

Ames

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2009 HCV 3034

BETWEEN	PETER KRYGGER	FIRST CLAIMANT
AND	GARRIE DON	SECOND CLAIMANT
AND	BRADLEY JOHNS	THIRD CLAIMANT
AND	F1 INVESTMENTS INC.	FIRST DEFENDANT
AND	STEVE PALMER	SECOND DEFENDANT
AND	PAUL ATKINSON	THIRD DEFENDANT
AND	CHRISTOPHER KELLY	FOURTH DEFENDANT
AND	PATRICE PALMER	FIFTH DEFENDANT

IN CHAMBERS

The Honourable Michael Hylton O.J., Q.C., Nicole Foster Pusey, Kevin Powell for the claimants

Franz Jobson and Raymond Clough for all the defendants

September 29, 2009 and January 22, 2010

WITHOUT NOTICE FREEZING ORDER - WHETHER IT SHOULD
CONTINUE UNTIL TRIAL - INTER PARTES HEARING - RISK OF
DISSIPATION OF ASSETS - ABSENCE OF EVIDENCE FROM THE
DEFENDANT IN THE FACE OF DETAILED ALLEGATIONS

SYKES J.

1. On June 16, 2009, the claimants applied for a without notice freezing order against all the defendants. The order was granted. In addition to restraining them from disposing of assets up to a value of US\$8,145,441.20 (the value of the claim), the defendants were required to disclose all their assets. The usual exceptions and permissions in a properly drafted freezing order were included in the order.
2. On September 29, 2009, the matter came before me on an inter partes hearing for a determination of whether the order should

continue until trial. I extended the order with a few variations which are reflected in the formal order. These are the reasons for my decision.

The claim

3. F1 Investments, the first defendant, is a company incorporated in Panama and carrying on business in Jamaica, c/o Steve Palmer, 1A Upper Melwood Avenue, Kingston 8. Mr. Steve Palmer, the second defendant, is a businessman. Mr. Paul Atkinson, the third defendant, is a Director of Flight Operations for Air Jamaica. Mr. Christopher Kelly, the fourth defendant, is an airline pilot. Mrs. Patrice Palmer, the fifth defendant, is a financial advisor and wife of Mr. Steve Palmer.
4. The claimants are all pilots who now live and work in the United Arab Emirates. They sue on behalf of themselves and 83 other persons.
5. This is another apparently failed investment scheme that mushroomed in Jamaica within the last half a decade. It was unregistered and therefore unregulated. It was indeed high risk: the prospect of high returns coupled with the very real risk of total loss. It appears, quite literally, that all has been lost. The defendants, according to the claimants, are unable to account for US\$8,135,441.20 invested by the claimants with FI Investments Incorporated ("F1 Investments").
6. The particulars of claim allege that the second to the fifth defendants purported to carry on the business of foreign currency trading using money deposited by members of the public, including the claimants. It also alleged that the second to the fifth defendants carried business through F1 Investments and F1 Holdings Company Limited ("F1 Holdings"), the latter being a company incorporated in Jamaica, with offices at 25 Burlington Avenue, Kingston 10, in the parish of St. Andrew.
7. In March of 2009, F1 Holdings was struck off the Register of Companies. This company had Mr. Palmer, Miss Palmer and Mr. Kelly as directors.

8. The claimants say that at all material times F1 Investments was either under the control, management and direction of the second to the fifth defendants or that the F1 Investments was simply a device through which the second to the fifth defendants carried on the foreign currency trading in their personal capacity and not as officers or agents of the company.
9. The particulars allege further that the defendants represented to the public at large, including the claimants, that funds invested with them would be used for the sole purpose of trading in foreign currency and the investors would receive a return on their investment based on any success the trading might produce.
10. The scheme has now collapsed and the claimants have sued seeking compensation for breach of contract, deceit and/or fraud, negligence, conversion, unjust enrichment on account.
11. The claim rests on the following foundation:
 - a. it is common ground that the claimants handed over money to F1 Investments to be used in foreign currency trading;
 - b. the money given to F1 Investments has not been returned to the investors;
 - c. most telling is a written report of a Mr. Peter Abalia, a retired Special Agent with 28 years service with the Internal Revenue Service Criminal Division of the United States of America. In that report, Mr. Abalia alleges that he conducted interviews in Jamaica on July 15, 2009, with Mrs. Patrice Palmer and Mr. Steve Palmer. In the interview with Mr. Palmer, he (Palmer) is alleged to have described what he was doing as a pyramid. It is also alleged that Mr. Palmer told Mr. Abalia that any client who wanted back his initial investment would be paid by funds that were coming in;

- d. the moneys invested were transferred to Olint Corporation Limited as well as to one Ingrid Loiten who operated a company known as May Daisy Corporation.

The law

12. It is now well established that an applicant for a freezing order must establish (a) that he has a good arguable case and (b) there is a real risk of dissipation (*Jamaica Citizens Bank Limited v Dalton Yap* (1994) 31 J.L.R. 41, 48C-D, 54B-C). In respect of (a), a good arguable case does not mean having greater than 50% possibility of success. In respect of (b) there is no need for proof of an intention on the part of the defendant to dissipate his assets. What is necessary is that on an objective view, there is a risk of dissipation. If there is evidence that the defendant intends to dissipate his assets, that strengthens the hand of the applicant. However, this depends on the purpose for disposing of the assets. Until judgment, the defendant is free to use his assets to meet his lawful debts. Having said this, it must be remembered as Downer J.A. said in *Dalton Yap* that a freezing order (known as a Mareva at the time of his judgment) is exceptional and usually granted ex parte (page 63 D).
13. It means that a court has to be careful in how it grants or extends a freezing order, particularly when this is being done before the trial. At the pretrial stage what has been alleged has not been established under oath in a full trial and there will be no contrary position before the court at the ex parte stage. For these reasons the courts have been at pains to emphasise that a freezing order is not a security against the insolvency of the defendant (Ratray P. *Jamaica Citizens Bank*, at 49I. *Iraqi Min. of Defence v Arcepey Shipping* [1981] Q.B. 65, 71 - 72), neither does it give a proprietary right in the defendant's property (*The Cretan Harmony* [1978] 1 Lloyd's Rep. 425, 431) and it is not an enforcement order (Lord Mustill in *Mercedes Benz AG v Leiduck* [1996] AC 284, 299B, 301E, 302B). The order cannot be used to prevent the defendant from meeting his debts. According to Ratray P., "[the defendant's] legitimate interests must prevail over the interest of the plaintiff" (Ratray P. *Jamaica Citizens Bank* at 50A).

14. As a prophylactic against bald assertions by the defendant that he is suffering hardship, Rattray P. stated that "these legitimate interests must be established by the defendants not just as allegation, but by identification of these interests and the hardship which he is suffering, or, (sic) is likely to suffer since these are most likely within the peculiar knowledge of the defendant himself" (see page 50A).
15. The *Jamaica Citizens Bank* case makes the point that although the threshold requirement of the first part of the test is not very high, the second part of the test needs to be established by "solid evidence" and not a naked assertion (Forte J.A. (as he then was) in *Jamaica Citizens Bank* at page 54C).
16. Further, a point frequently overlooked is that despite the fact that an applicant for a freezing order may meet the test, he is not entitled as of right to a freezing order. This is not a common law remedy which follows as of right once the conditions have been met. A freezing order, despite the new name, is an equitable remedy and is granted discretionarily. This does not mean that the remedy is subject to the judge's idiosyncratic notions of justice but rather, that it is subject to broader considerations found in equity, such as whether it is just in all the circumstances that the remedy should be granted. This is why Rattray P. said in *Jamaica Citizens Bank* that the remedy "is "in personam" and is available to a plaintiff, if the evidence satisfied the necessary pre-condition **and the justice of the situation requires it**" (page 49I) (my emphasis). The justice of the situation may require that the freezing order be refused, if for example, the defendant cannot discharge his legal obligations or meet his living expenses.
17. Finally, Rattray P. indicated that at the inter partes stage, the court at first instance is to look at the evidence in the round to see if the order should be continued. This is in contrast to the ex parte stage where the court often times has to take the assertions of the claimant at face value (page 48F).

Application

18. I have to observe that at this stage the defendants have not yet filed a defence or any affidavit. Much of what they have to say comes from

counsel's submission. This is a most unsatisfactory way of going about the matter. In effect, the defendants' submissions have no factual foundation.

19. The response of the defendants brings to mind this passage from Downer J.A. in *Jamaica Citizens Bank*. His Lordship said at page 68A:

Yet, if grave allegations are made, and there is merely a blanket denial, then it is open to the court to find that [the claimant] has a good arguable case to continue the injunction

20. The allegations in this case are not merely grave but laid out in a fair amount of detail. For the defendants to set aside the freezing order without any defence or affidavit evidence joining issue with what appears, at this stage, to be a formidable case is, to say the least, not promising material on which to build a successful application for a discharge of a freezing order.

21. In this case, there are serious allegations of fraud, breach of contract as well as a document indicating that one of the defendants, Mr. Palmer, is alleged to have admitted that the scheme was a Ponzi scheme. He is also alleged to have admitted that he was using subsequent funds to refund early investors - a clear indication that he does not have the initial capital deposited or any profit to repay some, if not all the investors.

22. For what it is worth, the written submission filed on behalf of the defendants admits the following:

- a. F1 Investments and the claimants entered into a contract whereby F1 Investments would manage funds given to it;
- b. F1 Investments and/or the second to the fifth defendants did receive money from the investors;
- c. the moneys received were for the purpose of foreign exchange trading;

d. the moneys have not been returned.

23. The written submissions have gone as far as admitting that the only assets the defendants have are those invested with May Daisy Corporation, the company allegedly controlled by Miss Ingrid Loiten.

24. In oral submissions, Mr. Jobson made the unsubstantiated claim, that the second to the fifth defendants were employees of F1 Investments. He asserted that F1 Investments functioned as a management company. Again, there is no relevant and admissible evidence in support of this submission.

25. I must say that the response of the defendants thus far is not inspiring. They have singularly failed to meet, by relevant and admissible evidence, the serious allegations of fraud, deceit and negligence made against them. They have not provided, by way of affidavit evidence, any explanation for the funds given to them by the investors. If, as Downer J.A. indicated in *Jamaica Citizens Bank*, a blanket denial from the defendant without details leaves it open to a court to find that the claimant has a good arguable case to continue the freezing order, even more so is this the case when there is no evidence placed before the court at all. When added to this is a document containing an alleged admission by one of the defendants that he was operating a Ponzi scheme, it would seem to me that the case for continuing the freezing order is established.

Conclusion

26. The freezing order is continued until trial subject to the variations agreed between the parties which are reflected in the formal order.