IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
SUIT NO. 1978 OF 2004

BETWEEN	KEN SALES & MARKETING LTD.	CLAIMANT
AND	EARL LEVY	1ST DEFENDANT
AND	TRIDENT VILLAS & HOTEL LTD.	2ND DEFENDANT
AND	PELICAN SECURITIES LTD.	3RD DEFENDANT
AND	MICHAEL LEE CHIN	4TH DEFENDANT
AND	CASTLEWOOD CORP. INC.	INTERESTED PTY

IN CHAMBERS

Seyon Hanson instructed by Carol Davis and Company for the claimant

Maurice Manning instructed by Nunes Scholefield De Leon and Company for the first and second defendants

Dr. the Hon. Lloyd Barnett O.J. and Weiden Daley instructed by Hart Muirhead Fatta for the third defendant

Michael Hylton O.J., Q.C. and Kevin Powell instructed by Michael Hylton and Associates for the fourth defendant

Castlewood Corporation Incorporated absent and unrepresented

October 9, 13 and 23, 2008

EQUITABLE EXECUTION - APPLICATION FOR APPOINTMENT OF RECEIVER/MANAGER TO COLLECT DEBT - CRITERIA FOR APPOINTMENT - FACTORS WEIGHING AGAINST APPOINTMENT

SYKES J.

1. On October 13, 2008, I dismissed the claimant's application, by way of equitable execution, for the appointment of a receiver/manager. Costs were awarded to the defendants to be agreed or taxed. These are my reasons.

2. This legal battle between Mr. Earl Levy and Trident Villas and Hotel Limited (TVHL) on the one hand, and Ken Sales & Marketing Limited (KSML) on the other hand over a judgment debt owed by TVHL is now in its fourth year. Summary judgment was entered against the first two defendants as long ago as June 1, 2005. Since then two other parties have become defendants and there is an interested party.

The background

3. KSML supplied goods to Mr. Levy and TVHL. The bills were not paid and KSML sued for the sums outstanding. Summary judgment was entered by Gloria Smith J. on June 1, 2005, in the sum of $28,500,000.00 with interest at 30% from January 7, 1998 to June 1, 2005. The interest may seem high to those person in low inflation economies but in Jamaica back in the 1980s, 1990s and beyond a commercial interest rate of 30% does not raise alarms. Nothing has been paid on this judgment. KSML sought and obtained an order for sale from Cole-Smith J. on June 30, 2005 against real property registered at volume 1012 of folio 543 of the Register Book of Titles (the first order for sale). TVHL is the registered proprietor. The property is subject to a mortgage to Pelican Securities Limited (PSL) as well as being the subject of a sale agreement between TVHL and Mr. Michael Lee Chin.

4. The Court of Appeal on July 13, 2007, dismissed the appeal against the summary judgment. Even after this dismissal of the appeal, nothing has been paid on account.

5. The first order for sale was not executed. The claimant obtained a second order for sale against the same property on November 12, 2007 (the second order for sale). The reasons why this became necessary are not relevant to the present application and so will not be examined. KSML was unable to enforce the order for sale granted on November 12, 2007

within the time span required, and so it applied for an extension of that order "for six months or until sale of the property whichever time is shorter" (see para. 1 of notice of application for court orders dated January 30, 2008). An extension was necessary because under section 134 of the Registration of Titles Act, the order for sale has a life span of three months unless it is extended.

6. I should mention at this stage that before the second order for sale was granted, TVHL had applied for an order that the first order for sale "had ceased to bind, charge or affect the land registered at volume 1012 folio 543 in the Register Book of Titles" (see para. 1 of notice of application for court orders dated January 10, 2007). This application was heard on May 5 and 7, 2008 by Jones J., along with of four other applications which will be mentioned below. Judgment in all the applications is expected on November 3, 2008.

7. PSL, the mortgagee, has applied to have both orders for sale set aside and also that the endorsements on the certificate of title of the subject property arising from both orders be cancelled and struck out (see paras. 1 and 2 of amended notice of application for court orders dated January 31, 2008). This application was also heard by Jones J.

8. These three applications (KSMS's, TVHL's and PSL's) came before Mangatal J. on February 8, 2008, and her Ladyship ordered that the second order for sale be extended until March 18, 2008. The other relevant part of her Ladyship's order is that she prevented KSML or any other party to the action from doing anything to sell the property until March 18, 2008, or until further order. It was also ordered that the three applications mentioned so far should be heard on March 14, 2008. It is not entirely clear how PSL came to be a party to these proceedings. PSL in its written submissions, in the matter before me, state that Mangatal J. made an order making them parties to the proceedings when the matter came before her on February 8, 2008. It true that PSL appeared before her and was represented by counsel but nonetheless the formal order signed by her Ladyship does not contain such an order. None of the other parties have raised the point and so I will proceed on the basis that PSL is properly a party before the court.

9. Mr. Michael Lee Chin applied to be added as a defendant to the proceedings and he too, like PSL, sought an order discharging both orders for sale and a further order removing the endorsements on the certificate of title of the disputed land which were placed on the title pursuant to the order for sale (see paras. 1, 2, 3 and 5 of notice of application for court orders dated February 27, 2008). Mr. Lee Chin's locus standi to make these applications rested on an agreement for sale of the subject property he executed with TVHL. This was the fourth application heard by Jones J. on May 5 and 7, 2008.

10. There was yet another application, the fifth, also heard by Jones J. This was a notice of application for court orders dated February 26, 2008. In this application KSML asked, inter alia, that (i) the report made by the Registrar of the Supreme Court be considered, (ii) PSL's mortgage registered in January 1998 be set aside, (iii) Mr. Michael Lee Chin's caveat on the disputed property be overridden, (iv) the sale of the land pursuant to the order for sale proceed, (v) the judgment debt and costs be paid from the sale.

Judgments, Orders and Applications

11. On May 5 and 7, Jones J. heard the five applications referred to above. If KSML succeeds and the others fail, then it would mean that KSML would be able to enforce the second order for sale, and possibly realise the judgment debt. It is also common ground that Jones J. ordered that no party takes any steps to enforce the order for sale or to complete the agreement for sale entered into between TVHL and Mr. Lee Chin in respect of the subject property until he delivers judgment. It appears, therefore, that the risk of dissipation of this asset is adequately provided for. Jones J. was continuing, if not in identical terms but certainly in effect, one of the orders made by Mangatal J. on February 8, 2008 preserving the property until the applications were heard and determined.

12. I should point out that on July 16, 2008, the life of the second order for sale was extended to November 3, 2008, the expected date of the judgment of Jones J. on the four applications mentioned.

13. I also understand that a freezing order is in place over the subject property and this freezing order was extended by the Court of Appeal pending delivery of its judgment on the issue of whether a freezing order should have been made over the subject property. This freezing order also preserves the property and so one of the claimant's grounds for seeking the relief, namely that there is the risk of dissipation has not been made out. The ultimate resolution of this application rests on the nature of equitable execution and I turn to that question.

What is equitable execution?

14. It is established beyond debate that the appointment of a receiver in order to enforce a judgment (equitable execution) is not the equivalent of the common law methods of executing judgment. That is to say it is not the equivalent of a writ of seizure and sale and neither is it a writ of fieri facias or even a writ of elegit. To use modern language, it is not a writ of execution as defined in rule 46.1 of the Civil Procedure Rules (CPR). This type of equitable remedy was developed by the Courts of Equity to assist judgment creditors who having secured judgment against the judgment debtor were unable to do so because, at law the judgment cannot be executed. As explained by Cotton L.J. in ***Atkins v Shephard*** (1890) LR 43 Ch. D. 131, 135 - 136:

> *But what he gets by the appointment of a receiver is not execution, but equitable relief, which is granted on the ground that there is no remedy by execution at law; it is a taking out of the way a hindrance which prevents execution at common law.*

15. Bowen L.J. in the same case added at page 137:

> *Equitable execution is not like legal execution; it is equitable relief, which the Court gives because execution at law cannot be had. It is not execution, but a substitute for execution.*

Finally, Fry L.J. stated at page 138:

> *The idea that a receivership order is a form of execution is in my opinion erroneous. A receiver was appointed by the Court of Chancery in aid of a judgment at law when the plaintiff shewed that he had sued out the proper writ of execution, and was met by certain difficulties arising from the nature of the property which prevented his obtaining possession at law, and in these circumstances only did the Court of Chancery interfere in aid of a legal judgment for a legal debt. Relief by the appointment of a receiver went on the ground that execution could not be had, and therefore it was not execution.*

The jurisdiction to appoint a receiver manager

16. The Judicature (Supreme Court) Act of Jamaica created the Supreme Court and by so doing combined the many previously existing superior courts of record into one court. This legislation followed verbatim the material parts of the English provisions of the Judicature Act of 1883. Specifically section 49 (h) of the Jamaican Act is identical to section 28 (8) of the English legislation.

17. Section 49 (h) of the Jamaican legislation states:

> *A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such an order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court thinks just, and if an injunction is asked either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court thinks fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of*

possession)does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

18. The Jamaican legislation like its English counterpart was designed to bring the administration of the common law courts and Courts of Equity into one court. Prior to the nineteenth century, litigants had to choose their forum carefully. If they went to Courts of Equity and it turned out that they should have been in the common law courts then they had to abandon the case and start again in the correct courts. As time went on this was seen as intolerable. There began a series of statutory reforms in the nineteenth century in which, gradually, common law courts were allowed in limited circumstances to exercise limited powers of the Courts of Equity and the same was done for Courts of Equity in respect of powers of the common law courts. The Judicature Acts of England and Jamaica completed this process. The statutes provided that in one action the claimant and defendant by way of counterclaim could claim in one action the various common law and equitable remedies which are available.

19. Section 49 (h) simply made it clear that the new court should have the power to grant injunctions and to appoint receivers provided that it was just and convenient so to do. One of the issues that occupied the attention of the new court was the extent to which the new court was bound by the practices of the old courts, particularly, for present purposes, the Courts of Equity.

Was the new court confined to appointing receivers only in the same instances as the Court of Chancery had done?

20. One of the recurring problems after these statutes is whether the statutes conferred on the new court new powers, that is to say, could the court exercise powers that were not previously exercised by either the Courts of Equity or the Common Law Courts, or was it confined to exercising powers that had previously been exercised by those courts? Specifically, was the new court, in matters of equity, restricted to exercising the power only in the same instances that the power had been so exercised prior to fusion? This issue has divided judges and academics in the ensuing century and there is no resolution in sight.

21. Speaking for myself, I am of the view that the statute did not give the new court the ability to exercise powers not previously exercised by the courts that it replaced. This is not to say that well established principles cannot be modified and applied to new and diverse facts.

22. I make these points because one of the main arguments advanced by the third defendant in opposition to the application by the claimant was that the Courts of Equity did not grant the order sought in respect of future debts, but only in respect of debts already incurred. In this regard it relied on a number of cases from the Court of Appeal in England and Wales which are entitled to high and great respect. Indeed some of the judges on whom this submission draws support were judges of great eminence who enjoyed and continue to enjoy the highest esteem of later generation of lawyers and judges. Having said this I must say that I am indebted to the thorough, lucid and impressive analysis of the pre-1873 position in England done by Lawrence Collins L.J. in ***Masri v Consolidated Contractors International Company*** [2008] 1 C.L.C. 657 at paras. 136 - 162.

23. Lawrence Collins L.J. had to embark on a thorough analysis of the law because, he like me, was confronted with the submission that a receiver could not be appointed over future debts. The case that has been relied on for this proposition is ***North London Railway Co v Great Northern Railway Co*** (1883) 11 QBD 30, a case on injunctions. The reasoning in that case, although developed in relation to injunctions, came to be applied to the appointment of receivers. His Lordship demonstrated that the case actually decided "that s 25(8) of the 1873 Act had not given to the court any jurisdiction to grant an injunction in a case where prior to the 1873 Act there was no legal right or liability" (see para. 143 of ***Masri***). The Lord Justice also held ***North London*** decided that "the words "just or convenient" did not increase the power of any part of the court to the extent of altering the rights of parties so as to give to either a right which did not exist in law or equity before the 1873 Act" (see para. 143 of ***Masri***).

24. His Lordship then went to look at views expressed by the members of the court in the ***North London*** case. These views concerned the extent

to which the new court would be bound by the pre-fusion practice. It is these expressions that led subsequent courts to conclude, quite erroneously, that ***North London*** was authority for the view that the new court could only appoint receivers in the same kinds of cases as it did before the passing of section 25 (8). The faulty reasoning went like this: a receiver could only be appointed in cases after section 25 (8) became law as they could have been appointed in cases before that provision was passed. Therefore since it was not shown that before the 1873 Judicature Act, a receiver was not appointed to receive future debts so a receiver could not be appointed to receive future debts in the post 1873 era. This reasoning has been shown to be erroneous by the Lord Justice.

25. Lawrence Collins L.J. showed that the cases of ***Holmes v Millage*** [1893] 1 QB 551, 557 (per Lindley L.J.) and ***Morgan v Hart*** [1914] 2 KB 183, 191 (per Buckley L.J.) which concluded that ***North London Railway Co v Great Northern Railway Co*** was authority for the proposition that s 25(8) gave no power to the court to grant an injunction **in a case** (my emphasis) where no court could have granted one before the 1873 Act, were based on a misunderstanding of ***North London*** (see para. 147).

26. I therefore agree with Mr. Hanson, counsel for the claimant, that the Supreme Court of Jamaica has the power to appoint a receiver in respect of future debts. I therefore do not accept the third defendant's submission that a receiver could not be appointed over future debts.

27. I shall now deal with a submission made on behalf of the first and second defendants which was to the effect that the ***Masri*** case in which a receiver of future debts was appointed turned on the fact that section 37 Supreme Court Act of 1981 gave the High Court in England and Wales specific statutory power to do so. I disagree and I now demonstrate why this submission is not sustainable.

28. The submission by Mr. Manning, counsel for the first two defendants, has completely overlooked the development of the freezing order in England (previously known as the Mareva Injunction) which came about before the 1981 Supreme Court Act in England. This pre 1981 position has been followed in Jamaica. I should indicated that section 25 (8) of the English 1873 Act was repeated in section 45 (1) of the Supreme Court

(Consolidation) Act of 1925 in England. Therefore the analysis by the English courts of section 45 is equally applicable to section 49 (h) of the Jamaican statute.

29. Like its English counterpart, the Court of Appeal of Jamaica has located the power to grant a freezing order in section 49 (h) of the Judicature (Supreme Court) Act (see ***Watkis v Simmons*** (1988) 25 J.L.R. 282, 283E - H per Kerr J.A. where the Justice of Appeal noted that section 45 (1) of the English, Supreme Court (Consolidation) Act of 1925 was similar in terms and purpose as section 49 (h) of the Judicature (Supreme Court) Act of Jamaica).

30. While the authors of ***Equity: Doctrines and Remedies*** (4th) do make a formidable case that the birth of the Mareva injunction was not permitted by the terms of section 25 (8) of the 1873 Act, it is now too late in the day to go back. Even if its origin was illegitimate, the CPR has accepted it and made specific provision for it (see part 17 on interim remedies).

31. Thus Jamaica has accepted that freezing order can be granted under section 49 (h) of the Jamaican statute. As far as I am aware the ancillary order for disclosure (which was developed to support the freezing order) was designed to extract information from the defendant about his assets, their extent and their location. This development too, has been accepted as part of Jamaican law. This point is critical because Mr. Manning submitted that the receiver could not be appointed because the claimant did not indicate whether TVHL has any debts due to it, and if so, from whom and the amount. To my mind these obstacles are more apparent than real and I now demonstrate why this is so.

32. The disclosure order development in the freezing order jurisprudence was a pre 1981 Supreme Court Act (UK) development. In other words, the disclosure order was developed by the courts before section 37 of the Supreme Court Act of 1981 became law. In the case of ***A.J. Bekhor v Bilton*** [1981] Q.B. 923, the Court of Appeal had to consider whether a disclosure order could be granted ancillary to a Mareva injunction. In so doing, the Court sought to locate the power to grant the order assuming that the court could grant the ancillary order.

33. Ackner L.J. began by noting that section 25 (8) of the 1873 Act was reproduced in section 45 (1) of the Supreme Court of Judicature (Consolidation) Act 1925. His Lordship noted that section 45 (1) created the power to grant Marevas. Lord Justice stated at page 940:

> *Having regard to the authorities referred to above it is now clearly established that the power of the High Court under section 45 (1) includes the power to grant an interlocutory injunction to restrain a party to any proceedings from removing from the jurisdiction or otherwise dealing with assets located within the jurisdiction where that party is, as well as where he is not, domiciled, resident or present within that jurisdiction. Clause 37 of the Supreme Court Bill is obviously designed to give statutory effect to those authorities.* ***To my mind there must be inherent in that power, the power to make all such ancillary orders as appear to the court to be just and convenient, to ensure that the exercise of the Mareva jurisdiction is effective to achieve its purpose.***
>
> *The power now contained in section 45 of the Act of 1925 was formerly contained in section 25 of the Supreme Court of Judicature Act 1873.* (my emphasis)

34. The expression "that power" in the highlighted text must have an antecedent. That antecedent must be the inherent power to grant a Mareva injunction based on section 45 (1) of the 1925 Act. This must be so because the 1981 Act, at the time of ***Bekhor*** was still a Bill (see page 940 where Ackner L.J. noted, "Clause 37 of the Supreme Court Bill is obviously designed to give statutory effect to those authorities").

35. Finally, his Lordship stated at pages 942 - 943:

> *If I am wrong in concluding that section 45 provides the basis for the jurisdiction to make the type of ancillary order referred to above, then the question*

arises as to whether the court has an inherent or residual jurisdiction to make such an ancillary order. In so far as Mr. Stamler contends that there is inherent jurisdiction in the court to make effective the remedies that it grants, this seems to me merely another way of submitting that, where the power exists to grant the remedy, there must also be inherent in that power the power to make ancillary orders to make that remedy effective. This I have accepted. However, if and in so far as he contends that the courts have a general residual discretion to make any order necessary to ensure that justice be done between the parties, then in my judgment that is too wide and sweeping a contention to be acceptable.

36. This reasoning has been applied in Jamaica in relation to Marevas. Disclosure orders have been made in Jamaica. Why cannot the same reasoning be applied to an application to appoint a receiver? What good reason can there be to say that in relation to future debts and the appointment of a receiver, there cannot be an ancillary disclosure order? It infringes no right of the judgment debtor. It does not prevent the debtor from carrying out his normal activities. He is simply being told to provide information so that the judgment creditor can have the judgment debt satisfied. The freezing order is a pre-trial remedy available where the claimant has not even had the case tried to say nothing of having a judgment whereas, by contrast, the judgment creditor who is seeking the appointment of a receiver already has a judgment that is not satisfied and is simply seeking to get what a lawfully constituted court has said is his. It would be quite an irrational system of law if it were that a claimant can extract information from the defendant even before the claim is filed (freezing orders in urgent cases can be granted before the claim is filed) but a judgment creditor cannot have a disclosure order after a court of competent jurisdiction has found in favour of the judgment creditor. Added to this, there is even post judgment freezing orders available. I therefore conclude that the law has now developed the capability (with sufficient safe guards) to appoint a receiver over future debts and to make ancillary orders in support of such an appointment. A court appointed receiver in this context is subject to the

jurisdiction of the court. The judgment debtor or any affected party can come back to court if he feels that the receiver has overstepped the mark.

37. An example of the type of disclosure order that can be made in support of an order to appoint a receiver was provided in ***Masri***. I set out a part of the order:

> *7 That from the date hereof until further order, CC (Oil and Gas) and its directors or officers including Fouad Asfour and Samir Nayef Khoury, shall co-operate with the receiver in the following ways:*
>
> *(a) Providing within a reasonable time such information and documents falling within the following categories as the receiver may reasonably require:*
>
> *(i) the whereabouts at any time of the Oil Revenues or any assets representing the proceeds of the same;*
>
> *(ii) the arrangements, whether contractual or based on instructions given from time to time, in place at any time for the sale of the oil referred to in para 1 above and realisation of the proceeds of the same;*
>
> *(iii) the identities of (and any other details concerning) all entities involved in the sale of the said oil and realisation of the proceeds of the same;*
>
> *(iv) the amounts due to CC (Oil and Gas) in respect of the Oil Revenues from time to time.*
>
> *(b) Providing within a reasonable time such written confirmation to third parties anywhere in the world as the receiver may reasonably require of the receiver's rights under this order to act on behalf of CC (Oil and*

Gas) for the purpose of carrying out his functions as set out above, and of his rights under this order to receive the Oil Revenues in that capacity, and providing to the receiver copies of such confirmations.

(c) Within three days of making any agreement for the sale of oil, or any sale of oil, providing to the receiver the following information in relation to such an agreement or sale, namely:

i. If it is in writing, a copy of any such agreement. If it is not in writing, a written description of its terms and conditions.

ii. The identity of the purchaser under such agreement or sale including the purchaser's name, registered office address and contact details of the office of the purchaser involved in the purchase.

iii. If an agent acted for CC (Oil and Gas) in making such agreement or sale, the agent's name, registered office address and the address and telephone and fax numbers (if any) of the office of the agent involved in the making of such agreement or sale.

iv. The details of the bank account to which any monies due to CC (Oil & Gas) SAL have been or are to be remitted in connection with such agreement or sale, including the name of the bank, the address of its branch involved, the name of the account and the number of the account.

38. The order appointing the receiver made provision for the directors of the company to provide information to the receiver in a timely manner which would enable the receiver to know when the company entered new

contracts and with whom and the income to be generated under those contract which would be lawfully due to the company.

Why the claimant failed

39. With the understanding of what a judgment creditor obtains on the appointment of a receiver, I examine the other objections to this application. All the defendants made by the point that having regard to the history of this matter including the fact that there is a decision of this court (Jones J.'s anticipated judgment on November 3, 2008) pending in which his Lordship will determine whether the second order for sale is valid and enforceable, it cannot be said, in light of this fact, that the claimant is unable to enforce its judgment. If KSML succeeds before Jones J. then it will have its remedy at law and would not have to rely on equitable execution.

40. The jurisprudence is clear that the appointment of receiver in cases like the present is not done merely because it would be more convenient for the applicant. The claimant is not permitted to elect between enforcement at law or equitable execution. Equitable execution can only be considered when the judgment creditor has come to the end of the road of enforcement at law and has nowhere else to go. Then and only then equity comes to his assistance.

41. It seems to me that opposition of the defendants is well founded. KSML has not shown that enforcement is not possible. Once it is understood that the appointment of receiver is a substitution for enforcement by the common law or statutory methods of enforcement then the weakness of KSML's case becomes clear. It is not that execution cannot be had; it is being contested.

42. The claimant's case was also based on the risk of dissipation. This ground has already been dealt with.

Conclusion

43. KSML has not established that there is the risk of dissipation of the subject property and neither has it established that it cannot enforce the judgment. A legal challenge to the enforcement of an order for sale, in the ordinary course of things, does not rise to the threshold

requirement that would trigger the appointment of a receiver. I do not find it necessary to consider the other grounds of objection to the application and neither do I think it desirable to do so because I may trespass inadvertently on some of the issues that are to be decided by Jones J. I have therefore confined this judgment to the discrete areas that I am reasonably certain are not being considered by his Lordship.