JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 91/94

COR: THE HON MR JUSTICE CAREY JA
THE HON MR JUSTICE GORDON J A
THE HON MR JUSTICE PATTERSON JA (AG)

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| BETWEEN | WHEELABRATOR AIR POLLUTION CONTROL | APPELLANT/ DEFENDANT |
| A N D | F C REYNOLDS | RESPONDENT/ PLAINTIFF |

R N A Henriques QC, Allan Wood & Ransford Braham for appellant

Miss Hillary Phillips & Miss Carol Davis for respondent



6th 7th 8th February & 13th March 1995

CAREY JA

The appellant is a company with its principal offices in Pittsburgh, Pennsylvania, United States of America, which specializes in the design manufacture and installation (inter alia) of electrostatic precipitators and is engaged in installing a new dust collections system for Jamaica Aluminium Company (Jamalco). The respondent was a contractor under contract to the appellant and who agreed to install foundation and stack, modify an existing building, demolish existing structures and install three electrostatic precipitators. This work was to be done at the Jamalco property at Halse

Hall in Clarendon. As a result of a disagreement between the parties, the respondent ceased work, removed from the site and filed a writ for :

> "... money due from the Defendant to the Plaintiff on a contract made on or about January 1993 for construction work on the Electrostatic Precipitator Project on the property of the Jamaica Aluminum Company in the parish of Clarendon and for interest thereon and/or alternatively for damages for breach of the said contract and interest thereon."

Reid J by an order dated 17th August 1994 granted a Mareva injunction in the following terms:

> "The Defendant be restricted whether by themselves, their servants or agents or howsoever otherwise from removing from the jurisdiction, disposing of and/or dealing with their assets within the jurisdiction limited to US$1,440,000.00 being the proceeds of contract for the erection and installation of Electrostatic Precipitators in the Electrostatic Precipitators Replacement Project, between the Defendant and Jamaica Aluminium Company (hereinafter call JAMALCO) of Clarendon, Jamaica, until Judgment or further order."

This appeal against that order requires a consideration of whether there was sufficient evidence to prove that there was a real risk of a dissipation of the assets or a risk of the assets being removed so that any judgment in the respondent's favour would remain unsatisfied. We are not concerned with whether or not the respondent had a good arguable case because that much was conceded by Mr Henriques QC for the appellant.

Counsel in this case, both accept as settled that once the threshold of a good arguable case is passed, then the plaintiff must demonstrate the risk of dissipation of assets or removal of assets from within the jurisdiction by cogent evidence. See **Watkis v Simmons** (unreported) SCCA 48/87 delivered 18th July 1988 in which dicta from **Third Chandris Shipping Corp v Unimarine [1979] 2 All ER 972 and Ninemia Corp v Trave Schiffahrts** [1984] 1 All ER 398 were cited with approval. Mr Henriques

QC contends that the evidence put forward by the respondent was wholly inadequate because it was clear that the respondent had made no effort to furnish the court with any information relating to the risk of dissipation. The appellant had supplied information which showed that company was a viable organization, and refuted any suggestion that any judgment could not be satisfied.

Miss Phillips maintained with her accustomed celerity, that the court was obliged to consider all the evidence placed before it in order to make a correct determination of the risk of dissipation or removal of assets. The appellant had put forward an unaudited balance sheet which showed among its assets a high level of receivables. If fifty percent of that amount remained uncollected, she said the account would be in deficit. The fact that the appellant was well connected, that is, the parent company had its stocks quoted on the Stock Exchange was irrelevant; there was no contract with the parent company. The picture presented was of words not of facts.

There was as well, she pointed out, an action filed in Pennsylvania by the appellant against the respondent which was proceeding by default. No reciprocal arrangements with the USA regarding judgments existed and, as a consequence, suit would have to be brought in that country. Granted a successful conclusion of that litigation in the respondent's favour, the judgment would have to be set off against the appellant's claim. But the present action in this country ought not to involve the respondent in protracted litigation in the USA. It was therefore the assets in this country which should be reachable. In regard to these, the appellant was conspicuously silent. It should be borne in mind that the appellant was a foreign corporation and apart from the contract with Jamalco has no other connection with this country.

With these arguments in mind, there is a need to examine the evidence which was put before Reid J. The respondent filed an affidavit in support of his application. I think the relevant paragraphs should be quoted:

> "2. That to the best of my knowledge and belief, the Defendant is a Company with offices in Pittsburgh in the United States of America and are specialists in the design, manufacture and installation of inter alia Electrostatic Precipitators.
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> 3. That the Defendant was contracted by the Jamaica Aluminium Company (hereinafter called JAMALCO) to construct inter alia, three (3) Electrostatic Precipitators, part of the Electrostatic Precipitators Replacement Project on the property of Jamalco, in the parish of Clarendon, Jamaica.
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> 4. That pursuant to the said contract, the Defendant has been conducting business in Jamaica and has offices on the worksite on Jamalco's property, in Halse Hall, in the parish of Clarendon.
> ...
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> 28. At a further meeting held at the Pegasus Hotel in Kingston, Jamaica on 11th May, 1994 and attended, inter alia, by myself and my Attorneys-at-Law, and by Mr Rzoski, Mr Campbell, Mr Hunkele, Mr Ravellette and Mr Withers representing the Defendant, the Defendant through its said representatives, informed me, and did verily believe, that they did not intend to pay me for work done on outstanding invoices that they had in their possession, nor for work that had been done by me from February 1994 and which was not yet invoiced nor paid by the Defendant. In the premises, the sum of NINE HUNDRED AND EIGHTY NINE THOUSAND SEVEN HUNDRED AND TWENTY EIGHT US DOLLARS (US$989,728,00), plus invoices for the period February to May 11th, remain unpaid by the Defendant, and the Defendant has no intention of paying the same.
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> 29. That the Defendant is a company with offices in Pittsburgh, in the United States of America, and to my knowledge, their operations in Jamaica are limited to their work on the Electrostatic Precipitator Replacement Project, which continues on the property of Jamalco, at Halse Hall in the parish of Clarendon.
>
> 30. That the Defendant is head Contractor on the

> Electrostatic Replacement Project for the erection and installation of Precipitators, which continues on Jamalco's property as aforesaid, and as such, are paid by Jamalco for work done by the Defendant on the Project including work done by subcontractors such as myself. Jamalco is a company with offices in the parish of Clarendon, Jamaica and to my knowledge, the said payments due from Jamalco represents the only major assets of the Defendant within the jurisdiction.
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> 31. That I verily believe that unless restrained by this Honourable Court, the Defendant will dispose of and remove the said assets from the jurisdiction leaving no assets from which my claim can be satisfied if successful."

A number of guidelines were formulated by Lord Denning MR. in **Third Chandris Shipping v Unimarine** (supra) at pp. 984-986 with respect to the contents of the affidavits in support of Mareva injunctions. He stated as follows:

> "...(i) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know: see The Assios [1979] 1 Lloyd's Rep 331 (ii) The plaintiff should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant. (iii) The plaintiff should give some grounds for believing that the defendants have assets here. I think that this requirement was put too high in the unreported case of MBPXL Corpn v Intercontinental Banking Corpn [1975] Court of Appeal Transcript 411. In most cases the plaintiff will not know the extent of the assets. He will only have indications of them. The existence of a bank account in England is enough, whether it is in overdraft or not. (iv) The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied. The mere fact that the defendant is abroad is not by itself sufficient. No one would wish any reputable foreign company to be plagued with a Mareva injunction simply because it has agreed to London arbitration. But there are some foreign companies whose structure invites comment. We often see in this court a corporation which is registered in a country where the company law is so loose that nothing is known about it, where it does no work and has no officers and no assets. Nothing can be found out about the membership, or its control, or its assets, or the

> charges on them. Judgment cannot be enforced against it. There is no reciprocal enforcement of judgments. It is nothing more than a name grasped from the air, as elusive as the Cheshire cat. In such cases the very fact of incorporation there gives some ground for believing there is a risk that, if judgment or an award is obtained, it may go unsatisfied. Such registration of such companies may carry many advantages to the individuals who control them, but they may suffer the disadvantage of having a Mareva injunction granted against them. The giving of security for a debt is a small price to pay for the convenience of such a registration. Security would certainly be required in New York. So also it may be in London. Other grounds may be shown for believing there is a risk. But some such should be shown."

Lawton LJ was also helpful. At p. 987 he said this:

> "... In my judgment an affidavit in support of a Mareva injunction should give enough particulars of the plaintiff's case to enable the court to assess its strength and should set out what enquiries have been made about the defendant's business and what information has been revealed, including that relating to its size, origins, business domicile, the location of its known assets and the circumstances in which the dispute has arisen. These facts should enable a commercial judge to infer whether there is likely to be any real risk of default. Default is most unlikely if the defendant is a long-established, well-known foreign corporation or is known to have substantial assets in countries where English judgments can easily be enforced either under the Foreign Judgments (Reciprocal Enforcement) Act 1933 or otherwise. But if nothing can be found out about the defendant, that by itself may be enough to justify a Mareva injunction."

In my view, what I derive from the guidelines suggested by Lord Denning MR and Lawton LJ in **Third Chandris Shipping v Unimarine** (supra) with respect to the information as to the risk factor, is that the plaintiff must state the nature and extent of the defendant's business and the location of assets within the jurisdiction. There should also be stated grounds for believing that the assets will be removed before satisfying any judgment and it is not sufficient merely to assert a belief in the fear of

removal. The fear must be determined on the basis of the facts disclosed in the affidavit.

Of course, if the defendant shows that it is a well-known multi-national or international or foreign company or has assets in a country to which our Judgments and Awards (Reciprocal Enforcement) Act or Judgments and Awards (Foreign) (Reciprocal Enforcement) Act apply, then a judge would not be inclined to grant a Mareva injunction.

In my view, the picture which emerges from these paragraphs especially, and it must be remembered that the entire affidavit has been scrutinized, is this. The appellant which is a USA company with offices in Pittsburgh, Pennsylvania specializes in designing, manufacturing and installing electrostatic precipitators. The company is operating in this country as a result of a contract with Jamalco. The payments due from that contract represent the entire assets within the jurisdiction. It is fair to say that the guidelines as they relate to enquiries about the appellant's business, and the location of its known assets have been faithfully followed. From the fact that the company is a foreign company whose entire assets comprise the balance of the proceeds of a contract which is almost completed, the inference is inescapable that having been paid, it will collect its assets and withdraw itself from the jurisdiction. It would hardly have any reason for remaining. It follows that there is or must be good grounds for believing that there is a real risk of a judgment in the respondent's favour remaining unsatisfied.

The legal advisors of the appellant, despite the usual forceful and incisive arguments deployed by Mr Henriques QC before us, were not so unwise as to refrain from filing rebuttal evidence. Learned counsel did remind us that there was no burden on the appellant, but an affidavit was filed on its behalf, to demonstrate the absence of

risk by a Vice President - Assistant Treasurer who deposed (as far as material), as follows:

> "3. Exhibited and annexed hereto, marked with the letter 'A' for identity, is a true and correct copy of Wheelabrator's 1993 balance sheet which I have certified as true and correct .
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> 4. The financial information annexed hereto at Exhibit A shows that as of December 31, 1993 Wheelabrator had total assets of approximately $28,034,000.
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> 5. Wheelabrator is a wholly owned subsidiary of Wheelabrator Technologies Inc., ('WTI') a public company whose stock is traded on the New York Stock Exchange . WTI had total revenues in excess of one billion dollars and total assets in excess of three billion dollars for the year ending December 31, 1993."

The material contained in the affidavit and the unaudited balance sheet have not, in my view, removed altogether the risk that after the contract is completed, which appears to be at a time before the action could be resolved, the assets would not have been removed from the jurisdiction. I say this because in agreement with the submissions of Miss Phillips, the appellant is a foreign company registered in a country with which no reciprocal arrangements for registering of judgments exists, the only asset is the contract which is shortly to come to an end, and the absence of any statement that assets will not be removed from the jurisdiction. With respect to the evidence of the Treasurer, although it would not be right to say that it shows that the company is in imminent danger of total collapse, nonetheless, it is not capable of indicating a consistently profitable business. I would doubt that credit-worthiness of a company can properly be established by the production of one year's unaudited balance sheet especially when the receivables therein represent such a high percentage of the assets.

There was an onus on the appellant to rebut the **prima facie** inference of danger which arose on the respondent's evidence and accordingly, I cannot agree with Mr Henriques QC that the respondent furnished no evidence. It would have to show that either it had adequate assets within the jurisdiction or showed from its balance sheet that it had large cash or investment balances, as Mustill J (as he then was) pointed out in **Third Chandris Shipping v Unimarine** (supra) at p. 979 - all designed to show that it will not be necessary or worth their while to default on an adverse judgment. The appellant was silent as to assets within the jurisdiction and the assets position as represented outside the jurisdiction, was not as healthy as could be under careful scrutiny. It had not shown, in my view, the existence of valuable tangible assets abroad in a place where Jamaican judgments or awards can be enforced.

I would not wish it to be thought that I am suggesting that the fact that the appellant is a foreign company, can be or is a decisive consideration in the grant of a Mareva injunction but it is a factor to be borne in mind. In the instant case, the appellant being a foreign company did not seek to show the existence of assets within the jurisdiction which was the concern of the respondent but endeavoured to show its financial strength outside the jurisdiction. The test to be applied with respect to the risk factor as appears from **Ninemia Corp v Trave Schiffahrts** (supra) is that a judgment or award in the plaintiff's favour would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction.

It appears to me that the evidence of the appellant is not, for the reasons I have suggested, sufficient to remove the fear that a judgment adverse to the appellant, would remain unsatisfied because there would be no assets within the jurisdiction.

Reid J was obliged to consider all the evidence before him, and on that evidence, he could properly have arrived at the decision he did. I do not find any reason to hold that he exercised his discretion otherwise than rightly. Accordingly, I would dismiss the appeal with costs to the respondent.

**GORDON JA**

I have read the draft judgment of Carey JA and I agree with the reasons and the conclusion.

**PATTERSON JA**

I too have read the draft judgment of Carey JA and I agree entirely.