IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL 2000/N-152

BETWEEN	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	PLAINTIFF
AND	GARTH SCOTT	1st DEFENDANT
AND	SONIA SCOTT	2nd DEFENDANT
AND	JAMCON INDUSTRIES LIMITED	3rd DEFENDANT
AND	INTEK STEEL LIMITED	4th DEFENDANT

SUMMONS TO SET ASIDE EXPARTE MAREVA INJUNCTION ORDER

Winston Spaulding, Q.C. and Abe Dabdoub for 2nd and 4th Defendants
Abe Dabdoub for 1st and 3rd Defendants
Mrs. Michelle Champagnie and Dave Garcia for the plaintiff

Heard: August 15, 16, 17, 18, 22, 24, 25 and November 21, 2000

CORAM: WOLFE C.J.

On the 10th day of July, 2000, Hibbert J (Acting) on an exparte summons ordered as follows:

That -

1. An injunction restraining the Defendants and each of them, whether by themselves or their servants or otherwise, howsoever, from disposing of and/or dealing with their assets wheresoever situate and from withdrawing or transferring any funds from their accounts wheresoever held until judgment or further order herein.

2. An Order that the Defendants and each of them do forthwith disclose with full particularity the nature of all such assets and their whereabouts and whether the same be held in their own name or by nominees or otherwise on their behalf and the sums standing in any accounts, such disclosures to be verified by Affidavits to be made by the said Defendants and served on the Plaintiff's Attorneys-at-Law within 14 days of this Order or Notice thereof being given.

3. That there be liberty to the Defendants and any third party affected by the order to apply on one clear day's notice to the Plaintiff's Attorneys-at-Law to set aside or vary this order.

PROVIDED THAT:

This order is declared to be of no effect against, and is not intended to bind any third party outside of the jurisdiction of this Court, directly or indirectly affected by the terms of this order, unless and until this order shall be declared enforceable or recognized or is endorsed by any Court of the jurisdiction in which the Defendants' assets are situated.

By Summons dated August 8, 2000, the Defendants sought the following orders:

A. To set aside the order made on the Exparte Summons for Mareva Injunction dated the 10th day of July, 2000 by the Honourable Mr. Justice Hibbert.

B Alternatively, an order that:-

The order made on the 10th day of July, 2000 by the Honourable Mr. Justice Hibbert on the Exparte Summons for Mareva Injunction be varied.

During the course of the arguments Mrs. Champagnie advised that the plaintiff was no longer pursuing the Mareva Injunction ordered against the second defendant, Sonia Scott. The order made against the defendant by Hibbert J on the 10th day of July, 2000 was accordingly discharged.

On August 18, 2000, the Attorneys-at-Law appearing for the plaintiff and defendants invited the Court to amend the order made by Hibbert J (Acting) to the following effect:

> "By consent it is hereby ordered that the parties be at liberty to vary the Exparte order made by Hibbert J on such terms as may be agreed in writing between the Attorneys-at-Law for the Applicants and the Respondents herein and that the Court be notified in writing of any such variation."

It is settled law that to obtain a Mareva Injunction the plaintiff must demonstrate that -

(i) in so far as the merits of his proposed action are concerned he has a 'good arguable case'. **See the Ninemia Case 1983/WLR per Kerr LJ at p. 1422;**

(ii) the defendant has assets within the jurisdiction and that there is a real risk that, if not restrained, he will remove his assets from the jurisdiction or dissipate them within it.

In addition, the Court will consider the broad justice of the case and, in particular, the prejudice which the grant of the Mareva Injunction may cause to the defendant and third parties.

Having granted the injunctions the Court will discharge the order if it finds that there was a failure to give full and frank disclosure of material facts.

In seeking to discharge the order made by Hibbert J (Acting) the defendants contend that the plaintiff has failed to demonstrate that it has a good and arguable case and further that the plaintiff failed to make full and frank disclosure of material facts.

I shall now proceed to examine the bases of the defendants' application.

1. GOOD AND ARGUABLE CASE

The plaintiff's claim against the first and third defendants is to recover money from them jointly and severally, as guarantors of debts outstanding from Intek Jamaica to the plaintiff.

The total indebtedness of the defendants amounts to J$156,987,438.20 with interest accruing at 29% per annum from June 13, 2000 and US$651,693.01 with interest accruing at 14.5% per annum from June 13, 2000.

The claim against the fourth defendant is for monies had and received, or alternatively, restitution for unjust enrichment, together with interest at commercial rates pursuant to the Law Reform (Miscellaneous Provisions) Act.

The allegations supporting the claim against the first and third defendants are that they guaranteed loans made to Intek (Jamaica) Limited (Intek) which loans are now due and owing.

An order to wind up Intek was made by a Judge of the Supreme Court, in Suit E136 of 2000, on the 1st day of June, 2000.

In respect of the fourth defendant the plaintiff contends as follows:

(i) That Intek made payments and/or incurred debt obligations that were properly due from the 4th defendant. It is further contended that the money borrowed from the Bank and Merchant Bank by Intek has been used in whole or in part, to purchase goods and otherwise finance the business of Intek Steel.

It is worth noting that the plaintiff is unable to give particulars of these transactions at this point in time but hopes to do so after discovery.

(ii) That assets of Intek have been transferred to Intek Steel without any or sufficient consideration being received by Intek.

(iii) That the aforesaid payments and transfers by Intek to Intek Steel reduced the assets of Intek, and unjustly enriched Intek, Steel at the expense and to the detriment of Intek and its creditors, including the Bank.

(iv) That Intek has acted in contravention of the mortgage instruments which forbid Intek from dealing with the mortgaged properties without the consent of the Bank.

In this regard, it is alleged that Intek has leased or purported to lease the mortgaged properties to the fourth defendant Intek Steel Limited without the consent of the Bank.

The question to be considered is, do these allegations provide the plaintiff with a good arguable case?

Mr. Spaulding, Q.C., posited that in attempting to decide whether the plaintiff has a good arguable case four vital questions must be answered.

(i) Is there sufficient material on the several facts before the Court to establish that Intek Steel is indebted to Intek Jamaica or has assets for it, to ground a good arguable case in this respect?

(ii) Is there sufficient material on the overall facts before the Court to establish that the sum allegedly owed by Intek Jamaica to N.C.B. is in fact owed to ground a good arguable case in this respect?

(iii) Does not the overall facts before the Court including the defendants' affidavits, particularly that of Douglas Chambers, establish a good arguable case that Intek Jamaica owes no money to N.C.B. in the sum claimed or at all?

(iv) Does not all the overall facts before the Court including the defendants' affidavits, particularly that of Douglas Chambers, establish a good arguable case that N.C.B. owes Intek Jamaica

money, contrary to N.C.B's claims to the contrary that Intek Jamaica is indebted to N.C.B?

In his attempt to answer the questions posited Learned Queen's Counsel points out that it is significant that the plaintiff in pleading its cause has failed to supply particulars from which it may be gleaned that there is a good arguable case. At paragraph 32 of the statement of claim, the plaintiff alleges that Intek -

> "made payments and/or incurred debt obligations that were properly due from Intek Steel. The money borrowed from Merchant Bank by Intek has been used, in whole or in part, to purchase goods and otherwise finance the business of Intek Steel"

Having made these bold allegations the plaintiff confessed that, "it is unable to give particulars of these transactions until after discovery".

So at this stage the plaintiff is unable to point the Court to any evidence upon which it would properly hold that the allegation is proved or capable of being proven.

Mrs. Champagnie for the plaintiff submits that the Court should find that the plaintiff has established a good arguable case for the following reasons.

(i) The defendants rely on evidence contained in counter affidavits which challenge the affidavit evidence relied on by the plaintiff. This she submits, putting it at its highest, amounts to no more than a difference of expert opinion which the court of trial must resolve. The fact of conflicting affidavit evidence, she contends, does not mean that the

plaintiff has failed to satisfy the tribunal that it has a good arguable case.

(ii) In respect of the defendants' contention that there is no liability by Intek Steel to the Bank, she submits that the defendants have failed to understand the

nature of the plaintiff's claim. The plaintiff is not claiming as a creditor simpliciter but as someone who is tracing its funds.

(iii) Even if the plaintiff did not have a cause of action against Intek Steel, it would be entitled to join Intek Steel and to obtain a Mareva Injunction against it because once the Court is satisfied that the first defendant may dissipate his assets then it is appropriate to grant this relief against the company in which he is a shareholder so as to prevent him from dissipating that interest.

Having summarized the arguments on both sides, I pose the question what constitutes "a good arguable case".

In Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft GmbH (The 'Neidersachsen') 1983 2 Lloyds Rep 600 at p. 605 Mustell J described a good arguable case as –

> "one which is more than barely capable of serious argument but not necessarily one which the judge considers would have a better than fifty percent chance of success."

This approach was followed in **Nycal (U.K.) Ltd. v. Lacey (1994) C.L.C. 12 at P.20.**

All the authorities express that the Judge must refrain from embarking upon the trial of the issues to ascertain whether or not "a good arguable case" exists. However, the Judge is invited to look at all evidence before the Court in coming to its conclusion whether or not the threshold has been reached.

The conflicting nature of the affidavits, the nature of the issues joined, lead me to conclude that the plaintiff has established that there exists a good arguable case against all the defendants.

2. RISK OF DISSIPATION OF ASSETS

Adopting the words of **Rattray P in Jamaica Citizens Bank Ltd. v. Dalton Yap (1994) 31 JLR 42 at P.48:**

> "Having got to first base, so to speak on (a) he must establish the risk or danger that the assets sought to be frozen by the Injunction and in respect of the restraining jurisdiction of the Court is being prayed against the defendant will be dissipated outside the reach of the Court by the Defendant thus depriving the plaintiff of the fruits of his judgment."

The burden of proof lies upon the plaintiff to establish that there is a real risk of dissipation. What is the evidence adduced by the plaintiff in discharge of this burden?

The plaintiff relied upon the following evidence:

(1) The failure of the defendants to comply with the Order of Disclosure made by - Hibbert J (Ag.) on the 10th day of July 2000

In **Z Ltd. v. A - Z [1982] 1 Q.B. 558 Lord Denning, M.R.** said:

> "In order to make a Mareva Injunction fully effective it is very desirable that the defendant should be required in a proper case to make discovery. If he comes on the return day and says that he has ample assets to meet the claim, he ought to specify them, otherwise his refusal to disclose them will go to show that he is really evading payment."

I understand the Master of the Rolls to be saying that refusal to disclose may be used to show an intention to evade. It is not conclusively so. In the instant case, Counsel for the defendants indicated that he became privy to the documents on August 2 and in the summons seeking the discharge of the Exparte Order the defendants have prayed an extension of time within which to perform any act pursuant to the order made by Hibbert J.

I am of the view that the application for extension of time makes it difficult to conclude that the defendants failure to comply with the order to disclose is a manifestation of an intention to evade payment and points to a real risk of dissipation of assets.

(2) Co-mingling of Funds, Sharing of Assets and Liabilities among the associated Companies

The plaintiff says that all the companies are related and co-mingle their funds and liabilities. The result is that a creditor of one company may be left

in a position where he is unable to recover because the company of which he is a creditor has taken on liabilities which it has not incurred.

A net work of companies by itself does not lead to an inference that there is a real risk of dissipation of assets.

(3) Association with and control of off shore company Seanic Investments (Cayman) Ltd.

It was submitted that offshore companies because of their secrecy regarding who controls them are a risk that a defendant may utilize them to dissipate assets.

I have adverted to the main arguments advanced by the plaintiff to show that there is a real risk of the dissipation of assets.

Having examined the assertions, I conclude that they are all highly speculative. The plaintiff has failed to point to any act done by the defendants which indicates an intention to dissipate assets.

In **Chitel v. Rothbart (1982) 39 OR (2D) 513 AT PP 532 - 533** the Court of Appeal of Ontario referring to the judgment of **Lord Denning in Third Chandris Shipping Corporation v Unimarine [1979] Q.B. 645 at p. 669**, said:

> "Turning finally to item (iv) of "Lord Denning's guidelines - the risk of removal of these assets before judgment - once again the material must be persuasive to the Court. The applicant must persuade the Court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment or that the defendant is otherwise dissipating or disposing

> of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or law."

The evidence has not so persuaded me but the real question is, was there any evidence before Hibbert J (Ag.) upon which the Mareva Injunction should properly have been granted.

Paragraphs 26 and 27 of Paul Stewart's affidavit in support of the Exparte application states:

> "26. The Defendants have real and personal assets within the jurisdiction, although I am not privy to the full details or magnitude of such assets.
>
> 27. Because many business transactions in Jamaica are conducted in cash and our ability to track movement of assets within and out of our country is limited in a developing country such as ours and on the basis of the matters set out above and in the other affidavits filed herein, the Bank fears that the Defendants will dissipate their assets within the jurisdiction or transfer moveable assets outside of the jurisdiction in order to avoid having to satisfy any judgment that may be entered against them."

The averments quoted above offer no basis, upon which it could properly be held that there was a real risk of dissipation of assets.

Further the "other affidavits" referred to in paragraph 27 are equally devoid of any evidence capable of leading to the conclusion that there is a real risk of dissipation of assets.

In the light of the above, I hold that the plaintiffs evidence disclosed no material upon which one could properly find a real risk of dissipation. In the circumstances, the Mareva Injunction should not properly have been granted.

The instanct case is easily distinguished from the decision in **Jamaica Citizens Bank Limited v. Dalton Yap (1994) 31 JLR 42.**

In Yap's case the status of the defendant and his own admission provided evidence upon which a Court could properly have found that there was a real risk of dissipation of assets. There is no such circumstance in the instant case.

I would therefore order that the Order made on July 10, be discharged.