

NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M 207/1997

BETWEEN	DR. DEV MARAGH	- PLAINTIFF
AND	MONEY TRADERS INVESTMENTS LTD.	- FIRST DEFENDANT
AND	HOME BUILDERS DEVELOPMENT COMPANY LTD.	- SECOND DEFENDANT
AND	CONRAD GRAHAM	- THIRD DEFENDANT
AND	EWART GILZEAN	- FOURTH DEFENDANT

Hugh Abel Levy, Jnr. and Miss Marina Sakhno instructed
by Hugh Abel Levy, Jnr. for the Plaintiff/Respondent

Dennis Goffe, Q.C. and Mrs. Sandra Minott-Phillips instructed
by Miss Barbara Alexander of Messrs. Myers, Fletcher and
Gordon for first, second & third Defendants.

Heard: September 25, 26 and October 2, 1997.

CORAM: WOLFE, C.J.

The first named defendant, is an investment company duly incorporated under the Laws of Jamaica for the purpose, inter alia, of acting as agents for the sale and purchase of stocks, shares and securities or for any other monetary transaction and to acquire by purchase or otherwise and to hold either as principal or agents absolutely as owners or by way of collateral security or otherwise to sell, deal in and convert stocks, shares, bonds, debentures and other

securities or obligations of any Government or any industrial or other company.

The second, third and fourth named defendants are shareholders and directors of the first named defendant, holding 51,000; 6,000 and 20,000 shares, respectively of \$1 per share. The nominal share capital of the first defendant is \$100,000.00.

The second named defendant is duly incorporated under the Laws of Jamaica, with registered office at 8 Garelli Avenue, Kingston, the same address as the registered office of the first defendant. The second defendant carries on business of purchasing, developing, selling and otherwise dealing with land.

The third defendant and his wife Lois Graham are the two members and Directors of the second named defendant company, both holding 999 shares and one (1) share respectively.

The plaintiff, a medical doctor, deposited with the first defendant four (4) different amounts of money to be invested by the first defendant on behalf of the plaintiff.

The amounts are set out hereunder along with the maturity yield.

<u>Amount</u>	<u>Maturity Value</u>
\$8,429,158.00	\$9,818,929.86
\$2,468,703.00	\$2,875,734.63
\$1,529,299.00	\$1,701,795.55
\$ 353,980.00	\$ 412,343.06

Three of the deposits would mature on June 30, 1997, and one on September 30, 1997 or on demand thereafter.

On June 16, by a letter addressed to the plaintiff, the first defendant advised as follows:-

"Recently Money Traders and Investment Limited was defrauded significantly by one of our long standing clients. The matter is currently being handled by our lawyers, Myers, Fletcher & Gordon with a view to recovery in the shortest possible time. This has created some cash flow problems for us and as such we are not able to meet the obligations of all our customers as and when they fall due."

On the 25th day of July, 1997, Panton J granted the plaintiff an *ex parte* Mareva Injunction for a period of ten (10) days.

On the 7th day of August, 1997, Smith J, granted a Mareva Injunction.

The second and third defendants now apply to the Court to have the Writ of Summons and Endorsement struck out as it discloses no cause of action against them or as an abuse of the process of the Court.

Further the defendants seek in the alternative to have the Mareva Injunction set aside or varied.

I set out below the relevant paragraphs of the summons:

- "1. This action be struck out as against the 2nd and 3rd defendants on the ground that it discloses no cause of action against them or as an abuse of the process of the Court.
2. Alternatively to 1 above, that the Mareva Injunction granted by this Honourable Court on the 7th day of August, 1997 be discharged. The grounds for the discharge of the said Injunction are as follows:

- (a) the failure by the Plaintiff to file and deliver his Statement of Claim within the time required by law so to do.
 - (b) that the injunction against said defendants is based solely upon the Plaintiff's evidence of his belief of the existence of the conspiracy referred to in the indorsement on the writ, there being no or no adequate evidence of facts which support the said allegation of conspiracy;
 - (c) that the injunction operates to restrain the 2nd & 3rd Defendants from carrying out their trade;
 - (d) the evidence upon which the Plaintiff's apprehensions of the flight of the 3rd Defendant are based is inadequate to justify such a conclusion;
 - (e) that there is material misrepresentation by the Plaintiff.
3. As a further alternative to 1 and 2 above, that the Mareva Injunction granted by this Honourable Court on the 7th day of August, 1997, be varied as against the 2nd and 3rd Defendants as follows:
- (a) to allow the 2nd Defendant to be at liberty to expend sums not exceeding \$2,126,000 each month for ordinary business expenses from its current account number 1101018103 with Citizens Bank Limited at 4 King Street, Kingston and through the use of credit card number 4559 7101 0084 4001 issued by the said Citizens Bank Limited in the name of the 2nd Defendant;
 - (b) to allow the 3rd Defendant to be at liberty to expend sums not exceeding
 - (i) \$120,000 each month; and
 - (ii) \$143,000 each year;
 for ordinary living expenses for himself and his dependents through his savings account number 35 483 9873 at the New Kingston (Knutsford Boulevard) branch of National Commercial Bank and through credit cards numbered 4907 9005 0028 5009 and 4565 4504 0102 5008 issued by the aforesaid Citizens Bank Limited in the name of the 3rd Defendant;

- (c) to allow the 2nd and 3rd Defendants to expend such sums for legal advice and legal fees as may be required:
 - (i) to defend these proceedings;
 - (ii) to defend such other Court proceedings as have been, and may be, brought by other investors against them and to prosecute the action brought by the 1st Defendant against Dexter Chin; and
 - (iii) to settle legal fees incurred pursuant to the sales and subdivisions referred to in sub-paragraphs (g), (h) and (i) of this paragraph;
 such sums not without the prior approval of this Court or of the plaintiff, to exceed \$3,500,000.
- (d) to provide that nothing in the said Order dated August 7, 1997 shall affect any payments that the 2nd Defendant is bound to make to its mortgagees Horizon Merchant Bank Limited (HMB) and Dehring, Bunting & Golding Limited (DB&G) under their instruments of Mortgage:
 - (i) registered on October 13, 1994 by HMB on duplicate Certificate of Title registered at Volume 498 Folio 36 and on May 14, 1996 on duplicate Certificates of Title registered at Volume 1287 Folio 800 and Volume 1291 Folios 445, 446, 447, 448, 449, 450 and 451 of the Register Book of Titles; and
 - (ii) registered by DB&G on October 28, 1996 on duplicate Certificate of Title registered at Volume 1253 Folio 43 of the Register Book of Titles.
- (e) to provide that nothing in the said Order dated August 7, 1997 shall affect any payments that the 2nd Defendant is bound to make to Citizens Bank Limited and Citizens Merchant Bank (formerly known as Jamaica Citizens Bank Limited and Jamaica Citizens Trust & Merchant Bank Limited, respectively) pursuant to a debenture registered on April 22, 1992 in the Register of Charges and the Office of the Registrar of Companies secured by a fixed and floating charge on the 2nd defendant's property (present and future) including its uncalled capital and goodwill.
- (f) to provide that nothing in the said Order dated August 7, 1997 shall affect any payments that the 3rd Defendant is bound to make to his mortgagees, Capital Assurance Building Society (CABS) under its instrument of

Mortgage submitted by CABS to the Office of Titles for registration on September 2, 1997 on Certificate of Title entered at Volume 1254 Folio 837 of the Register Book of Titles.

- (g) to allow the 2nd defendant through its attorneys-at-law, Myers, Fletcher & Gordon, to complete the subdivision (referred to as "The Radison") of land registered at Volume 1287 Folio 800 of the Register Book of Titles and to sell the strata lots on condition that any net proceeds of the sale of the strata lots be held in escrow by the said Myers, Fletcher & Gordon until otherwise agreed by the Plaintiff or until this Honourable Court otherwise orders;
 - (h) to allow the 2nd Defendant through its attorneys-at-law, Myers, Fletcher & Gordon, to commence and proceed with the subdivision (referred to as "Oakhurst") of land registered at Volume 1253 Folio 43 of the Register Book of Titles and to sell the strata lots on condition that any net proceeds of the sale of the strata lots be held in escrow by the said Myers, Fletcher & Gordon until otherwise agreed by the Plaintiff or until this Honourable Court otherwise orders;
 - (i) to allow the 3rd Defendant, through his attorneys-at-law, Myers, Fletcher & Gordon, to complete the subdivision (referred to as "Club Carmel") of land at Cherry Hill, St. Andrew, registered at Volume 1254, Folio 837 of the Register Book of Titles and to sell the strata lots on condition that any net proceeds of the sale of the strata lots be held in escrow by the said Myers, Fletcher & Gordon until otherwise agreed by the Plaintiff or until this Honourable Court otherwise orders;
4. That the parties hereto retain liberty to apply in respect of the Injunction granted on August 7, 1997 and this order.
 5. The costs of this application be in the cause."

RE: STRIKING OUT OF ACTION

Mr. Goffe for the second and third defendants referred to paragraph 8 of the Statement of Claim and submitted that it was devoid of any particulars to support this very serious allegation of conspiracy. He said there was no evidence of the defendants acting together and that in so acting together they had the requisite intention and that the intention was to injure the plaintiff's interest.

He further submitted that there is no averment to the effect that the second and third defendants had any dealing with the plaintiff. There was no averment of a fiduciary relationship between the plaintiff and defendants neither was there any nexus between the plaintiffs and the defendants. Mr. Goffe contended that it was necessary to establish, that if there was a conspiracy the plaintiff was the object of that conspiracy.

In striking out an action on the basis that it discloses no reasonable cause of action, the Court must be guided by the following principle:

"So long as the Statement of Claim or the particulars disclose some cause of action or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed is no ground for striking it out."

In *Wenclock v. Maloney and Others* [1965] 1 WLR 1238, the Court of Appeal held allowing the appeal:

"that trial by the master of issues of facts on affidavits to ascertain whether the plaintiff had a case was a usurpation of the functions of a trial judge and was a wholly improper procedure and that since the

pleadings on their face disclosed a reasonable cause of action and raised issues of fact which required to be determined on oral evidence by a judge, the action would not be struck out but would proceed to trial."

Whilst affidavit evidence may not be considered to determine whether or not there was a reasonable cause of action which was likely to succeed, it is however permissible to use affidavit evidence to show that an action is vexatious or an abuse of the process of the Court.

It is, therefore, clearly established that the Court in exercising its discretion as to whether or not to strike out must never embark upon the trial of the whole action when facts and issues have been raised and are disputed.

The question to be resolved is what did the pleadings disclose. By way of summary, I hold that the following have been disclosed in the Writ of Summons and Endorsement and the Statement of Claim.

1. That the plaintiff deposited certain sums of money with the first defendant to be invested for and on behalf of the plaintiff.
2. That the second named defendant holds 51,000 shares in the first named defendant company.
3. That the third named defendant holds 6000 shares in the first named defendant company.
4. That the third named defendant is a director of the second named defendant and holds 999 shares in the second named defendant company.
5. Paragraph 8 of the Statement of Claim alleges that the Defendants and each of them well knowing of the terms and conditions of the said

agreements wilfully conspired among themselves with intent to injure the plaintiff, to procure cause and induce the first defendant to break the said agreements by refusing, failing or neglecting to pay to the said plaintiff all or any of the said moneys due and owing to him under the aforesaid agreements.

6. Paragraph 16 of the Statement of Claim alleges "Further or in the alternative, the second, third and/or 4th defendant (sic) assisted, aided and/or abetted the first defendant in its breach of trust as aforesaid".

These in my view raise issues which ought to be determined by a judge. Mr. Goffe raised the point that there was no evidence to support the allegation of conspiracy. The plaintiff in my view is not required to produce evidence at this stage. The real test at this stage is whether the allegations in the Statement of Claim raise issues which could be resolved in favour of the plaintiff and which would give rise to liability on the part of the defendants. Whether there is evidence in support of the allegations is for the determination of the trial judge.

For these reasons, I hold and rule that the application to strike out, on the basis that the Statement of Claim discloses no cause of action and also that it is an abuse of the process of the Court, ought to be refused.

DISCHARGE OF MAREVA INJUNCTION

The defendants seek to have the Mareva Injunction granted by the Court on the 7th day of August, 1997, discharged on the following grounds:

- (a) that the plaintiff failed to file and deliver his Statement of Claim within the time required by law so to.

This ground was not pursued by the defendants.

- (b) That the injunction against the said defendants is based solely upon the plaintiff's evidence of his belief of the existence of the conspiracy referred to in (sic) indorsement on the writ, there being no or no adequate evidence of facts which support the said allegation of conspiracy.

As already observed, the court is not concerned with evidence in support of the allegations. The real question is whether or not the allegations raise a good arguable case. A good arguable case it has been said, means that the plaintiff need not show that his case against the defendant is so strong that he is likely to obtain summary judgment.

In *Orri v. Moundreas* [1981] Com. L.R. 168 Mustill J, said:

"The judge is not required to apply the standard of proof which must be attained at the trial.... Since the standard is one of the balance of probabilities it must follow that the plaintiff does not fail under Order 11 just because he cannot demonstrate a better than even chance that the qualifying condition is satisfied."

The all important question is whether in the circumstances it is just and convenient to grant the injunction.

I conclude in the circumstances of the case that it is just and convenient to grant the Mareva Injunction against the first defendant with whom the deposit was made and who by the letter dated June 16, 1997, admits receipt of the

amount. As against the first defendant, the plaintiff can proceed to obtain summary judgment for the amount of \$8,808,803.10.

With respect to the second and third defendants the circumstances are significantly different. The claim by the plaintiff is essentially a money claim. The claim is primarily to recover the amount deposited and in addition thereto the guaranteed interest. It is worthy of note that this claim is against the first defendant only.

The claim against the second and third defendants is for damages in respect of the alleged conspiracy. If the plaintiff succeeds in establishing his claim, damages would have to be assessed.

I am not to be understood as saying that a Mareva Injunction cannot be granted where the claim is for damages as opposed to where the claim is for payment of debt.

It is clear that the conspiracy claim is designed to bring the second and third defendants who appear to be solvent, into the net because the first defendant appears to be insolvent.

In the circumstances, I hold that it is not just and convenient to grant a Mareva Injunction against the second and third defendants and I therefore order that the Injunction granted by Smith J on August 7, 1997, be discharged in respect of the second and third defendant.

Costs of this Summons will be Costs in the Cause.