IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO 2009 HCV 02600

BETWEEN	PAULETTE KOLBUSCH	CLAIMANT
AND	DR. PETER KOLBUSCH	FIRST DEFENDANT
AND	KING ALARM LIMITED	SECOND DEFENDANT

IN CHAMBERS

Jerome Spencer instructed by Patterson Mair Hamilton for the claimant
Glenroy Mellish for the first defendant

June 4 and July 31, 2009

APPLICATION FOR DISCHARGE OF FREEZING ORDER - DISTINCTION BETWEEN EQUITABLE AND COMMON LAW REMEDIES - WHETHER COURT CAN DECLINE TO EXTEND FREEZING ORDER IF THRESHOLD REQUIREMENTS EXIST

SYKES J.

1. On June 4, 2009, I heard an application from Mrs. Kolbusch for an extension of an ex parte freezing order and application from Dr. Kolbusch for an order discharging the freezing order. I granted Dr. Kolbusch's application. After making my decision, Mr. Spencer applied for leave to appeal and a stay of execution. I refused these as well. These are my reasons.

2. On May 20, 2009, a without notice application for a freezing order was granted by Frank Williams J. (Ag) in the following material terms:

    1. *The first defendants is restrained from removing his assets, disposing of and/or dealing with his assets in Jamaica whether by himself, his servants*

and/or agents or howsoever insofar as this does not exceed $3,500,000.00. In particular, the first defendant shall not dispose of his share in the net proceeds of Lot 19 Peter's Rock in the parish of St. Andrew.

...

6. *This Order does not prohibit the first defendant from spending reasonable sums towards his ordinary living expenses or a reasonable sum on legal advice and representation as agreed with the claimant's attorney at law.*

7. *The order will cease to have effect if the first defendants provides security by paying the sum of $3,500,000.00 into court or makes provision for security in that sum by another method agreed with the claimant's attorneys at law.*

3. The schedule to the order had the undertaking to abide by any order the court may make should it be found that the Dr. Kolbusch suffered any damage.

4. The order was to be considered again on June 1, 2009, but that hearing was adjourned to June 4, 2009, when it was heard inter partes.

CONTEXT

5. On May 19, 2009, Mrs. Paulette Kolbusch filed a claim in the Supreme Court against Dr. Peter Kolbusch and King Alarms Limited. She is seeking damages for trespass to property located at 3a Lavant Avenue against Dr. Kolbusch as well as damages for conversion. Mrs. Kolbush also alleges that Dr. Kolbusch unlawfully entered the property and removed household furniture and personal effects valued at $750,270.00. Both Dr. Kolbusch and Mrs. Kolbusch were the registered proprietors of this property.

6. The claim against King Alarm alleging breach of contract is not relevant to this application and will not be mentioned any further.

7. During the course of the marriage the couple acquired two properties; one located at 3a Lavant Avenue and the other at lot 19 Peter's Rock. 3a Lavant Avenue was sold in 2007 as part of a settlement between the properties when the union was being dissolved. The only other known asset of the Dr. Kolbusch of substantial value is lot 19 Peter's Rock which is in the process of being sold.

8. The freezing order was obtained to prevent Dr. Kolbusch from disposing of his share of the proceeds of the sale of lot 19 Peter's Rock since it is alleged that Dr. Kolbusch has no other asset of significant value.

9. Dr. Kolbusch has filed an affidavit supporting his application for a discharge of the order. He alleges that in a suit in the Supreme Court, Suit No. E 540 of 2001 (***Peter Otto Kolbusch v Paulette Eileen Kolbusch***), Reid J. ordered, among other things, that 3a Lavant Avenue be valued and sold and the net proceeds of sale be divided equally between the parties.

10. The significance of this order as explained by Mr. George Mellish is this. The property had to be prepared for viewing by prospective purchasers. It also had to be made safe because chemicals and other material were stored there. This meant that the property had to be entered and cleaned up. On this basis, Mr. Mellish argues, it is extremely, doubtful whether the claim to trespass and conversion is as strong as contended for by Mrs. Kolbusch. In any event, Dr. Kolbusch had a lawful and legitimate reason to be on the property, if for no other reason that he was a registered proprietor at the material time. Also, if he was going to prepare the property for sale, then of necessity he would have to be on the property.

11. Dr. Kolbusch outlined that he identified a valuator and a real estate agent who would also have to enter the property if they were going to be able to do a proper job of valuing and advertising the property. Dr. Kolbusch would need to be present during this process.

12. He has asserted that the down stairs part of the building, which was occupied by his wife, was wet and damp. It had dust, mildew and stripping wall paint being prominent features. He asserts that the analytical instruments and laboratory equipment were heavily corroded and could not be repaired. Also there were chemicals in the building which had to be properly disposed.

13. Dr. Kolbusch has presented other evidence before the court which is important. He has declared how he intends to spend the proceeds of sale of lot 19 Peter's Rock. He placed before the court an order of Donald McIntosh J. who ordered that Dr. Peter Kolbusch is to make good his maintenance arrears of $400,000.00 to Mrs. Lawayne Jefferson-Kolbusch (the first Mrs. Kolbusch) or he would be committed to prison for twelve weeks. This order was made on December 30, 2008.

14. Dr. Kolbusch exhibited another order, dated January 20, 2009, this time by Jones J. ordering him to pay $1,200,000.00, out of the proceeds of sale of lot 19 Peter's Rock, as full and final settlement of the maintenance claim. The order goes on to say that until the lump sum payment, he is to pay $50,000.00 per month in maintenance to Mrs. Jefferson-Kolbusch. In practical terms what this meant was that even before lot 19 was sold, Dr. Kolbusch had to pay over $1,600,000.00 to the first Mrs. Kolbusch. In addition, he says that he has medical bills to meet arising from treatment he received in April 2009. In respect of the order made by Donald McIntosh J. he has only been able to pay $150,000.00.

Non-disclosure

15. Mr. Mellish submitted that there was material non-disclosure by Mrs. Kolbusch. The non-disclosure is said to have arisen in this way. It is common ground that 3a Lavant Avenue was ordered to be sold by Reid J. As a practical matter, the property would have to be prepared for sale. This would mean removing debris and other material so that the property could be made attractive. Of necessity, Dr. Kolbusch would have had to enter the property whether alone or with his wife to do the things necessary for a sale to take place. These matters were not

brought to the attention of Frank Williams J. (Ag), thereby causing the court to believe that Dr. Kolbusch could not have had any possible lawful reason for going onto the property. It is also said that Mrs. Kolbusch failed to disclose to the learned judge that there were chemicals, old equipment and machinery that had to be removed.

16. Mr. Mellish submitted, quite forcefully, that the claimant gave the judge a misleading impression. He emphasised that an ex parte applicant is under a heavy burden to bring to the attention of the court all material matters.

17. I must say that I agree completely with Mr. Mellish. The authorities on the necessity for full disclosure on an ex parte application are many. An ex parte applicant must bring to the attention of the court any factor that the defendant may have raised had he been present. In other words, the ex parte applicant has the serious and onerous obligation to place before the court matters favourable and unfavourable to his case, especially, if there is a possible legitimate explanation for the defendant's alleged breach of the applicant's rights. In my view, Mrs. Kolbusch failed in her duty to make full and frank disclosure. Frank Williams J. (Ag) ought to have been told that the lot 3a Lavant Avenue was sold by virtue of a court order and it was Dr. Kolbusch who prepared the property for sale. The court ought to have been told that it was Dr. Kolbusch who secured the valuator and real estate agent. From this the court would have before it information which may have explained Dr. Kolbusch's presence on the property and why he may have found it necessary to enter the down stairs part of the building which Mrs. Kolbusch occupied. In effect, she failed to disclose that it was possible for Dr. Kolbusch to argue that he was acting under a court order and was therefore not a trespasser. Instead, the court was left with the impression that Dr. Kolbusch without any lawful justification simply, barred Mrs. Kolbusch from the premises, rented out the top floor and has not accounted to her for any of the rent and took items from the property belonging to her. She failed to disclose the presence of chemicals on the property. It could not be that any potential purchaser would be invited in to a possibly hazardous environment.

18. On this ground alone I would discharge the injunction.

Other ground of discharge

19. However, there is also a second ground on which I would discharge this order. It is this: now that I have heard both sides, even if there were full disclosure by Mrs. Kolbusch I would exercise my discretion to discharge the order.

20. In Jamaica the applicable law on freezing orders is found in ***Jamaica Citizens Bank Limited v Dalton Yap*** (1994) 31 J.L.R.42. According to Rattray P. (at page 48 D-F), a freezing order ought not to be granted:

> *(a) on a preliminary appraisal [the applicant] [has to established] 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] ... This is the 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...he must establish the risk or danger that the assets...will be dissipated...*
>
> *At the ex parte stage of the application before the judge the benefit of hearing both sides is naturally absent (sic). To this extent facts presented are assessed on face value, but the plaintiff still has two tests. At the inter partes stage when there is opportunity for the filing of rebutting affidavits and the exposure of the fuller picture, at the end of the day the evidence as a whole has to be considered in determining whether or not to exercise the jurisdiction.*

21. It was Staughton L.J. who warned in ***Sions v Ruscoe-Price*** (Court of Appeal - Civil Division) delivered November 30, 1988 slip op at page 2, that:

> *A Mareva injunction is an exceptional measure, and not a routine one. That is because it freezes a defendant's assets before it has been established that he owes anything at all. It also very often compels him to disclose where his assets are before it has been established that he owed anything at all.*

22. Further a freezing order is not a tool to be used to seek security against the insolvency of the defendant (***Iraqi Min. of Defence v Arcepey Shipping*** [1981] Q.B. 65, 71 - 72) and neither does the claimant gain any proprietary interest or right in the defendant's property (***The Cretan Harmony*** [1978] 1 Lloyds Rep. 425, 431). Also, it is not an enforcement order (per Lord Mustill in ***Mercedez Benz AG v Leiduck*** [1996] AC 284 at pages 299B, 301E, 302B).

23. As Robert Goff J. stated in the ***Iraqi Ministry*** case, at page 72: "For my part I do not believe that the *Mareva* jurisdiction was intended to rewrite the [Jamaican] law of insolvency in this way." Until Mrs. Kolbusch secures judgment against her husband she has to take the risk that at the time of judgment there may not be any assets. The freezing order was never designed to turn a claimant into a secured creditor. I am not aware that a freezing order can be used to prevent a defendant from meeting his lawful debts. Thus it is not sufficient to say, as Mr. Spencer submitted, that Mrs. Kolbusch has met the ***Dalton Yap*** test, therefore the freezing order must be granted. This submission does not take account of the fact that a freezing order is granted in the equitable jurisdiction of the court and so, the court has a discretion to decline to grant the order even if the technical threshold requirements are met, if there are, in the circumstances of the case, sufficient reasons not to grant the order. Indeed, this case demonstrates and reinforces (despite much ink and paper to the contrary) the fundamental distinction between equitable and common law remedies. In the case of the latter, once the legal requirements

are met, the remedy follows as a matter of right. On the other hand, regarding equitable remedies, the court always retains a discretion to withhold the remedy, even if the legal threshold has been crossed, if the grant of the remedy would do greater harm to the defendant than to the claimant.

24. Equity is concerned with the conscience and that is right it always acts in personam as against in rem. This explains why there is no equitable decree that is directed at property. It is always directed at persons. I say this to say, that despite the fact that Dr. Kolbusch's conduct will have the effect of dissipating his share of the proceeds of sale of lot 19 Peter's Rock, there is no evidence that he has embarked upon a scheme that has its objective, the frustration of any judgment that may be made against him in this claim. He is seeking to satisfy just debts and liabilities that in all probability will undoubtedly deplete or even dissipate all his known assets. This he is entitled to do without interference from the courts.

25. All that I have said is supported by Lord Donaldson M.R. in ***Derby and Company Limited v Weldon (No, 2)*** [1989] E.C.C. 322 at page 330:

> *The fundamental principle underlying this jurisdiction is that, within the limits of its powers, no court should permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case. On the other hand, it is not its purpose to prevent a defendant carrying on business in the ordinary way or, if an individual, living his life normally pending the determination of the dispute, nor to impede him in any way in defending himself against the claim. Nor is it its purpose to place the plaintiff in the position of a secured creditor. In a word, whilst one of the hazards facing a plaintiff in litigation is that, come the day of judgment, it may not be possible for him to obtain satisfaction of that judgment fully or at all, the court should not permit the defendant*

artificially to create such a situation.

26. Mrs. Kolbusch has not presented any evidence that could remotely suggest that Mr. Kolbusch is doing anything other than using his assets to meet is liabilities.

Scandalous material

27. Mr. Mellish objected strongly to Dr. Kolbusch being called "dishonest" and accused of "consistent dishonesty and connivance." He submitted that no particulars of the alleged dishonesty were given. Again I agree with Mr. Mellish. The law has consistently frowned up on an accusation of dishonesty being leveled at person in civil matters without particularities being given.

28. Mrs. Kolbusch ought not to have been permitted to make these allegations without giving particulars. This leads me to observe that it cannot be too strongly stated that allegations of dishonesty are not to be lightly made. Counsel has a professional responsibility and duty to refrain from putting forward these allegations unless there is clear, admissible evidence that can support the allegation. The excuse of "These are my client's instructions," is not an acceptable explanation. Counsel is expected to use his professional training and advise the client, even if firm language is necessary, that allegations of dishonesty are not countenanced by the courts unless the instructions do point to such a possible conclusion. If the instructions are capable of an interpretation consistent with honesty, carelessness or even negligence then they are not sufficient to permit an allegation of dishonesty to say nothing of a court making a finding of dishonesty. It is, regrettably, common place to see these allegations appearing in affidavits without supporting particulars and what is even more surprising is that counsel for the opposing side fails to object.

29. Also, in situations like this involving a dispute between husband and wife in the context of a break down of the union, the legal advisers of the parties would be well advised to refrain from using words such as "dishonesty", "consistent dishonesty and connivance" to describe the other party, unless there is unequivocal evidence to support the allegation and making such allegations are necessary for the

application before the court. When a marriage has collapsed it is not usual for either party to the union to recall events more favourable to themselves and less charitably in respect of the other party. Such language only serves of inflame the already exposed nerve certainly does not create an environment for resolution without further litigation.

Conclusion

30. The application to discharge the order is granted and the application to extend the order until trial was refused. I do not see that the claimant has any real prospect of succeeding on appeal and so the application for leave to appeal was refused. Neither do I see any good reason for delaying the operation of the order to discharge the freezing order. Thus the application for a stay of the application of the order discharging the freezing order was refused. Costs to Dr. Kolbusch to be agreed or taxed.