.J. in Third Chandris Shipping v. Unimarine [1979] 2 All. E.R. at page 987
Lawton L.J. stated inter alia:

"...In my judgment an affidavit in support of a Mareva injunction should give enough particulars of the plaintiff's case to enable the Court to assess its strength and should set out what enquiries have been made about the defendant's business and what information has been revealed, including that relating to size, origins, business domicile, the location of its known assets and the circumstances in which the dispute has arisen. These facts should enable a commercial judge to infer whether there is likely to be any real risk of default. Default is most unlikely if the defendant is a long-established, well-known foreign corporation or is known to have substantial assets in countries where English judgments can easily be enforced ... But if nothing can be found out about the defendant, that by itself may be enough to justify a Mareva injunction."

Findings

I would say, that my first task is to ascertain whether or not the plaintiff has established a good arguable case. The affidavit evidence of the plaintiff has revealed that at the commencement of the lease, the demised building was in good state of repairs and that all its fittings were in order. However, it has been deposed that a number of items were either found missing or damaged after the defendants had vacated the leased premises.

Mr. Chisholm has deposed in his affidavit sworn to on the 4th September 1995 that he was approached by The Jamaica Record Ltd in or about 1988 and that the premises was leased to this company in 1989. He further deposed that:

3. "... I informed them that the previous tenants had recently departed and damaged the building, but they informed me that they need accommodation urgently and desired to occupy the building as it was. It was however agreed between the Jamaica Record and my company that the Jamaica Record would do all repairs required to restore the building to good

condition, and that the cost of the said repairs would be deducted from the rent and in this way paid for by my company over a period. I attach marked "JC 6" for identity copy letter embodying said agreement and further statement from Mr. DeRizzio dated 5th August, 1994. The repairs were duly done and paid for per this agreement.

This document "JC 6" states inter alia:

"This is to confirm that in Janaury 1989, Chisholm & Co. Realty Limited had six (6) older Air Condition Window units and one (1) Central Unit Installed in their Office Building space leades to the Jamaica Record Ltd at 4 Caledonia Crescent, Kingston 5 and, occupied by Compton Elliott & Ashley Ltd. (The Money Index) with their permission.

In 1989, I requested and received from Chisholm & Co. Realty Limited four (4) more New 18,000 BTU Air Condition units from Ello Limited and which Chisholm & Co paid for ... Mr. Donald Berry ... installed all of the Air Condition units stated in paragraph 2 above at the Chisholm & Co. building ... during the period from June 1989 to May 1992 when I was manager of Compton Elliott & Ashley Ltd (The Money Index) ...

The Jamaica Record Limited leased the office buiding from Chisholm & Co. Realty Limtied from 15th July, 1988 to 14th July 1991. Compton Elliott & Ashley (The Money Index) took occupancy of the said office space in Janaury 1989, with the permission of the Jamaica Record Limtied and Chisholm & Co. Realty Limited. Compton Elliott & Ashley paid most of the monthly rental directly to Mr. James H. Chisholm the Managing Director of Chisholm & Co. Realty Limited, for and on behalf of the Jamaica Record Limited.

Compton Elliott & Ashley Limited (The Money Index) leased the said office space at 4 Caledonia Crescent directly from Chisholm & Co. Realty Limited from 15th July 1991 in good rentable condition and with ten (1) Air Condition Window Units and one (1) Central Unit on the building in good order and condition.

....."

Sgd. Earl DeRizzio

Now, one of the major issues in the suit, concern four missing air conditioning units which have been alleged to have been removed by the defendants. The plaintiff on the one hand is saying that these units are theirs as result of a contra agreement dated August 5, 1989. Both the affidavit evidence and statement from Mr. DeRizzio have revealed that four air conditioning units were purchased by Compton Elliott and Ashley, the first defendant Mr. Earl DeRizzio, a former Manager of the second defendant has stated in Exhibit marked "JC 3", that four 18000 BTU air conditioning units which were bought from Ello Ltd for \$19,000.00 on the 9th June, 1989 and billed to Compton Elliott were fully paid for by the Plaintiff Company. However, Mr. DeRizzio has further explained in a letter dated 28th April, 1995 that the plaintiff became the sole owner of these units by virtue of a contra agreement dated 4th August, 1989 between The Jamaica Record Ltd and the Plaintiff Company. I now turn to the contents of this Agreement which has been exhibited as part of exhibit "JC 3".

The Contra Agreement

"...This letter confirms the following: -

- 1 (a) That rental owing by the Jamaica Record Ltd from 15th July, 1988 to 15th July 1989 to Chisholm & Co. \$ 84,500.00
- (b) Less amount paid to date by Jamaica Record Ltd 44,500.00
- (c) Balance owing 40,000.00
- 2 (a) That, total adjusted expenditure by Jamaica Record Ltd for and on behalf of Chisholm & Co. 83,651.00

(b) Less net amount owing by Jamaica Record Ltd \$ 40,000.00

Balance owing by Chisholm & Co. 43,651.00

It is agree (sic) that as from August 15, 1989, the Jamaica Record Ltd will apply \$2,500.00 from the monthly rental of \$65,000.00 towards the \$43,651.00 until the said amount of \$43,651.00 is liquidated.

It is further recognized and agreed that all of the central and window air condition units installed in the building at 4-6 Caledonia Crescent are the sole property of Chisholm and Co. And none of these ten units shall be removed from the building without the written authority of Chisholm & Co.

It is further agreed that the Jamaica Record Ltd shall pay Chisholm and Co. the balance of \$4,000.00 due for rent on the 15th day of each month in accordance with our lease agreement, and until the present lease agreement expires or terminated."

Sgd. James Chisholm

Agreed by:
Sgd. E. DeRizzio
for and on behalf of the Jamaica Record Ltd.
Dated August 5, 1989

The list of expenditure totalling \$83,651.00 at 2(a) above comprises the following:

4 new air condition units	.....	\$ 19,000.00
1 central air condition unit	.....	17,000.00
Painting	.....	8,000.00
paint	.....	1,000.00
Sanding floor	.....	9,500.00
Carpentry	.....	1,000.00
Water rates paid	.....	4,721.00
Plumbing repairs	.....	3,000.00
Carpeting downstairs	.....	3,400.00
Electrical work	.....	20,000.00
		<hr/>
		\$ 86,621.00
Less cleaning premises	.....	- 2,970.00
Total		\$ 83,651.00

The defendants on the other hand are contending since the plaintiff refused to carry out repairs to the building, the Jamaica Record Ltd had to do so themselves. There is no mention of any agreement between the plaintiff and themselves. The third defendant claims that it was not until he had vacated the premises that he heard of the contra agreement. It was also their contention that the air conditioning units which were removed by them, were units bought from Mr. Donald Berry of Freezwell Air Condition Refrigeration & Electrical Installaciton Co. and paid for in 1992 by the first defendant. Four cheques, all drawn in 1992, were exhibited as evidence of payment and the respective sums shown on the cheques are as follows. \$5,000.00, \$3,620.00, \$6,000.00 and \$6,000.00. The letter "MR 2", referred to in paragraph 10 of the defendants' affidavit states inter alia.

July 26, 1994

".... within the past three (3) years I have sold the Money Index four Air Condition Units which was installed at the premises of 4 Caledonia Crescent.

These units Mr. Ricketts had instructed me to remove in July of this year.

Four of the older units I took out which was replaced by the newer units bought by the Money Index, these were left on the premises. Two of which was replace to former location."

Sgd. Donald Berry "

In response to the defendants' affidavit, the plaintiff in its affidavit sworn to on the 4th September 1995, has exhibited two letters from Mr. Donald Berry. The first letter, "JC 8", dated August 28, 1995 states inter alia:

"This is to certify that:

1. I, Donald Berry, trading as Freezwell Air Condition Refrigeration & Electrical Installaction Co. Of 6 Keesing Avenue, Kingston 10, never sold any Quasar 18,000 BTU Air Condition Unit to Mr. Mark Ricketts and/or The Money Index Limited and/or Compton Elliott & Ashley Limited or to any other company under the control of Mr. Mark Ricketts, between 1989 and July 1994, or at any earlier date.;

AND

2. I never installed into the office building of Chisholm & Company at 4 Caledonia Crescent, Cross Roads, Kingston 5 any Quasar Air Condition Unit, EXCEPT, the four (4) Quasar which I installed in June 1989. No other Quasar 18,000 BTU Air Condition Unit was installed into the Chisholm & Co. office building between June 1919 and July 1994."

Sgd. Donald Berry.

The second letter, "JC 9", dates September 4, 1989 states inter alia:

"On 26th July 1994 I gave a letter to Mr. Mark Ricketts, at his request, regarding a total of four (4) Air condition (sic) Window Units which I sold to him during the past three years; and which he said, and I presumed, were installed into the Chisholm & Co. Office Building at 4 Caledonia Crescent, Cross Road, Kingston 5.

I now desire to clarify my letter of 26th July 1994, as follows:

- (A) In July 1994, Mr. Ricketts asked me to take down for removal from the Chisholm & Co. Office Building the four (4) Air Condition Window Units which I sold to him during the past three years; and I presumed that they were in fact installed there. I instructed my assistants to visit the building and Mr. Ricketts and/or his assistants would show them the Air Condition units which they would like to take down for removal. I therefore do not know how many Air Condition Units or name of Units which Mr. Mark Ricketts removed from Chisholm & Company Office Building at 4 Caledonia Crescent, Kingston 5 in July 1994."

Sgd. D. Berry.

What has the affidavit evidence in this case reveal? It shows:

1. That the Jamaica Record Ltd had leased the premises from the plaintiff in and around 1988.
2. That since the Jamaica Record needed accommodation urgently and the building was in a state of disrepair the plaintiff and Jamaica Record agreed that Jamaica Record would restore the building to good condition and that the costs of such repairs would be deducted from the rent. In this way it was said that the expense incurred by Jamaica Record would be paid for by the plaintiff over a period of time.
3. The evidence shows that the defendants and The Jamaica Record Ltd. had a certain course of dealing as rent was paid by Compton, Ashley and Elliott for and on behalf of the Jamaica Record.
4. That the first and second defendants were allowed to occupy these premises in 1989 with the permission of the plaintiff and The Jamaica Record Ltd.
5. That four (4) new 18,000 BTU air condition units were purchased by DeRizzio from Ello Ltd on behalf of the first defendant and that these items formed part of the expenditure incurred in order to bring the premises up to a certain standard and

which was owing by the plaintiff company. [Although DeRizzio has not stated the make of the air conditioners in his statement part of exhibit "JC 3", this is a matter which I think would have to be dealt with at the trial.]

6. That the repairs were done and a contra agreement was entered into between the plaintiff and Jamaica Record with DeRizzio signing on behalf of Jamaica Record.
7. That the said contra agreement recites at its commencement that the letter was confirming certain terms which by implication were orally agreed to.
8. That the first and second defendants entered into a lease agreement with the plaintiff in 1991.
9. That the first defendant had been paying most of the rental for and on behalf of the Jamaica Record Ltd.
10. That Mr. Donald Berry, the person from whom, the third defendant claimed four (4) new air condition units were purchased, has stated that he had not sold any 18,000 Quasar units to the defendants between 1989 and July 1994.
11. That according to Mr. Berry, he had, at the request of the third defendant given his assistants instructions to remove air condition units in July 1994 from the plaintiff's premises.
12. That there were damaged air condition units, damaged floors, ceiling and walls and a damaged glass entrance door.
13. That in addition to missing air condition units, there were a number of other items missing after the defendants vacated the premises.

Having regard to the above evidence, I am satisfied on a balance of probabilities that the plaintiff has established that it has a good arguable case.

My next task is to see if the plaintiffs has established evidence that there is a real risk or danger that the assets sought to be frozen will be

dissipated outside the reach of the Court by the defendants thus depriving the plaintiff the fruits of its judgment.

The evidence has revealed where there is an admission by the third defendant that the second defendant's assets are up for sale. The third defendant has also admitted that his home was sold but seeks to explain that it was sold by the Bank in order to satisfy a mortgage commitment.

Paragraph 22 of the plaintiff's affidavit sworn to on the 4th day of September, 1995 states inter alia:

"22 ... I have made enquiries and am informed that the third defendant also possesses an apartment in upper St. Andrew which is now also up for sale. Since 1988 when I came to know the third defendant all of the businesses with which he was associated are either wound up, not operating or up for sale. By way of example, the Jamaica Record Ltd which is a company with which the third defendant was closely associated, is now being wound up. I have consulted the records of the Registrar of Companies, and I saw no recent returns filed with regard to the first defendant. Further I notice that all the assets which I previously believed belonged to the first defendant have been pledged in the Bill of Sale to the Jamaica Citizens Bank in the name of the second defendant which said assets are up for sale.

23...I say that I am informed by Mr. DeRizzio who is a previous business associate of the third defendant that Supreme Printers Ltd is also up for sale as a joint package with the second defendant and that the said package was offered inter alia to Radio Jamaica Ltd. In the premises I verily believe that given the third defendant's recent course of action in liquidating all his assets in Jamaica ... that he is indeed planning to migrate and leave Jamaica."

There is indeed silence on the part of the third defendant concerning the above allegations. Neither has the second defendant brought evidence to counter the inference that since its assets are being sold, there would be a real risk that if the plaintiff succeeds, its judgment would remain unsatisfied. Likewise, the third defendant has not brought any evidence of assets he has in the jurisdiction since there are allegations that certain assets he owns are either sold or are up for sale.

I am also satisfied on a balance of probabilities that the plaintiff has succeeded in bringing evidence in support of the second limb, that is to say, the test that there is a real risk or danger that the second and third defendants are dissipating their assets within the jurisdiction to the extent that if the plaintiff succeeds in its action against them, there is every likelihood that the judgment would remain unsatisfied.

Conclusion

It is hereby ordered that:

"1. The second and third defendants be restrained whether by themselves, or their servants or agents or howsoever otherwise from removing from the jurisdiction, disposing of and/or dealing with their assets within the jurisdiction limited to \$800,000.00 until the trial of this matter or until further order.

2. There shall be costs to the plaintiff to be taxed if not agreed.

Certificate for Counsel granted.