

NMCS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

IN CHAMBERS

SUIT NO. C.L. 1996/H-012

BETWEEN	HALF MOON BAY LIMITED	-	PLAINTIFF/ RESPONDENT
AND	EARL LEVY	-	DEFENDANT/ APPLICANT

Gordon Robinson and David Henry instructed by Mrs. Winsome Marsh of Messrs. Nunes, Scholefield, DeLeon & Co. for the Plaintiff/Respondent

Dr. Lloyd Barnett instructed by Hugh Hart of Hart, Muirhead, Fatta for the Defendant/Applicant.

Heard on: March 17 & May 7, 1997.

CORAM: WOLFE, C.J.

On the 5th day of February, 1997, on an exparte summons for Mareva Injunction, I ordered as follows:

1. That the defendant whether by himself, his servants and/or agents or otherwise be and is hereby restrained until the trial of this action from removing from the jurisdiction, disposing of, dealing with or creating a charge over all and any of the defendants assets within, and as they come within, the jurisdiction of this Honourable Court, save and except, such assets of the

defendant, as are reasonably required by him for his normal living expenses.

2. That the defendant hereby file and submit to the plaintiff's Attorney-at-Law, within fourteen (14) days of the date hereof, affidavit evidence of the extent, location, estimated value and particulars of his assets.
3. That the plaintiff, by its Attorneys-at-Law, hereby undertakes to abide by any order of the Court as to damages, should the Court hereafter be of the opinion that the defendant or any third party given notice of this order has or have suffered any damages that the plaintiff ought to pay.
4. The costs of and occasioned by this application be costs in the cause.
5. Liberty to Apply.

The defendant now seeks to discharge or modify the order made on February 5, 1997, on the following grounds:

1. The plaintiff on the said ex parte application failed to give full and frank disclosure;
2. the plaintiff gave false and/or misleading information to the Court; and

3. there is no real or credible evidence of any risk, that if the plaintiff were to obtain a judgment against the defendant, it would remain unsatisfied.

In 1992, the plaintiff engaged the services of the defendant as a building contractor for two (2) projects on the plaintiff's land at Rose Hall in St. James. Project number 1 involved the building of twenty villas and a boundary wall. Project number 2 involved the construction of a shopping centre.

The plaintiff contends that it was agreed between the parties that the defendant would perform the construction work on the basis, that each of them would retain the services of a quantity surveyor and upon consultation with each other, the plaintiff would pay to the defendant the amounts certified as the value of the work performed by the defendant.

By a separate agreement the defendant was also engaged as the architect for the projects.

In accordance with the agreement, payments were made to the defendant by the plaintiff, following up on the commencement of the contract in December 1992. All went well up to December 1993, when as a result of complaints made by the defendant, the plaintiff made several advances to the defendant totalling some \$75,124,091.00 in excess of sums certified as due to the defendant under the said contract.

This excess was reduced to \$57,689,107.00 when the final certificates of the Quantity Surveyors for both parties were submitted.

The plaintiff and defendant commenced separate actions in the Supreme Court. The plaintiff's action was to recover the sum of \$57,689,107.00, whereas the defendant sought to recover damages for breach of contract, *inter alia*.

The affidavit relied on by the plaintiff at the hearing of the *exparte* summons, disclosed that:

- (1) the defendant was the owner of the Trident Hotel which is situated in Portland, on lands registered in the name of the defendant at Volume 1214 Folio 709 of the Register Book of Titles. The said property is mortgaged to Capital and Credit Merchant Bank to secure a sum of U.S. 315,000.00 with interest.
- (2) The defendant is the holder of 9,000 of the 10,000 issued shares in the capital of Trident Villas and Hotel Limited. The remaining 1000 issued shares are held by the defendant's wife, Beverley Mae Levy.
- (3) Trident Villas and Hotel Ltd. is the registered proprietor of lands registered at Volume 1012 Folio 543 in the Register Book of Titles on which is erected a castle which is sometimes used by the defendant as a residence.
- (4) The defendant owns a home at 3 Dilcoosha Avenue, Kingston 10, which is valued at approximately \$12 - 15 million.

- (5) If the plaintiff's action succeeds, the judgment is likely to exceed J\$85,000.00 inclusive of interest plus costs.
- The plaintiff avers that this sum is in excess of what the defendant is likely to obtain if his assets were to be realized.
- (6) The defendant through his Attorneys-at-Law seeks to discharge the mortgage held by plaintiff to secure the sum of J\$16,000, 000.00.
- (7) Ken Sales & Marketing Ltd. (Ken's Sales) has indicated its intention to sue the defendant for the amount of J\$80,000,000.00 in respect of goods supplied to the defendant under the contract between plaintiff and defendant.
- (8) Further, the defendant is endeavouring to sell the Rio Grande Rafting concession in which he has an interest.
- (9) The plaintiff is apprehensive that the defendant will dispose of his assets and if not restrained will remove the proceeds out of the jurisdiction.

The defendant by affidavits dated February 24, and March 4, 1997, admits the following:

1. That he owns substantially the whole share capital of the Trident Hotel and Villas Ltd. which owns:

- (a) the Trident Castle operated as part of the Trident Hotel;
 - (b) the beneficial interest in the Trident Hotel;
 - (c) four acres of land and a house opposite to the hotel (both used in conjunction with the hotel).
 - (d) the furniture, fixtures and equipment in the hotel and castle.
2. That he owns seventy-five percent of the shares in Rio Grande Attractions Ltd., which he estimates to be valued at U.S.\$100,000.00.

The defendant states that the net value of his assets amount to U.S.\$6,000,000.00 or J\$210,000,000.00 and that he has no intention of removing his assets from the jurisdiction. At no time, states the defendant, was he attempting to dispose of his property clandestinely.

The issue which I must now resolve is simply this, under what circumstances will a Court discharge or modify a Mareva Injunction.

Firstly, the Court will discharge or modify the Order, where the plaintiff failed to give full and frank disclosure of material facts at the ex parte hearing. It is incumbent on the plaintiff to draw the attention of the Judge to all facts and arguments which, if the defendant were present, he might put forward in opposition to the grant of the Mareva Injunction. The plaintiff is obliged to

make reasonable enquiries before he applies for the injunction, so that he is in a position to know what such arguments for the defendant might be.

Dr. Barnett urged that the plaintiff failed to make full and frank disclosure of the undermentioned material facts:

1. That money was due to the defendant from the plaintiff in respect of professional fees for architectural work done by the defendant.

In so far as this claim is concerned, the plaintiff denies that any amount is owing to the defendant for architectural fees. The plaintiff contends that the defendant was to be paid for his services on a profit percentage basis. In support of this position, Mr. Robinson for the plaintiff, pointed out that the defendant had not specified the amount which was being claimed.

However, it must be noted that Heinz Simonitsch, in his affidavit sworn to on the 14th day of January, 1996, at paragraph 6, stated that the defendant was engaged under a separate agreement as the Architect for the projects. This leads me to ask the question, why two agreements, if it were the intention of the parties to treat the Architectural work and the construction work as one for purpose of payment.

In the circumstances, I would not be prepared to hold the non disclosure by the plaintiff, re the architectural fees, as a failure to make full and frank disclosure of a material fact. This non disclosure in my view is an innocent action on the part of the plaintiff. As far as the plaintiff is concerned there was nothing to disclose because there was no specific sum agreed for the architectural work.

2. The plaintiff sought to minimize the value of Trident Hotel by under stating the number of rooms. The plaintiff averred that there were some 26 rooms in the hotel whereas the defendant in his affidavit states that there are 29 rooms.

This to my mind does not qualify as failure to make full and frank disclosure of a material fact or as a false statement. The number of rooms at Trident was nothing more than an estimate and as it turned out, was a reasonable estimate. In any event, there is no evidence to say that the plaintiff knew the exact number of rooms and deliberately misrepresented that fact to the Court.

3. The plaintiff sought to treat the castle, as merely a part of the hotel, concealing the fact that the castle had rooms

which were used for rental, as well as its own intrinsic value, standing on a substantial piece of land and having itself 11 bedrooms. The plaintiff further misrepresented the castle as a place which was used by the defendant, sometimes, as residence.

This averment by the plaintiff is clearly based upon information which he received. He is not speaking of his own knowledge. The plaintiff stated, "I am further so informed and verily believe etc." and later on he states, "I understand it is sometimes used by the defendant as a residence".

Again, I find that this is neither a failure to make full and frank disclosure nor a deliberately false statement.

4. The plaintiff stated that he knew of no assets other than Trident, which would be capable of satisfying the Judgment and omitted to point out that on one of the other parcels of land there was a three bedroom house and that another parcel of land contained half acre.

This statement must be reviewed contextually. The plaintiff was seeking to sell Trident which is the major asset owned by the defendant. If he were allowed to sell Trident, the other assets might not fetch a price which

would be adequate to satisfy the amount being claimed by the plaintiff.

I would therefore not regard the statement complained about as being a failure to make full and frank disclosure or deliberately false statement.

5. The plaintiff misrepresented the condition of the hotel by stating that nothing had been spent on the hotel to maintain it, whereas considerable sums had recently been expended to refurbish the hotel, thereby maintaining its usual high standard.

This information is based upon investigation done for the plaintiff by a firm known as Security Advisory and Management Services Ltd. Having hired a reputable firm of investigators to investigate, the plaintiff is entitled to rely upon information received from them. If he relies upon such information, it cannot properly be said that he has deliberately misrepresented the facts. Such a conclusion could only be arrived at, if the plaintiff knew that the information was false and nevertheless relied upon it.

6. The plaintiff falsely stated that the hotel was experiencing low bookings when in fact it was experiencing comparatively good occupancy levels and bookings.

My comments at (5) are applicable to this allegation as well.

The question of whether or not there was a failure by the plaintiff to make full and frank disclosure of material facts, having been resolved in favour of the plaintiff, is not the end of the matter. The Court must now consider, whether or not the plaintiff's fear of the assets of the defendant being dissipated or removed from the jurisdiction is justifiable.

In support of his fear the plaintiff relies upon the following:

1. The defendant is seeking to sell the Trident Hotel.
2. The proceeds of the sale can easily be transferred out of the jurisdiction.

The evidence, which is unchallenged, discloses that the defendant has lived in Jamaica all his life. There is no evidence adduced to show that the defendant is taking steps to transfer assets out of the jurisdiction. The defendant has said that his reason for wanting to sell the hotel is that he has attained the age when he ought to retire.

In *Wheelabrator Air Pollution Control v. F. C. Reynolds*, S.C.C.A. 91/94 (unreported) *the Court per Carey J.A.* said:

"In my view, what I derive from the guidelines suggested by Lord Denning M.R. and Lawton L.J. in *Third Chandris Shipping v. Unimarine* [1979] 2 All E.R. 972, with respect to the information as to the risk factor, is that the plaintiff must state the nature and extent of the defendant's business and the location of assets within the jurisdiction. There should also be stated grounds for believing that the assets will be removed before satisfying any judgment and it is not sufficient merely to assert a belief in the fear of removal. The fear must be determined on the basis of the facts disclosed in the affidavit."

In the instant case the plaintiff's fear, of removal of the assets from the jurisdiction, is based upon the fact that if the defendant is allowed to sell, the proceeds of sale could readily be transferred out of the jurisdiction. This to my mind is not sufficient to establish the risk factor. No evidence has been adduced which suggests that the defendant is taking steps to dissipate the assets or remove them from the jurisdiction. This case is readily distinguished from the *Wheelabrator* case.

In *Wheelabrator*, the defendant company was a foreign company with no assets in Jamaica, but the sum payable under the contract. It was therefore an inescapable inference that the proceeds of the contract would be taken out of the jurisdiction.

The plaintiff should depose in his affidavit to objective facts from which it may be inferred that the defendant is likely to remove his assets abroad or dissipate them; unsupported statements or expressions of fear have little weight, see *O'Regan v. Iambic Productions Ltd.* (1989) *New L.J.* 1378 D.C.

In the circumstances, I find that there are no objective factors to show that the defendant intends to remove his assets from the jurisdiction or dissipate them within the jurisdiction and that the defendant has no such intention. As indicated before, the plaintiff's case is based on unsupported expressions of fear. Mere intention to sell does not in my view provide the necessary proof.

If at the *ex parte* hearing, the evidence of the defendant had been available, that he has lived in Jamaica all his life and that the reason for selling was that he wished to retire, I certainly would not have granted the injunction in the terms in which it was granted or at all.

In *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft m.b.H*
UND Co. KG [1984] 1 All E.R. 398 Kerr L.J. stated inter alia:

"Further, it must always be remembered that if, or to the extent that, the grant of the Mareva injunction inflicts hardship on the defendants, their legitimate interest must prevail over those of the plaintiffs, who seek to obtain security for a claim which may appear to be well founded but which still remains to be established at the trial."

The defendant does not admit the plaintiff's claim, so the issue has to be determined at a trial. At the same time, the defendant claims against the plaintiff for \$98,976,037.14, which he says he is entitled to have set off, if the Court finds that both the plaintiff's and the defendant's claims have been proven.

To prevent the defendant from disposing of the property, in the circumstances alluded to in the foregoing paragraph is, in my view, to inflict hardship upon him.

Finally, in *Barclay-Johnson v. Yuill* [1980] 1 W.L.R. 1259 at p. 1264, Sir Robert Megarry V.C. said:

"It seems to me that the heart and core of the Mareva injunction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in the action. If there is no real risk of this, such an injunction should be refused; if there is a real risk, then if the other requirements are satisfied, the injunction ought to be granted. If the assets are likely to remain in the jurisdiction, then the plaintiff, like all others with claims against the defendant, must run the risk, common to all, that the defendant may dissipate his assets, or consume them in discharging other liabilities, and so leave nothing with which to satisfy any judgment. On the other hand, if there is a real risk of the assets being removed from the jurisdiction, a Mareva injunction will prevent their removal. It is not enough for such an injunction merely to forbid the defendant to remove them from the jurisdiction, for otherwise he might transfer them to some collaborator who would then remove them; accordingly, the injunction will restrain the defendant from disposing of them even within the jurisdiction. But that does not mean that the assets will remain sterilised for the benefit of the plaintiff, for the court will permit the defendant to use them for paying debts as they fall due: see *Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A.* [1980] 2 W.L.R. 488, especially at p. 494, per Robert Goff J."

For the reasons stated, I order that the Mareva injunction granted on the 5th of February, 1997, be discharged.

Costs to be costs in the Cause.