IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 48/87

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.

BETWEEN	BERTRAM ALEXANDER WATKIS	APPELLANT/1ST DEFENDANT
AND	ANTHONY CHRISTOPHER SIMMONS	RESPONDENTS/PLAINTIFFS
AND	SANDRA PAULINE SIMMONS	
AND	JANICE WATKIS	RESPONDENT/2ND DEFENDANT
AND	GEORGE DESNOES	RESPONDENT/3RD DEFENDANT

C. Dennis Morrison for appellant

Maurice Tenn and Miss Joanne Wood for respondents

February 11 & 12 and July 18, 1988

KERR, J.A.:

This was an appeal from a Mareva injunction granted on the application of the plaintiffs against the appellant.

In this Court an appeal against a Mareva injunction is rare. The familiar name Mareva is derived from the English case Mareva Compania Naviera S.A. v International Bulkcarriers S.A. The Mareva [1980] 1 All E.R. 213, although it was not the first case in which this type of injunction was granted. See Nippon Yusen Kaisha v Karageorgis [1975] 3 All E.R. 282. There was no real conflict between Counsel on either side as to the guiding principles in granting this type of interlocutory remedy. The argument

centered on the question whether in the circumstances of this case and applying those principles the learned trial judge ought to have granted the injunction as prayed. Influenced no doubt by the industry of Counsel and the rarity of the occasion we promised to give written reasons. It is to honour this promise that I set out herein my reasons for concurring in the Judgment of the Court dismissing the appeal and affirming the Judgment and order of Reckord, J.

The jurisdiction to grant a Mareva injunction is well established. In the Mareva case the English Court of Appeal considered the general principle of respectable antiquity expressed in Lister v Stubbs (1890) 45 Ch. D. 1 (1886-90) All E.R. Rep. 797, to the effect that the Court has no jurisdiction to protect a claim creditor before he obtains judgment. Nevertheless, it was held that the jurisdiction conferred by Section 45 of the Supreme Court (Consolidation) Act 1925 was sufficiently wide to confer jurisdiction to grant an interlocutory injunction:

> "If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets. It seems to me that this is a proper case for the exercise of this jurisdiction."

per Lord Denning page 215. Section 45 of the English Act is similar in terms and purpose to Section 49 (h) of our Judicature (Supreme Court) Act, the relevant part of which reads:

> "A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just, ..."

In resolving the questions raised on appeal it was necessary for us to give careful consideration to the history of the proceedings, the issues in contention and the specific factors and special circumstances upon which the application for the injunction rested.

The plaintiffs are husband and wife residing in the parish of Saint Andrew. The first and second defendants are also husband and wife and are the registered proprietors as joint tenants of lands situate at Belgrade in Saint Andrew, registered at Volume 1057 Folio 522 of the Register of Titles. The third defendant is an Attorney-at-law. By Writ dated 23rd June, 1982, the plaintiffs claimed against the first and second defendants, (i) specific performance of an agreement for sale of the said lands dated 17th November, 1980 (ii) Damages against the third defendant for (a) Breach of warranty of authority as agent for the first and second defendants (b) Damages for negligent mis-statement and or mis-representation (iii) Against the three defendants special damages or damages in lieu of specific performance.

The averments upon which the claims rested as disclosed by their Statement of Claim were to the effect that by the said agreement, the plaintiffs entered into a contract for the sale and purchase of the registered land for $285,000 and paid on signing, a deposit of $28,500. The agreement was prepared and signed as agent for the vendor, by the third defendant who held himself out and represented himself as the duly authorised agent of both first and second defendants. On the 10th February, 1981, by consent the lands were revalued at $519,915 and shortly after on 17th February, 1981, the third defendant by letter advised the plaintiffs' Attorneys that the second defendant would not consent to the sale because the price was inadequate. By letter dated February 24, 1981, the third defendant essayed to rescind the agreement by returning the deposit. The plaintiffs' Attorneys, Milholland,

Ashenheim and Stone, by letter dated 26th February, 1981, promptly rejected these overtures returning the deposit. By notice to the defendants dated August 10, 1981, time was engrafted and made the essence of the contract.

By their pleaded defences the first and second defendants aver that the second defendant was the sole beneficial owner of the land in question, the first defendant having transferred his beneficial interest to her on or about December 1978, (ii) that the third defendant had no authority to act as their agent and (iii) the contract was illegal as being in breach of the Exchange Control Act on the basis that at the date of the agreement they were resident abroad.

The third defendant admitted (i) that he acted as the duly authorised agent of the first defendant/appellant who is the named Vendor in the agreement prepared by him, and (ii) that he accepted the deposit thereon,but (iii) denied being the agent of the second defendant. He also pleaded that the contract was illegal for breach of the Exchange Control Act. By their reply the plaintiffs challenge (i) the genuineness of the transfer to the second defendant of the appellant's beneficial interest in the lands in question (ii) that the appellant and second defendant were residing in the United States (iii) the plea of illegality and exhibited the consent of the Minister to the sale and transfer of the property in support of their contention that the contract was enforceable.

Now,the application for the injunction was supported by the affidavit dated 27th March, 1986, of Joanne Elizabeth Wood, Attorney-at-law and of the firm of Attorneys for the plaintiffs. She deposed to the effect that during the years 1981-84 both first and second defendants sold and transferred several properties. In the documents which were exhibited as evidence of those transactions the first and second defendants were described as being

resident in Jamaica. In regard to the assets of the appellant, she deposed as follows:

> "So far as the Plaintiffs are currently aware the assets of the First Defendant held solely or jointly with the Second Defendant within the Jurisdiction consist of:-
>
> (a) 9,995 shares out of 10,000 issued shares in Belmont Rivers Limited.
>
> (b) 49,990 shares out of 50,000 issued shares in AMALGAMATED FINANCE & DEVELOPMENT LIMITED Registered office No. 16 Havendale Shopping Centre, Kingston 8.
>
> (c) 500 shares out of 1,000 issued shares in MODERN CERAMIC PRODUCTS LIMITED, Registered Office 9 Cecelio Avenue, Kingston 10.
>
> (d) 400 shares out of 1,200 issued shares in NEGRIL BEACH CLUB LIMITED.
>
> (e) Accounts at the Royal Bank Jamaica Limited and at the Jamaica Citizens Bank Limited.
>
> (f) Motor car lettered and numbered S-4963.
>
> In all the circumstances aforesaid in particular that the First and Second Defendants have made divers averment as to their place of residence, that the offices of the First Defendant's Real Estate agency have been closed, that the First and Second Defendants have been disposing of their Real Estate, the Plaintiffs believe that the First and Second Defendants by themselves, their servants, workmen and agents or otherwise howsoever may be in the process of dissipating the assets of their sole names and these assets in the joint names of the First and Second Defendants."

On the basis of the material contained in this affidavit, on June 25, 1986, an interim exparte injunction was granted against all three defendants. On July 30, the injunction was discontinued against the third defendant and after the Exparte hearing by order of the 18th December, 1986, the Mareva injunction against which this appeal was made, was limited to the appellant and in the following terms: (Pages 85-6)

"IT IS HEREBY ORDERED:

1. That the application for Mareva Injunction in respect of the First Defendant is granted, restraining him from dealing in any way whatsoever with any of his assets within the jurisdiction of this Court until the Court otherwise orders.

2. That the Plaintiffs give an undertaking in damages to the First Defendant or other parties given notice for expenses reasonably incurred.

3. Costs as against the First Defendant to be costs in the cause. Costs against the Plaintiff to be agreed or taxed as against the Second and Third Defendants."

At the inter-parties hearing the evidence before the learned judge, in addition to Miss Wood's affidavit, included the appellant's affidavit in reply.

The following paragraphs are relevant: (page 81)

"1. That I reside and have my true place of abode at 2130 North 54th Avenue, Hollywood, Florida 33021 in the United States of America and, whenever I am in Jamaica, at 25 Eastmead Belgrade, Kingston 19 in the parish of Saint Andrew.

2. .....

3. That I have never been a Director or shareholder of a company called Magnum Housing Estates Limited and I have no knowledge of that company or of its operation as referred to in paragraph 26 of the Affidavit of Joanne Wood sworn to on the 27th March, 1986 and filed herein.

4. That it is not true that either my wife or myself have been or are in the process of disposing of or otherwise dissipating such assets as we hold in Jamaica.

5. That there is and there has never been any intention on my part and to the best of my knowledge information and belief on the part of my wife of dealing with any assets held by us in Jamaica so as to avoid any judgment that may ultimately be given against us in this action."

Mr. Morrison relying on the criteria for the grant of a Mareva injunction as defined in Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co. K.G. The Niedersachsen [1984] 1 All E.R. 398, submitted that the material before the Judge was insufficient to raise the inference that there was a real risk of the appellant disposing of his assets so as to defeat the plaintiffs' judgment, if obtained. The Mareva injunction is an extraordinary remedy and in the exercise of this jurisdiction, a Court should be mindful of the burden it would cast upon a defendant at a stage when there was no final adjudication of the plaintiffs' rights.

Now in the Ninemia Corp case, Mustill, J., after examining and considering statements in a number of cases cited in arguments at pages 402-3 said:

> "These cases are not easily reconciled, but to my mind they establish that the strength of the plaintiff's case is relevant in two distinct respects: (1) the plaintiff must have a case of a certain strength, before the question of granting Mareva relief can arise at all. I will call this the 'threshold': (2) even where the plaintiff shows that he has a case which reaches the threshold, the strength of his case is to be weighed in the balance with other factors relevant to the exercise of the discretion. It seems to me plain that the second proposition is justified by common sense and by the authorities."

Mr. Morrison frankly conceded that on the evidence before the Judge, it could fairly be said that the 'threshold' had been passed by the plaintiffs. However, he maintained that the history of the proceedings indicate that there was no urgency meriting the exparte injunction in the first place and further, the mere fact that the appellant was residing abroad was not sufficient ground for the grant of the injunction.

In Ninemia Corp (supra), Mustill, J. after referring at pages 405-6 to dicta of how Lord Denning and Lawton, L.J. in

Third Chandris Shipping Corp v Unimarine S.A., The Pythia, The Angelic Wings, The Genie [1979] 2 All E.R. 972, said:

> "Nevertheless, certain themes can be seen to run through the cases. It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on."

In Barclay-Johnson v Yuill [1980] 3 All E.R. 190, a Mareva injunction was granted on facts illustrative of the evidence sufficient to move a Court to exercise this jurisdiction. The facts as summarised in the headnote are:

> "The plaintiff and defendant were jointly engaged in the purchase, renovation and resale of a flat. The proceeds of the resale, amounting to some £3,300, were paid into a bank account in the defendant's name. A dispute arose between the parties over a sum of £2,000 which the plaintiff claimed the defendant owed her, and in the course of negotiations with the defendant's solicitors to agree a statement of account the plaintiff discovered that the defendant had sold his own flat, had gone abroad and was cruising in an ocean-going yacht of which he was a part-owner. The defendant, who was an English national with an English domicile, had previously lived abroad when in financial difficulties, and the plaintiff, fearing that he would again do so and transfer his assets out of the jurisdiction, issued a writ claiming the sum of £2,000 and the taking of accounts and obtained a Mareva injunction restraining the defendant from removing the proceeds of the resale of the flat out of the jurisdiction or otherwise dealing with them except by placing them in a deposit account. When the injunction came up for extension the defendant submitted that it should not be continued because the Mareva jurisdiction was restricted to preventing foreign nationals from removing assets

"out of the jurisdiction and the court ought not to grant a Mareva injunction against an English national domiciled in England."

"HELD - The grant of a Mareva injunction was not barred merely because the defendant was not a foreigner or a foreign-based person, although the defendant's nationality, domicile and place of residence could be material to a greater or lesser degree in determining whether there was a real risk that the assets would be removed from the jurisdiction. The essence of the jurisdiction was the existence of a real risk that the defendant would remove his assets from the jurisdiction and thereby stultify the judgment sought by the plaintiff. On the facts, the plaintiff had, on balance, established that there was a real risk of removal of the £3,300 in the bank account and the injunction would accordingly be continued, although it would be restricted to the amount claimed by the plaintiff and costs".

In the course of his judgment Sir Robert Megarry V.C. said: (page 194)

"It seems to me that the heart and core of the Mareva injunction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in the action. If there is no real risk of this, such an injunction should be refused; if there is a real risk, then if the other requirements are satisfied the injunction ought to be granted. If the assets are likely to remain in the jurisdiction, then the plaintiff, like all others with claims against the defendant, must run the risk, common to all, that the defendant may dissipate his assets, or consume them in discharging other liabilities, and so leave nothing with which to satisfy any judgment. On the other hand, if there is a real risk of the assets being removed from the jurisdiction, a Mareva injunction will prevent their removal. It is not enough for such an injunction merely to forbid the defendant to remove them from the jurisdiction, for otherwise he might transfer them to some collaborator who would then remove them; accordingly, the injunction will restrain the defendant from disposing of them even within the jurisdiction."

and later:

> "Naturally the risk of removal of assets from the jurisdiction will usually be greater or more obvious in the case of foreign-based defendants, and so the jurisdiction has grown up in relation to them. But I cannot see why this should make some requirement of foreignness a prerequisite of the jurisdiction. If, for example, an Englishman who has lived and worked all his life in England is engaged in making arrangements to emigrate and remove all his assets with him, is the court to say 'He is not a foreigner, nor is he yet foreign-based, and so no Mareva injunction can be granted'?"

Mr. Tenn, in reply, submitted that there were no specific denials or traverses to certain allegations concerning the appellant's disposal of his real property and his conduct was such that it was reasonable to infer the risk of disposal or dissipation of his remaining assets. The delay in seeking the injunctive remedy had no material bearing on the matter. In any event, it took time to investigate and "ferret" out the facts.

I accept as the proper approach to the evidence at the inter-parties hearing of an application for a Mareva injunction that advocated by Mustill, J. in the Ninemia Corp case thus: (p 409)

> "The judge who hears the proceedings inter parties must decide on all the evidence laid before him. The evidence adduced for the defendant will normally be looked at for the purposes of deciding whether it is enough to displace any inference which might otherwise be drawn from the plaintiff's evidence. But I see no reason in principle why, if the defendant's evidence raises more questions than it answers, and does so in a manner which tends to enhance rather than allay any justifiable apprehension concerning dissipation of assets, the court should be obliged to leave this out of account. On the other hand, the plaintiff has no right to criticise the defendant's evidence, for omissions or obscurities. The defendant is entitled to choose for himself what evidence, if any, he adduces. The less impressive his evidence, the less effective it will be to displace any adverse inferences.

> "But there must be an inference to be displaced, if the injunction is to stand, and comment on the defendant's evidence must not be taken so far that the burden of proof is unconsciously reversed."

In the instant case, due consideration must be given to the absence of denials or traverses to the allegation that since the agreement of the 17th November, 1980, the appellant and his wife have sold and transferred certain real properties and that in the sale and transfers "the first and second defendants gave Jamaican addresses as their place of residence".

Although there was no obligation on the appellant to make specific traverses to these allegations, the omission to do so left it open to the Judge to draw sufficiently adverse inferences to support the conclusion that there was a real risk of disposition or disposal of assets which consist in the main of shares in limited liability companies.

In particular, there was no specific traverses to the following averment relating to the sale and transfer of the defendants' real estate in the affidavit of Joanne Wood:

> "In all of the abovementioned sale and transfers, the First and Second Defendants gave Jamaican addresses as their place of residence."

On the other hand, in his affidavit of the 15th July, 1986, the appellant deposed that he is resident in the U.S.A. and in his pleaded defence that he was so resident at the date of the agreement for sale.

Although I have not had the benefit of a written or recorded oral judgment of the learned judge, there is on the material which was before him ample evidence to support a

finding of probable risk of dissipation or disposal of the assets with intent to defeat the judgment, if obtained, and upon a balance of all the factors, it seems just and convenient to make the order he in fact did.

For these reasons I concurred in the dismissal of the appeal.

WHITE, J.A.:

At the time of delivering the oral decision on this appeal, the Court opined that there was sufficient material before the learned trial judge justifying the grant of the injunction sought by the plaintiffs/respondents. The written judgment of Kerr, J.A. gives the cogent reasons for dismissing the appeal. I accept his reasons which underline the decision this Court had given earlier.

WRIGHT, J.A.:

The judgment of Kerr, J.A. adequately covers the reasons for the Court's decision to dismiss the appeal and there is nothing that I can usefully add.

Cases referred to

1. Mareva Compania Naviera S.A v. International Bulkcarriers S.A The Mareva (1980) 1 All E.R. 213
2. Nippon Yusen Kaisha v Karageorgis (1975) 3 All E.R. 282
3. Lister v Stubbs (1890) 45 Ch D 1 (1886-90) All E.R. Rep 797
4. Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co. K.G. The Niedersachsen (1984) 1 All E.R. 398
5. Third Chandris Shipping Corp v Unimarine S.A, The Pythia, The Angelic Wings, The Genie (1979) 2 All E.R. 972
6. Barclay-Johnson v Yuill (1980) 3 All E.R. 190