

MMS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV05079/2010

BETWEEN	BRUCE WONG KEN	CLAIMANT
AND	DAVID FULLWOOD	1 <sup>ST</sup> DEFENDANT
AND	KARL GRAHAM	2 <sup>ND</sup> DEFENDANT
AND	FULLGRAM SOLUTIONS LTD	3 <sup>RD</sup> DEFENDANT

Mr. Conrad George and Ms. Natoya Boyd instructed by Hart Muirhead and Fatta for the Claimant

Ms. Simone Mayhew and Ms. Shauna Kay Carter instructed by Harrison & Harrison for the Defendants

Heard: March 28, 31 and April 6, 2011

Section 213a of the Companies Act;  
Interim Declaration; Mareva Injunction

Straw J

1. Mr. Bruce Wong Ken, the claimant has brought an action against the defendants, Mr. David Fullwood, Mr. Karl Graham and Fullgram Solutions Limited for relief pursuant to Section 213A of the Companies Act. He is seeking *inter alia* a declaration that he is entitled to 33 1/3% share in the company, Fullgram Solutions Limited, and an order appointing himself or his nominee director of the company.

Both Mr. Fullwood and Mr. Graham are the directors of the said company that was registered on March 2, 2010.

2. The application before this court is one for interim relief by the claimant pending the determination of the issues at trial.

He is requesting an interim declaration by virtue of Rule 17.1 (1) (b) that he is entitled to 33 1/3% share in the company and pursuant to that declaration, other interim relief and/or in the alternative, an injunction to restrain the directors from dealing with the assets and funds of the company except to pay bona fide expenses and removing, altering, disposing or destroying documents relating to the affairs of the company without the applicants' approval in writing.

3. He is also requesting that one Mr. Kenneth Tomlinson be appointed receiver manager of the company and that he be paid US\$75,000.00 representing outstanding director's fee for June to October 2010 and thereafter the sum of US\$15,000.00 monthly from November 2010 until the court has made a final determination of these proceedings.

4. The issues in dispute are whether firstly, Mr. Wong Ken has *locus standi* to request any relief under Section 213A of the Companies Act. If so, whether this is a proper case to grant any injunctive relief by virtue of the said Section 213A or, in the alternative a freezing order/injunction in relation to the company's assets.

#### **The Relevant Facts**

5. The facts reveal that the applicant and the first and second defendants were contemplating a business relationship in which all three would be directors of the third defendant with each holding 33 1/3% shares. This is evident in the e-mails that passed

between the applicant, the first and second defendants, as well as the attorneys for the third defendant.

6. All three parties, the applicant and first and second defendants were expected to inject US\$150,000.00 into the third defendant company consisting of equity of US\$75,000.00 and directors' loan of US\$75,000.00.

The applicant injected US\$60,000.00 on March 24, 2010. The company had already been registered on March 2, 2010 with the first and second defendants listed as shareholders and directors.

7. For reasons that are a mystery to the applicant but stated by the second defendant to be disquiet with the role to be played by one Dr. Thomas in the company, the relationship between the parties deteriorated in late April 2010. The applicant was neither appointed a director nor assigned the said quota of shares.

8. Mr. Conrad George, counsel for the applicant, has submitted that the contract was completed and that the applicant gave consideration by the injection of US\$60,000.00.

Ms. Simone Mayhew, counsel for the defendants, has submitted that the contractual terms were never finalized.

She has further submitted that it is evident from the e-mails that the applicant's injection of US\$60,000.00 was considered a director's loan to be paid back with interest and that the defendants stand ready to repay the said amount with the required interest.

9. It is clear therefore, that these issues will have to be ventilated and determined before a trial judge and that these are essentially the very same issues on which the applicant is seeking the interim relief.

## **The Applicable Law**

10. In relation to the first issue, Section 213A of the Companies Act allows a complainant to apply to the court for certain orders against a company under certain circumstances.

These are outlined in Section 213A as follows:

- (1) ----
- (2) If upon an application under subsection (1), the court is satisfied that in respect of a company or of any of its affiliates –
  - (a) any act or omission of the company or any of its affiliates effects a result;
  - (b) the business or affairs of the company or any of its affiliates are or have been carried on or contracted in a manner;
  - (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner.

That is oppressive or unfairly prejudicial to, any shareholder or debenture holder, creditor, director or officer of the company. The court may make an order to rectify the matters complained of.

3. The court may, in connection with an application under this section make any interim or final order it thinks fit, including an order -

The remainder of this section list several options available to the court in the making of any interim or final order.

Suffice it to say that these include some of the relief requested by the applicant.

11. Mr. George has submitted that Rule 17.1(1) (b) grants power to the court to make an interim declaration and that in the interest of justice, this ought to be done so that the applicant can apply as a ‘complainant’ to the court under the Companies Act for interim orders to protect his interest in the company as the actions of the defendants are oppressive.

12. Section 212(3) of the Companies Act defines 'complainant' as a shareholder or former shareholder, a debenture holder or former debenture holder, a director or officer or former director or officer of a company or affiliated company.

Ms. Mayhew has submitted that the applicant does not fall into any of the above categories and therefore cannot seek to move the court to make any order under the relevant section of the said Act.

13. This court is of the view that if any such interim declaration is made, it will be actually adjudicating on and determining the substantive issue for trial. The court therefore refuses to make any such interim declaration.

Consequently, no interim relief can be granted to the applicant under section 213A of the Act as he has no *locus standi*.

#### **MAREVA INJUNCTION**

14. In the alternative, Mr. George has asked this court to grant interim relief to the applicant by virtue of a mareva injunction to restrain the directors from *inter alia* dealing with the assets and funds of the company except to pay *bona fide* expenses without his approval in writing.

15. Paragraphs 35-39 of his affidavit speak to facts on which he relies for such an order. Paragraphs 10 – 11 of his supplemental affidavit, speaks to recent developments which (it is alleged) will affect the company's revenue and which will cause the defendants to dispose of the company's assets and put the same beyond his reach.

16. Suffice it to say, that the recent development surrounds a newspaper report of an agreement between Claro and Digicel in relation to Claro's market in Jamaica. Claro is a major client of the defendant company.

17. It is well established that, in order to obtain a mareva injunction, the applicant must have a 'good arguable case.'

A good arguable case is 'one which is more than barely capable of serious argument but not necessarily one which the judge considers would have a better than 50 percent chance of success' (See **Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft Gmb H**, per Mustill J (1983) 2 Lloyd's Rep 600 at pg 605).

18. This court is not to try to resolve conflicts of evidence on affidavit, or to decide difficult questions of law which call for detailed argument and mature consideration (See **Derby & Co. Ltd v Weldon** (1989) 2 WLR, 276 per Parker LJ).

I am of the view that the applicant has mounted this first threshold.

19. The second criteria is that the applicant has to satisfy the court that there is a real risk that the assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted.

It is important to note that the claimant must adduce 'solid evidence to support his assertion that there is a real risk of any judgment or award going unsatisfied' (**Ninemia**, supra, per Mustill J at pg 606-607).

Mr. George has asked the court to consider the behaviour of the defendants as a relevant factor in this regard (See **O'Regan and others v Iambic Productions** (1989) 139 NLJ 1378 at pg 1379 per Sir Peter Pain).

20. However, there is nothing on the factual evidence revealed in the affidavits to show any pattern of evasiveness or other negative action on the part of the defendants. They have agreed certain factual issues. They had admitted the injection of US\$60,000.00 by the applicant and a willingness to repay him with interest.

21. The major issue as to whether the agreement between the parties was completed is the issue for determination. The court is of the view that there is nothing in the defendants' behaviour in response to the applicant's claim that assists him in this regard.

Is there any evidence that the refusal of the *mareva* injunction would involve a real risk that a judgment or award would remain unsatisfied?

22. As I indicated previously, the claimant must adduce solid evidence of this. The applicant's own affidavit speaks to the growth of the company in the first year of existence. There is no evidence of delinquency on the part of the company in the payment of its debts, or, (in spite of the facts alleged in the supplemental affidavit of the applicant, that about 90% of the company's revenue is being threatened), there is no evidence that the company is about to become insolvent.

23. The applicant is fearful of the intentions of the defendants as there is a level of distrust on his part based on the past conduct of the first and second defendants. This assertion of a belief in the fear of the dissipation of assets is not sufficient (per Carey JA in **Wheelbraker Air Pollution Control v Reynolds** 1985 37 WIR 417, at 420).

In **Half Moon Bay Ltd v Earl Levy**, suit No. CL 1996/H012, Wolfe CJ stated that the plaintiff should depone to objective facts from which it may be inferred that the defendant is likely to remove his assets abroad or dissipate them:

'Unsupported statements or expressions of fear have little weight ...' (supra) (pg 12).

24. There is no solid evidence presented by the claimant to induce this court to believe that on a balance of probabilities, the defendants will dissipate their assets.

The court also bears in mind the principle stated in **Iraqi Ministry of Defence and others v Arcepy Shipping Co. et al.** 1981, 1QB, pg 65, where it was held that the

purpose of the mareva injunction was not to improve the position of the claimants in the property of an insolvent debtor.

It would appear the applicant wants to ensure that whatever he may be entitled to, he is able to obtain satisfaction of the judgment.

25. The court also bears in mind the hardships that would be experienced by the defendants in their ability to direct the course of the business of the third defendant by such a draconian measure.

There is no basis to grant such a relief.

The Notice of Application filed on November 1, 2010 is therefore refused.

Application for leave to appeal granted.

Costs to the defendants.