IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
HCV 01032/2004

BETWEEN	RUDOLPH	SHOUCAIR	CLAIMANT
AND	KEVIN	TUCKER-BROWN	1ST DEF.
AND	CARMEN	TUCKER-BROWN	2ND DEF.

Mr. Ransford Braham instructed by Livingston, Alexander and Levy for the claimant

No defendants or representation for defendants

IN CHAMBERS

MAY 4, 2004

SYKES J (Ag)

EX PARTE APPLICATION FOR FREEZING ORDER

Mr. Kevin Tucker-Brown and Mrs. Carmen Tucker-Brown signed a sale agreement with the claimant. They were selling property known as 29 Courtleigh Towers, 3 Renfrew Road, Kingston 10 in the parish of St. Andrew to Dr. Shoucair. The agreement is dated May 7, 2003. The sale price was $3,000,000.00. The completion date was to be forty five days after both parties signed the sale agreement.

The claimant paid his deposit and was waiting expectantly for the sale to take its normal course. That was not to be. A seemingly soluble problem arose. The defendants could not produce the title. Correspondence from

their attorney suggested that it was lost by the National Housing Trust Corporation. The proposed solution coming from the defendants' attorney was that a lost title application should be made to the Registrar of Titles. Though the correspondence does not say but it seems clear that if the new title were issued, it would have been in the name of the claimant.

The problem became worse. Up to now there is no clear evidence of what became of the title. However that problem need not be resolved because the National Housing Trust, who were mortgagees of the property in question, took steps to exercise their power of sale under a mortgage between themselves and the defendants. The property was sold under that power.

Not surprisingly the defendants wanted to back out of the sale agreement. They say that the contract was frustrated. Needless to say, the claimant's attorney rejected this.

The claimant responded with a claim form asking for specific performance of the contract and/or damages. It is doubtful whether specific performance is now possible since the property has now been sold and there is no challenge to that sale. The likely remedy is damages. He is seeking a freezing order against both defendants. He supports his claim by with an affidavit and a number of exhibits.

The claimant's affidavit narrates the history of the transaction up until the filing of the claim. The critical

parts of the affidavit to ground the application for the freezing order state that

a. he does not know where the defendants now live since they have removed from their last address;
b. that the first defendant goes overseas from time to time;
c. the defendants failed to complete the sale to him;
d. the defendants' attorney successfully bid for the property at the public auction of property;
e. the defendants' are indebted to several mortgagees.

THE FREEZING ORDER

Before the new rules the Mareva injunction was the main order freezing dealings in property. This expression, Mareva injunction, has not survived the introductions of the new Civil Procedure Rules (CPR) that came into force on January 1, 2003. Such orders are now known as freezing orders.

Part 17 of the CPR deals with what is called interim remedies.

Rule 17.1 (1) states

> *The court may grant interim remedies including-*
> *(a)…*
> *….*
> *(f) an order (referred to as a "**freezing order**")*

(i) restraining a party from removing from the jurisdiction assets located there; and/or

(ii) restraining a party from dealing with any assets whether located within the jurisdiction or not;

The Rules Committee were leaving nothing to chance. Rule 17.1(3) states

The fact that a particular type of interim remedy is not listed in paragraph (1) does not affect any power that the court may have to grant that remedy.

The effect of these two paragraphs is that the power to grant freezing orders is either preserved in the case of Rule 17.1(3) or conferred by Rule 17.1(1)(f).

Rule 17.2(1) grants the power to make a freezing order before a claim has been made. Rule 17.2(2) controls the power to make freezing orders by stating that (a) the making of such an order before a claim is made is subject to any rule which states otherwise and (b) a court may grant an freezing order before a claim is made only if the matter is urgent or it is otherwise desirable to do so in the interests of justice. All this is quite similar to what the courts were already doing when granting a Mareva injunction.

What Rule 17 does not do is to indicate how the court should determine whether or not the freezing order should

be granted. It does not lay down any test that must or should be met before the order is granted. This has been left to the courts to develop. The learning on the Mareva injunction is still of great value when deciding whether to grant a freezing order.

I should make it clear that the principles in the Mareva cases have been used by me in determining this application.

OBJECTIVE OR SUBJECTIVE TEST

One of the points made by Mr. Braham is that the court should apply the objective test laid down in cases subsequent to "early cases" in the development of the Mareva jurisdiction jurisprudence. These "early cases" had developed a subjective test.

Mr. Braham relied on extracts from *Gee, Steven, Mareva Injunctions and Anton Piller Relief, 4th Ed, Sweet and Maxwell, pages 189-199.* In those pages the author makes the point that when granting Mareva injunctions the criteria are (i) the claimant must have a good arguable case and (ii) there is a real risk that that a judgment or award may go unsatisfied. The author insists that the test of whether there is a real risk that a judgment or award may go unsatisfied is an objective one and does not depend upon the intention of the defendant. He says that, in respect of the second criterion, the early cases established that there had to be evidence that the defendant was removing or dissipating his assets with the **intention** or **purpose** of defeating any judgment the claimant may obtain. This, he says, is no longer the law. Now there is no need to prove the intention

or the objective of the defendant. All that needs to be established, according to Mr. Gee, in respect of the second criterion is that there is a real risk that any judgment or award would not be satisfied.

Mr. Steven Gee has overstated the case as far as the "early authorities" are concerned. While there are dicta, in some cases, that suggest that the courts were focusing on the intention of the defendant, it is my view that this was not a settled position and in the majority of reported cases that reached the Court of Appeal the actual decisions did not depend upon the intention of the defendant. The truth is that in many instances there was simply no evidence of the intention of the defendant. The courts really proceeded on the basis of drawing inferences from the evidence.

What the courts did, and continue to do, was to establish that freezing of assets could take place if (a) the claimant had a good case and (b) there was a risk of the assets being dissipated unless they were frozen. This second part of the test was based upon inferences drawn from objective facts known about the defendant. However if the courts had evidence that the defendant intended to remove his assets from the jurisdiction or dissipate with the aim of defeating any judgment made against him then it made the case for freezing stronger. So there is no need to debate whether the test is or was subjective and is now objective but since the issue was raised I will deal with it.

The United Kingdom

I will now examine some of the cases. In the case of ***Nippon Yusen Kaisha v Karageorgis and another*** [1975] 3 All ER 282 the claimants sued the defendants who had hired ships from them. The defendants did not pay the hire as agreed. All attempts to find the defendants failed. Their known office was closed. Lord Denning MR said that the claimants had made out a strong prima facie case that the money sought to frozen might be moved out of the jurisdiction. There is no mention in the case of the intention of the defendant. Given the disappearance of the defendants and the closing of their known office it is not difficult to see why the court inferred that there was a risk of the assets disappearing. The injunction was granted, reversing the refusal of Donaldson J to grant the injunction. The head note provides an accurate summary of the principle in that case.

The second case is ***Mareva Compania Naviera SA v International Bulk Carriers*** [1980] 1 All ER 213. Here again the charterers defaulted on their payments to the ship owners. They could not afford to pay the hireage. They also said that they could not fulfill any further obligations under the charterparty. They said that they their efforts to secure financial support had failed. One could hardly want a stronger case of the real risk of defendant's inability to satisfy any judgment that may be made. This was a confession of bankruptcy. There was no evidence that the charterers had intended to move money from their bank with the intention of defeating any successful claim that may be made by the claimant. The court continued the injunction restraining the charterers from moving their money from the bank account. It is true that Lord Denning MR spoke of the danger of the defendant disposing of his

assets "so as to defeat" the judgment of the court. There was no evidence that the charterers intended to dissipate their property for the purpose of defeating the plaintiff's claim. The charterers had made full disclosure to the claimants about their financial position. This is hardly the conduct of a dishonest defendant who intends to hide his assets thereby frustrating the court's judgment The objective facts spoke for themselves. In any event neither Roskill nor Ormrod LJJ used or adopted the language of Lord Denning MR.

The defendant in ***Chartered Bank v Daklouche and another*** [1980] 1 All ER 205 was heavily indebted to the plaintiff. He promised to pay the debt with trade receipts. Instead he secreted the sums in another bank, transferred them to another bank in Dubai before returning it to England in yet another bank into an account in his wife's name. This is classic evidence of concealment. The plaintiff was able to prove that the defendant's wife had lied about the source of funds in her account. This was a clear case of the debtor leading his debtors down the garden path. Could there really be any other inference other than that the defendant did not intend to pay his debts or remove his assets thereby defeating any judgment that the court may award? The Mareva injunction was continued by the Court of Appeal.

In ***Rasu Maritima SA v Perusahaan*** [1978] 1 QB 644 the plaintiff failed at the first hurdle. The court was satisfied that the plaintiff did not have a good case. Consequently it was not necessary to decide whether the second part of the test was met. In justifying his decisions in the ***Nippon*** (supra) and ***Mareva*** cases (supra)

Lord Denning MR had this to say about those two cases at page 660E:

> *Study those facts and you will see that it was both just and convenient that the court should restrain the debtor from removing his funds from London. Unless an interlocutory injunction were granted, ex parte, the debtor could, and probably would,…deprive the shipowner of the money to which he was plainly entitled.*

This passage makes it clear that in those two cases there was no evidence that the intention of the defendant to remove his assets so as to defeat the court's judgment but the risk of movement of the property was great.

The next case is ***Third Chandris Shipping Corporation v Unimarine*** [1979] 1 QB 645. The evidence of the risk of removal of assets in the case consisted of (i) the defendants were a registered corporation in Panama with no known assets; (ii) there was no evidence that the defendants had any specific assets anywhere. Not surprisingly the injunctions were sustained. Again the decision was not based upon the intention of the defendants but on the inferences to be drawn from the facts.

In ***Allen v Jambo Holdings Ltd.*** [1980] 2 All ER 502 the Mareva injunction was granted because there was a real risk of the judgment going unsatisfied. There the defendant was a Nigerian company with no other assets in the United Kingdom but the aircraft that was frozen.

Bridge LJ in ***Montecchi v Shimco*** [1980] 1 Lloyds Rep. 50, made no reference to the intention of the debtor but rather to the effect of his conduct if he is not restrained.

Similarly Sir Robert Megarry VC in ***Barclay-Johnson v Yuill*** [1980] 3 All ER 190 relied on the previous history and current conduct of the defendant when he granted a Mareva injunction to restrain the defendant from removing the proceeds of the sale of his flat. Here was a defendant who in the past when he was in financial difficulties had ensconsced himself abroad beyond the reach of his creditors. He was once again in difficulty and had sold his flat. He was sailing on a vessel in which he was part owner. The inference drawn by the court could hardly have been otherwise. The injunction was continued. The Vice Chancellor said that basis of the Mareva injunction is the risk of the defendant removing his assets from the jurisdiction thereby defeating the courts' judgment. No mention was made of the intention of the defendant.

In ***Ninemia Corp. v Trave Schiffahrts*** [1984] 1 All ER 398 Kerr LJ said at page 419h

> *In our view the test is whether, on the assumption that the plaintiff has shown at least 'a good arguable case', the court concludes, on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiff would remain unsatisfied.*

The learned Lord Justice was endeavouring to correct a passage of his in ***Z Ltd v A*** [1982] 1 QB 558, 585G in which he said that the Mareva injunction would be granted if the defendant was taking steps designed to defeat any judgment awarded by the court.

These were the major reported cases in the first ten years of the Mareva injunction. Since then there has been the occasional lapse in language which the courts have to corrected on subsequent occasions. For example, Lord Donaldson MR said in one case that the claimant had to establish that the defendant intended to deal with his assets with the intention of defeating any judgment that may be made (see ***Derby & Co. Ltd v Weldon*** (Nos. 3 and 4) [1990] Ch. 65, 76E-F). He corrected this in his judgment in ***Regina v Secretary of State for Home Department, Ex Parte Muboyayi*** [1992] 1 QB 244, 257h. This latter was an immigration appeal but so important was the point that the Master of the Rolls felt compelled to make the correction.

From this survey it is not accurate to say that the courts in the "early cases" had adopted a test that required the claimant to establish that the defendant dealt with his assets with the intention of defeating the court's judgment.

Jamaica

This debate over what is called the subjective/objective test never took place at the appellate level in Jamaica.

The Court of Appeal of Jamaica in ***Jamaica Citizens Bank Limited v Dalton Yap*** (1994) 31 J.L.R. 42 affirmed its previous decision of ***Watkis v Simmons and others*** (1988) 25 J.L.R. 282 where it was held that the Supreme Court had the power to grant Mareva injunctions. These decisions are six years apart and there is nothing in any of the judgments in both cases that reflect this kind of debate. By the time of ***Wheelabrator Air Pollution Control v FC Reynolds*** (1995) 32 JLR 74 the Court was well beyond this kind of debate.

In ***Yaps case*** (supra) Rattray P says at page 48C that the principle to be found in the many cases cited was that a Mareva injunction was appropriate where the claimant established (a) that he had a good arguable case and (b) that there is a real risk that the assets of the defendant will be dissipated by the defendant thereby depriving the claimant of the fruits of his judgment. Forte JA (as the was then) formulated the two pronged test in a manner that strengthens the view that as far as he was not too concerned with the intention of the defendant.

> *Before a Mareva Injunction can be granted therefore, two things must be established:*
>
> *(1) that the plaintiff has a good arguable case the standard of which is evidence which is more than barely capable of serious argument, but not necessarily having a 50% chance of success, and*
>
> *(2) 'Solid evidence' that there is a real risk that the assets will be dissipated, either by removal or in some other way and that*

consequently a judgment or award is favour of the plaintiff would remain unsatisfied.

Downer JA at page 65C in stating the two preconditions that must be met before a Mareva injunction is granted said that the authorities suggest that there must be (a) a good arguable case and (b) the risk of removal of property *so as to avoid payment*. This formulation by Downer JA is the closest the court came to incorporating the intention of the defendant as a part of the test.

APPLICATION

The question here is whether the claimant has satisfied the test as stated by Forte JA in ***Yap's*** case (supra).

The authorities, in my view, have established that the freezing of a defendant's assets must be approached with great caution. One of the reasons for this is that in many cases, and this is one such case, the application is ex parte. The consequences to a defendant may be devastating. It is not unknown that seemingly iron clad cases turn out to be as solid as vapour, when contested (see the ***Rasu*** case (supra)).

It must be remembered that the purpose of the freezing order is not to provide security against insolvency (see Robert Goff J in ***Iraqi Min. of Defence v Arcepey Shipping***

[1980] 1 All ER 480, 486d). The claimant does not acquire any propriety rights in the defendant's property (see ***The Cretan Harmony*** [1978] 1 Lloyds Rep. 425, 431). It is not designed to elevate the claimant above any other set of persons who may also be claiming part or whole of the defendant's property. The freezing order does not determine whether rights exist or even what rights have been infringed. The purpose is to ensure that something is available on which the judgment can bite. The freezing order is not an enforcement order (see Lord Mustill in ***Mercedez Benz AG v Leiduck*** [1996] AC 284 at pages 299B, 301E, 302B).

Until judgment is delivered and steps taken to enforce it a defendant should be free to deal with his property as he sees fit provided that he does not take steps to dispose of the property with the intention of frustrating the judgment of the court.

With the appropriate caution in mind I now examine the evidence adduced in support of this application.

I am satisfied that the first hurdle had been crossed successfully by the claimant. He has established a good case arguable case.

As far as the second hurdle is concerned the claimant relies on the defendant's apparent indebtedness evidenced by the fact that the subject matter of the contract had to be sold by the mortgagee. Other than this nothing else is known about the financial health of the defendants. There is no other evidence before the court about the defendant's behavior in financial matters.

The defendants' indebtedness while a factor that cannot be ignored does not with the other points made by the claimant, establish that there is a real risk of dissipation. There is nothing to show that the attempt to sell the property to the claimant was not an attempt to satisfy the obligations of the defendants. The conduct of the defendants' attorney at the auction and the failure to complete the sale do not advance the case of the claimant. In the final analysis there is nothing to show that the defendants would not be able to meet the any judgment that may be awarded against them. A claimant's suspicion is not sufficient.

The claimant says that the first defendant travels abroad from time to time. What this shows is that he returns to Jamaica and there is no evidence that since the collapse of the sale he has done or is doing anything to suggest that he might emigrate from Jamaica.

Absolutely nothing has been said about the second defendant other than, like the first defendant, the claimant does not know where she now lives.

Mr. Braham further said that the claimant did not know of the mortgages until five months after the sale agreement was signed because the mortgages were not reflected on the title at the Registrar of Titles. It may well be that the mortgages were not registered at the time the check was made. This is usually the responsibility of the mortgagee.

As Forte JA said in ***Yap's case*** (supra) there must be solid evidence that there is a real risk that the assets of

the defendant will be dissipated. To my mind the evidence presented here does not meet this standard. Solid evidence means that there must be something more than the assertion by the claimant that his judgment may not be satisfied. The evidence adduced by any one applying for a freezing order must be such then when examined by an impartial, informed and reasonable person he would conclude that there is a real risk of dissipation or removal of assets from the jurisdiction. This excludes the highly suspicious who will always see malevolence in even the most innocent act.

The application for a freezing order is refused.