JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 58/98

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE SMITH, J.A. (Ag.)

BETWEEN: DALTON YAP APPELLANT

AND UNION BANK OF JAMAICA LTD. RESPONDENT

Hilary Phillips, Q.C. and Christopher Dunkley instructed by Cowan Dunkley and Cowan for the appellant

Dennis Goffe, Q.C., and Hilary Reid instructed by Myers Fletcher and Gordon for the respondent

10,11,12,16,17,18,19 October and 22 November, 2001

DOWNER, J.A.

In allowing this appeal, we set aside the order of Karl Harrison, J. and made the following order:

(1) Appeal allowed

(2) Order below set aside

(3) An enquiry into and assessment of damages ordered in the Supreme Court

(4) Costs to the appellant both here and in the Court below to be taxed if not agreed

It is against this background that reasons for this decision are now being delivered, and the necessary directions given to dispose of this case.

The History of the matter

Dalton Yap was a highly placed manager at Jamaica Citizens Bank Ltd. That Bank has now been merged with other banks to form Union Bank of Jamaica Ltd. Ewart Scott, the acting Managing Director of the respondent Bank, made grave charges against Yap, in an affidavit of 8th October, 1993. On the strength of that affidavit the respondent Bank persuaded Reid, J. to grant an ex parte Mareva injunction on 8th October, 1993. The material part of this Order for purposes of this appeal reads as follows:

> "... the Plaintiff... undertaking,...
>
> 2. To abide by any Order of the Court as to damages should the Court hereafter be of the opinion that the Defendant or any third party given notice of this Order have suffered any damages that the Plaintiff ought to pay
>
> 3. To serve upon the Defendant a copy of the Affidavit of Ewart Scott sworn to on the 8th day of October, 1993, herein"

Then the order continues:

> "IT IS HEREBY ORDERED THAT:
>
> (a) The Defendant be restrained, whether by himself, his servants or agents, or howsoever otherwise from disposing of and/or dealing with his assets wheresoever situate in so far as the same do not exceed the sum of US$400,000.00 and in particular from withdrawing or transferring the funds in his accounts at Jamaica Citizens Bank, until judgment or further order herein.
>
> (b) Liberty to the Defendant and any Third party affected by the Order to apply on notice to the Plaintiff's Attorneys-at-law to set aside or vary this Order."

The Mareva injunction was discharged by Theobalds, J. on the 26th October, and subsequently restored by this Court (See **Jamaica Citizens Bank Ltd. v. Dalton Yap** (1994) 31 JLR 42.)

The next stage in the proceedings pertinent to this appeal, was the trial before Panton J. in the Supreme Court. See **Jamaica Citizens Bank Ltd. v. Dalton Yap** Suit No. 1993/J 320 DELIVERED 22ND September, 1997, at page 155 of the Record. It is important to note that the grave charges of fraudulent conduct made in the affidavit of Ewart Scott were either withdrawn or rejected at the trial. Here is how Panton J. concluded his judgment at page 209 of the Record:

> **"SUMMARY OF JUDGMENT**
>
> I find that the defendant has incurred no liability so far as the FTA issue is concerned. He is also not liable in respect of the telemarketing accounts prior to July 6, 1993. However, he committed a breach of his contract of employment in opening the account in the name Worldwide Marketing Ltd., and is liable in respect of the losses arising therefrom. Accordingly, judgment is entered for the plaintiff for US106,226.04. Interest is awarded at the rate of 12% per annum from June 30, 1994. Costs to the plaintiff are to be agreed or taxed."

On this issue Panton, J. was overruled by this Court (Forte P., Bingham, Walker JJA)**Dalton Yap v. Jamaica Citizens Bank** SCCA No. 121/97 delivered June 15, 2000 at page 222 of the Record. No further mention will be made of this decision because it does not have any bearing on this appeal from the order of Karl Harrison, J. The judgment of the Court of Appeal was not then delivered. This was forcibly put by Mr. Goffe, Q.C. for the Bank, and it was correct. It may, however, have a bearing on an assessment of damages.

It is against this background that the relevant issues must be decided on in this appeal. Firstly, it must be decided whether Karl Harrison, J. exercised his

discretion wrongfully in refusing to accord Yap an enquiry and assessment of damages. Secondly, if the initial discretion was wrongly exercised how ought this Court to exercise its discretion? Thirdly, whether this Court ought to give any guidelines as to how the Supreme Court might conduct the inquiry and the assessment of damages since, on October 19 this Court made an order that there must be an assessment. Fourthly, what are the appropriate directions which may be given for the conduct of the trial?

Why this Court decided that Karl Harrison, J. exercised his discretion wrongly

The summons before the learned judge below filed 13 January, 1998, with a return date of 23rd February, 1998, so far as material reads:

> "1. There be an inquiry whether the Plaintiff has sustained damages by reason of the Mareva Injunction dated October 8, 1993 which the Defendant ought to pay according to their undertaking as to damages contained in the said order.
>
> 2. That the inquiry proceed as follows:-
>
> Place of Hearing of Assessment Kingston
>
> Mode of Assessment Judge alone in open Court
>
> Estimate of Length of hearing ( ) day (s)
>
> Liberty to Apply to either party generally:
>
> Costs of Summons to be the Plaintiff's to be agreed or taxed:
>
> Time for setting down: ( ) day (s)"

The authorities suggest that wherever possible the judge who presided at the trial, ought to be the judge to hear the summons to enquire into the assessment of damages. See **Smith v Day** (1882) 21 Ch.D. per Brett L.J. at 427-428 as well as

Financiera Avenida S.A. v. Shiblaq C.A. Lexis transcript [1990] E.W.J No. 224 reported briefly in the Times Law Reports, January 14, 1991. This stance was approved of in **Cheltenham & Gloucester BS v Ricketts** [1993] 4 All ER 276 at pages 285 and 290, by both Neil and Peter Gibson LLJ, as well as in **Barclay's Bank v Illingworth** per Kerr L.J., C.A. (Transcript Association) 10th May 1985 at page 6/7.

In his affidavit of support, Yap adduced evidence, to demonstrate why he ought to have an enquiry into the matter, as well as outlined the basis on which he intended to claim both general and special damages.

It should be stated at the outset that the basis for examining whether the discretion below was properly exercised in the circumstances of this case must involve the proper interpretation of the affidavit of Scott, then acting Managing Director of the plaintiff Bank, at pages 28-31 of the Record; the affidavits of Yap at pages 12-19 and pages 89-90; the affidavit of James Chan at pages 84-85 of the Record; the judgment of this Court on the Mareva injunction at pages 103-154 of the Record; the judgment of Panton, J. at pages 155-210 of the Record, as well as the judgment of Karl Harrison, J. on appeal at pages 211-221 of the Record. In particular the affidavits of Chan and Yap particularized how as a result of the Mareva injunction certain cheques were dishonoured.

At the heart of Scott's affidavit was a charge that Yap showed no fidelity to the Bank and further that he was a dishonest manager. Paragraphs 5,6,and 7 tell the story. They are as follows at pages 29-30 of the Record:

> "5. As a result of queries raised by Visa International and Master Card International, the Bank conducted a thorough internal investigation and this investigation has so far revealed, among other things, that:

(a) The Defendant completely disregarded several bank guidelines in setting up and managing the credit card operations;

(b) The Defendant circumvented instructions from the Bank to terminate the processing of such transactions;

(c) The Defendant withheld information pertaining to the operation of this service from the Executive management personnel of the Bank."

Then the affidavit continues thus:

"6. More specifically, the Defendant between April and August 1993:

(a) Established credit card relationships with certain Telemarketers in the United States and Antigua, without the authority or knowledge of the Bank, without carrying out the appropriate credit checks and procedures and in contravention of the conditions of the Visa International license, which prohibits licensee banks from entering into credit card relationships with Merchants carrying on business outside the licensee Bank's region;

(b) Delayed complying with instructions from Visa International and Master Card International for dealing with such relationships;

(c) Delayed communication to executive management of the Plaintiff Bank of problems which arose pertaining to the said operations;

(d) Circumvented executive management's instructions to terminate such arrangements by assisting in the setting up of a fictitious office in Kingston for one of the said Telemarketers;

(e) Authorised payments to the said Telemarketers totaling over US$400,000.00 which authorisation was either fraudulent or grossly negligent;

(f) Improperly caused or allowed a portion of the reserves held by the Plaintiff bank to meet potential liability arising from disputed charges to be paid out of the Bank."

Paragraph 7 goes on to state Yap's dismissal thus:

> "7. As a result of these investigations, the Defendant was dismissed from the Plaintiff Bank with immediate effect. I exhibit hereto marked "ES 1" a copy of the letter terminating the Defendant's employment dated October 1, 1993."

Although Yap's affidavit was before this Court, on an appeal by the Bank to restore the Mareva injunction, it was rejected, and the Court came down in favour of the Bank and so restored the injunction which had been discharged by Theobalds, J.

Here were the principal paragraphs in his affidavit at page 12 of the Record.

> "3. That until October 1, 1993, I was employed to the Jamaica Citizens Bank in the capacity of General Manager, Technology & Operations. I am also a customer of the Bank in Jamaica and with the Bank's Miami Agency in the United States.
>
> 4. That on October 1st I was summoned to a meeting with Mr. Ewart Scott who is the General Manager – Retail Banking of the Jamaica Citizens Bank and at that time, the Acting Managing Director for the said Bank.
>
> 5. That I was shown a document which I was advised was an Audit Report produced by the Chief Internal Auditor for the I.C.W.I. Group, which made a number of very serious and defamatory allegations against myself. I was then presented with a letter dated October 1st, repeating the allegations in the Audit Report, and purporting to dismiss me with immediate effect.
>
> 6. That I requested a copy of the said Audit Report from Mr. Scott, which he refused without giving any reason therefor."

Paragraph 8 is important. It reads:

> "8. That on Monday, October 11th, I attempted to withdraw funds from my personal account at the Jamaica Citizens Bank, King Street, but was advised that the account was frozen and that I must direct any queries to the Law firm of Myers, Fletcher & Gordon. Inquiries by my

> Attorney-at-Law confirmed that a Mareva Injunction had been applied for and obtained in this Honourable Court, by the Plaintiff Bank, on October 8, 1993."

Also relevant in this context is paragraph 10 of Scott's affidavit of October 8, 1993, which reads:

> "10. I have been informed by the General manager of the Plaintiff Bank's Miami Branch, William Hinds, and do verily believe that on the 4th October, 1993, the Defendant instructed the Branch to transfer some of the funds currently standing to his credit in the said accounts to another Bank, and that on the 5th of October, 1993, the Defendant attempted to withdraw some of the funds from these accounts." (Emphasis supplied)

There is also a further statement in Yap's affidavit in paragraphs 12-13 at pages 39-40 of the Record which, if pleaded, may attract substantial damages which might include exemplary damages on the basis of the principle expounded by Lord Atkinson in the **Addis** case which will be referred to hereafter. Further if it was brought to the attention of the Bank that the accounts in the Miami branch were used for trading then the principles expounded in detail in **Wilson v United Counties Bank** [1920] A.C. 102 might be applicable. It might be necessary to produce the contract between Yap and the Bank in this context. Then Yap continued thus:

> "9 That I have perused the affidavit of Mr. Ewart Scott dated October 8, 1993 which repeats the allegations contained in my letter of dismissal of October 1st, and I vigorously deny each and every allegation which has been leveled against me in paragraphs 5 and 6 of the said Affidavit, and have given my Attorneys-at-Law firm instructions to file Suit against the plaintiff for damages for wrongful dismissal and defamation."

The failure of the Bank to show Yap the auditor's report as outlined in paragraph 6 above, and the withdrawal or rejection of some of the charges in the affidavit pertaining to fraud before Panton J., were features which were sufficiently

cogent to persuade Karl Harrison J. that on a proper exercise of his discretion these factors should be accorded due weight. When these features were coupled with the failure to prove the remaining issues save one before Panton J, there ought to have been no hesitation to accede to the prayer in the summons filed. An extract from the judgment of Panton J. at page 203 of the record makes a telling point against the probity of Scott. It reads:

> "Mr. Scott's signature on page 119 of Ex. 1 is damning, in my view, to the plaintiff's cause. It speaks of non-disclosure and non-dissemination of trade secret information in the future. Signing this document along with Mr. Scott were representatives of three telemarketing companies that were to feature heavily in the activities of the plaintiff over the next few months. This document is dated March 17. One should never forget that the important executive meeting was held, according to Mr. Scott, in February. So, what good reason would Mr. Scott have for signing this document in March? His explanation about the need for 'testing' by the defendant is unacceptable. <u>This explanation is, in my view, a clear attempt to send the Court in the wrong direction. It is a feint. Mr. Scott appears to know much more than he wished to impart."</u> (Emphasis supplied)

The writ which was before Reid J, then before Theobalds J, as well as before this Court on the Mareva appeal was of some importance. It reads in part:

> "...claim...for:
>
> 1. Damages for breach of contract of employment
>
> 2. Further and/or in the alternative, damages for conspiracy
>
> 3. Further and/or in the alternative, damages for deceit
>
> 4. Further and/or in the alternative, damages for negligence.
>
> ..."

The serious charges of conspiracy and deceit failed before Panton, J.

In his reasons for refusing to order an enquiry, and assessment of damages the learned judge below relied heavily on the judgment of this Court, (Rattray P; Forte, Downer JJA) at pages 103-154 of the Record. What was lacking in those reasons was a proper analysis of the Court of Appeal's judgment considered against the findings of Panton J. Here is how the learned judge treated the comparison. At page 216 of the Record he quoted the following passage from the judgment of Panton J:

> "I find that in relation to the FTA arrangements the defendant was neither negligent nor in breach of contract. He did not conspire with anyone, nor did he commit the tort of deceit. There is no false statement that was made by him, intending for the plaintiff to act on it, which has resulted in the plaintiff acting thereon and suffering loss. As said earlier, the activities in relation to the account in Chicago were the result of the contract that the plaintiff knowingly made, under legal advice with FTA, coupled with the fraudulent behaviour of Mr. Palmer and the laxity of those who were in charge of the plaintiff's finances."

So these very important parts of the allegation in Scott's affidavit were not proven. This aspect of the case was crucial to the grant of the Mareva injunction which froze Yap's assets amounting to US$400,000.

Then Karl Harrison J, referred to the findings of Panton J. against Yap at page 216 of the record thus:

> "The second heading in the learned judge's findings dealt with Telemarketing. He made certain findings as to the re-opening of certain accounts. He said finally:
>
> > 'In my judgment, the re-opening of LMP Marketing and the opening of Worldwide marketing constituted a breach of the defendant's contract of employment with the plaintiff. This was clear defiance of the plaintiff's policy. It follows that the defendant is liable for the losses sustained by the plaintiff from this breach. In the case of Worldwide Marketing Ltd. he is liable for the loss recorded at page 507 of Ex. 2 that is, US

> $106,226.04. In respect of LMP Marketing, if I understand the chart at page 507 there does not appear to have been a loss to the plaintiff, in any event, no loss was pleaded.
>
> In the circumstances as I find them, the defendant has also committed the tort of negligence. However, I agree that where there is the protection of a contract, it is impermissible to disregard the contract and allege liability in tort'."

Then the learned judge below continued his analysis of the judgment of Panton J. thus at page 217 of the record:

> "This is how the learned trial judge summarized his written judgment:
>
> > 'I find that the defendant has incurred no liability so far as the FTA issue is concerned. He is also not liable in respect of the telemarketing accounts prior to July 6, 1993. However, he committed a breach of his contract of employment in opening the account in the name Worldwide Marketing Ltd., and is liable in respect of the losses arising therefrom. Accordingly, judgment is entered for the plaintiff for US$106,226.04. Interest is awarded at the rate of 12% per annum from June 30, 1994. Costs to the Plaintiff are to be agreed or taxed'."

Further, in examining the judgment of this Court in restoring the Mareva injunction, Karl Harrison J. emphasized the preponderant role of fraud in the reasons of the Court of Appeal.

He proceeded thus at page 217 of the record:

> "...This is how the Court of Appeal made reference to the issue of fraud, Rattray P, having examined the affidavit of Ewart Scott, the acting General Manager of the Bank, he stated inter alia, at page 10
>
> > 'A scrutiny of the defendant's activities, if accepted at the hearing will:
> >
> > 1. Establish a strong inference which can legitimately ground the belief of the plaintiff as stated in paragraph 14 "that the defendant is likely

> to remove or otherwise deal with those assets in such a manner as to frustrate any judgment which may be awarded against him, unless restrained by the Court."
>
> 2. Taken with the other allegations and for the purpose of meeting the "risk" criteria, provide "direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. [**Ninemia** (supra) 406]
>
> These are the factors which the plaintiff relies upon to discharge the burden placed upon it to satisfy the judge of the existence of "a good arguable case" as well as the probability or risk.
>
> It must be kept in mind that this action is based upon allegations of fraud and the question of probity of the defendant is therefore very material'.

Then at page 14 of the judgment the learned President stated:

> 'The defendant placed in a position of heightening the awareness of the plaintiff and calming its fears by disclosing some of his other assets is merely content to rely on a statement that he has "substantial assets in Jamaica". This in my view is very unsatisfactory, particularly within the forum of a jurisdiction in equity and an allegation by the plaintiff of fraud'...".

Referring to the reasons given by Forte J.A. (as he then was) the learned judge said:

> "Forte J.A. expressed himself as follows:
>
> 'On the evidence as a whole, can there be a conclusion that there was a good arguable case? The plaintiff alleges that the respondent, while an employee of its Bank, conducted himself in circumstances which amounted to either a fraudulent or negligent treatment of its funds resulting in loss of an amount of about US400,000.00. In my view the content of the respondent's affidavit and in particular his general denial in the face of an allegation of fraud made against him does not displace the inferences arising in the evidence of the appellant, which clearly discloses a good arguable case'."

Then in examining the judgment of Downer, J.A. the learned judge said at pages 218-219 of the Record:

> "Downer J.A. in his judgment referred to the defendant's responsibility in relation to the credit card operations and what the Bank stated were improper credit card relationship worldwide with Telemarketers. Then he said:
>
> > 'The other allegation was that as a manager, he conspired with others to set up a fictitious office to defraud the Bank of its funds. These allegations also suggest that there may have been a "fraudulent breach of fiduciary duty'."

It cannot be denied that fraud was the dominant issue in this Court in the Mareva appeal. As regards the lesser charge of breach of contract, Rattray, P. and Forte, J.A. referred to it by implication. Here are the passages which tell their stories. Rattray P., stated at page 111 of the record:

> "The action brought by the plaintiff is based upon breach of contract of employment, conspiracy, deceit and negligence. The defendant held a high position of trust in the plaintiff's Bank. The evidence identified in paragraphs 1-7 of the affidavit of Ewart Scott, the Acting Managing Director of the plaintiff bank meets the threshold requirement and merits consideration as to whether a good arguable case exists on the plaintiff's behalf. The plaintiff has stated the unauthorized actions of the defendant which were either fraudulent or grossly negligent and from which the plaintiff maintains it has suffered the damage referred to in the endorsement to the writ of summons filed in the suit on which the application for the interlocutory relief has been made. The letter of termination of employment of the defendant exhibited as "ES 1" states potential financial losses by the Bank attributable to the acts or defaults of the defendant of up to US$695,710.89."

To reiterate for emphasis Forte, J.A. stated at page 135 of the record:

> "On the evidence, as a whole, can there be a conclusion that there was a good arguable case? The plaintiff alleges that the respondent, while an employee of its Bank,

> conducted himself in circumstances which amounted to either a fraudulent or negligent treatment of its funds, resulting in loss of an amount of about US$400,000. In my view the content of the respondent's affidavit and in particular his general denial in the face of an allegation of fraud made against him does not displace the inferences arising in the evidence of the appellant, which clearly discloses a good arguable case."

The contribution of Downer, J.A. on this lesser charge ran thus at p. 144:

> "The affidavit before Reid J was crucial to determine if the learned judge was justified in granting the Mareva injunction. The deponent Ewart Scott was the acting managing director of the Bank. As such he had access to its records. In detailing the misconduct of Yap, he specified the reasons for suspecting Yap of impropriety. Here is how he outlined it:
>
> '5. As a result of queries raised by Visa International and Master Card International, the Bank conducted a thorough internal investigation and this investigation has so far revealed among other things, that:-
>
> (a) The Defendant completely disregarded several bank guidelines in setting up and managing the credit card operations;
>
> (b) The Defendant circumvented instructions from the Bank to terminate the processing of such transactions; (Emphasis supplied)
>
> (c) The Defendant withheld information pertaining to the operation of this service from the Executive management personnel of the Bank'."

In concluding, I said in part at page 154 of the Record:

> "...Since there are allegations of fraud against Yap, and his bank accounts are frozen, it would be in the interests of justice that there be an order for a speedy trial."

The interpretation I put on this passage was that because of the allegations of fraud in the affidavit, a speedy trial was warranted. This was not meant to ignore the specific charge in paragraph 5 of Scott's affidaviiit which was previously cited.

This lesser charge was the charge on which Panton, J. found in favour of the Bank at the trial. Reference has been made to these passages to demonstrate that although fraud was the dominant theme in the Mareva appeal the allegation of breach of contract was acknowledged by all three judges. Three judgments instead of one is the preferred way of the common law and its superiority was demonstrated in this instance.

Lord Reid had some pertinent words on this issue in **Cassell & Co. Ltd., v Broome** 1972 1 All E.R. 801 at 835-836 which run thus:

> "The very full argument which we have had in this case has not caused me to change the views which I held when **Rookes v Barnard** [1964] 1 All ER 367, [1964] AC 1129 was decided or to disagree with any of Lord Devlin's main conclusions. But it has convinced me that I and my colleagues made a mistake in simply concurring with Lord Devlin's speech. With the passage of time I have come more and more firmly to the conclusion that it is never wise to have only one speech in this House dealing with an important question of law. My main reason is that experience has shown that those who have to apply the decision to other cases and still more those who wish to criticize it seem to find it difficult to avoid treating sentences and phrases in a single speech as if they were provisions in an Act of Parliament. They do not seem to realize that it is not the function of noble and learned Lords or indeed of any judges to frame definitions or to lay down hard and fast rules. It is their function to enunciate principles and much that they say is intended to be illustrative or explanatory and not to be definitive. When there are two or more speeches they must be read together and then it is generally much easier to see what are the principles involved and what are merely illustrations of it."

Lord Hailsham also had some pertinent words on this issue. They were as follows at page 821:

> "...Moreover, as I shall show, many of Lord Devlin's statements in **Rookes v Barnard** [1964] 1 All ER 367, [1964] AC 1129 have been misunderstood, particularly by

> his critics, and the view of the House may well have suffered to some extent from the fact that its reasons were given in a single speech. Whatever the advantages of a judgment of an undivided court delivered by a single voice, the result may be an unduly fundamentalist approach to the actual language employed. Phrases which were clearly only illustrative or descriptive can be treated in isolation from their context, as being definitive or exhaustive. I am convinced that this has happened here and that to some extent at least, the purpose and nature of Lord Devlin's exposition has been misunderstood."

To my mind, the learned judge below erred in the following passage in his judgment at page 220 which reads:

> "It is my considered view therefore, that although fraud was one of the issues at the trial, it was not the primary one. I also hold, that the plaintiff's failure to establish fraud on the part of the defendant did not mean that there was no merit in its case and for that reason the injunction ought not to have been granted. The plaintiff's success at trial in respect of the breach of contract of employment is an indication to me, that it did have a good arguable case. As a matter of fact when the matter came before the Court of Appeal this is how Forte J.A. expressed himself:
>
> '...In my view the content of the respondent's affidavit and in particular his general denial in the face of an allegation of fraud made against him does not displace the inferences arising in the evidence of the appellant which clearly discloses a good arguable case'.
>
> In the circumstances, I must say that I was not persuaded with the arguments and submissions made on behalf of the defendant. On the other hand, I am constrained to accept the submissions made by Mr.McDonald."

That there was a good arguable case on the issue of breach of contract as adumbrated in Scott's affidavit and found by Panton, J. cannot be denied. However, the Mareva injunction froze assets for US$400,000 for specific fraudulent conduct. This was a different injunction altogether from one which would have frozen US$106,226.04, assuming that a case pleaded for breach of contract alone would

have persuaded Reid, J. and this Court to grant a Mareva injunction for that amount. Such a case pertaining to contract alone, was never envisaged in the Scott affidavit or the Writ of Summons and the reasoning and conclusion which the learned judge below advanced in the above passage was without warrant. The assumption was that the evidence of fraud and conspiracy in the affidavit could have been severed from the breach of contract and that an injunction freezing US$400,000 was in substance the same as one freezing US$106,226.04. The authorities will demonstrate that the learned judge's assumption is not quite correct. Another approach by the appellant Yap which would have achieved the same result of setting aside the order made below would be to say that an injunction which froze US$ 400,000 was manifestly excessive. In this case also, the Mareva injunction would have been wrongly sought and wrongly issued. It should be borne in mind that he who seeks equity must do equity. The Bank should have reminded itself of this maxim when it sought the Mareva injunction.

A significant feature of this appeal must be the recognition that Scott misled the Court in the Mareva proceedings. It was the equitable jurisdiction of the Court which was invoked and on that basis alone the injunction ought not to have been sought, and now that the truth is known it ought not to have been granted. Mr. Goffe, Q.C. cited **Stephen Hill et al v. Maurice Croisan** Suit No. C.L. H152 of 1983 delivered 18th October 1983 and **Wheelabrator Air Pollution Control v. F.C. Reynolds** SCCA No. 91/94 delivered 13th March, 1995 to demonstrate that a Mareva injunction may be issued where a breach of contract is the sole cause of action. That proposition is correct. But it does not meet the situation in this case, where apart from the charge relating to the breach of contract, the preponderance is of the alleged fraud and conspiracy in the affidavit. Moreover, the Endorsement on the Writ, made a

claim in deceit. Such allegations if not proved may result in aggravated or even exemplary damages, when the injunction is discharged and there is a claim for an enquiry and assessment of damages.

The authorities which ordain how this Court should exercise its discretion

At the outset it should be stated that there are no special circumstances in the instant case which would preclude the exercise of the discretion to order an enquiry and assessment of damages in this case. The following passage from **Cheltenham** (supra)explains such circumstances. It reads at page 287:

> "There are only a few reported decisions on what constitute special circumstances. If the respondent delays unduly in seeking an inquiry as to damages, he may be refused **(Smith v Day** (1882) 21 Ch D 421, **Re Wood, ex p Hall** (1883) 23 Ch D 644). In the Canadian case of **Hessin v Coppin** (1874) 21 Gr 253 an interlocutory injunction, with the usual undertaking in damages, had been granted on the basis of the validity of a patent, but a motion to continue the injunction was dismissed when the patent was found to be invalid. On an application for an inquiry as to damages, Blake V-C exercised his discretion against granting the inquiry, saying 'I do not think the conduct of the defendants presents so meritorious a state of facts as compels me to grant the inquiry asked' In **Modern Transport Co. Ltd v Duneric Steamship Co** [1917] 1 KB 370 at 380 Swinfen Eady LJ said that inequitable conduct by the defendant constituted special circumstances such that no inquiry as to damages was to be granted even if the claim for an injunction could not be sustained at the trial; but that was a case where he held that the plaintiffs were justified in applying for an interlocutory injunction. In **Upper Canada College v City of Toronto** (1917) 40 OLR 483 the court in refusing to order an inquiry as to damages on an undertaking given on the grant of an interlocutory injunction discharged at the trial, had regard to a number of circumstances including the good faith of the plaintiffs and the fact that no costs were awarded against them when the action was dismissed. **In A-G for Ontario v Harry** (1982) 35 OR 248 a factor taken into account by the court in refusing to enforce an undertaking as to damages, notwithstanding the discharge at the trial of the interlocutory injunction,

> was the inequitable conduct of the defendants. These cases support the general words of Turner LJ in **Newby v Harrison** (1861) 3 De GF & J 287 at 290, 45 ER 889 at 890: '... there may be cases in which the court will not consider it just to enforce an undertaking, though the jurisdiction to do so exists'."

In **Griffith v Blake** (1884) 27 Ch. D. 474 Baggallay, L.J. said at 476:

> "...This injunction was obtained by the Plaintiffs on the usual undertaking as to damages, and if it turns out that the injunction ought not to have been granted, the Defendants will get full compensation by means of the undertaking for the temporary damage they will have sustained."

Cotton, L.J. was of the same view. He said at 477:

> "...and that the rule is, that whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be granted unless there are special circumstances to the contrary."

In the earlier case of **Graham v Campbell** (1878) 7 Ch. D. 490 James, L.J. expressed a similar view at 494-495 thus:

> "As to the other subject of appeal, the inquiry as to damages, we think the Defendant **Campbell** is clearly entitled to have all damage sustained by him by reason of the injunction. The undertaking as to damages which ought to be given on every interlocutory injunction is one to which (unless under special circumstances) effect ought to be given. If any damage has been occasioned by an interlocutory injunction, which, on the hearing, is found to have been wrongly asked for, justice requires that such damage should fall on the voluntary litigant who fails, not on the litigant who has been without just cause made so. In this case we should therefore have granted the Defendant **Campbell** the inquiry he asks for as to damages. But as the legal wrong which he has suffered was being kept many months out of his money, and as the law does not regard collateral or consequential damages arising from delay in the receipt of money, it is not right to direct an inquiry on a matter on which we can satisfy ourselves. He is entitled to interest at 5 per cent. curing the delay, minus any interest he may have made, and we will take his affidavit verifying that amount."

The case of **Financiera Avenida SA v Shiblaq** reported in The Times Law Reports, January 14, 1991, demonstrates that the assets frozen are a significant part of the definition of the Mareva injunction. The following passage is to be found in the Transcript taken from the Internet [1990] E.W.J. No. 224 Wednesday, 7th November, 1990. Lloyd, L.J. stated at the following paragraphs:

> "7 On 2nd June 1983 the plaintiffs issued the writ in these proceedings. They claim sums of money amounting in all to over three-and-a-half million dollars. They say that those sums have been retained by Mr. Shiblaq in breach of trust. On the same day that they issued their writ they applied for and obtained a Mareva injunction. The affidavit in support of the application for an injunction was sworn by a Mr. Brister, a solicitor with Messrs. Linklaters & Paines. Mr. Brister identifies four particular sums which make up the total claim: US$70,050 paid on 4th December 1979, US$ 1 million paid on 10th January 1980, US$ 1 million paid on 29th February 1980 and US$ 1.5 million paid on 18th March 1980.
>
> 8. In paragraph 13 of his affidavit Mr. Brister says:
>
> > 'In the light of the circumstances in which Financiera's funds appear to have been misappropriated by Mr. Shiblaq, those acting on behalf of Financiera are gravely concerned that, unless restrained by this honourable court, once Mr. Shiblaq learns of the issue of the present proceedings he will take immediate steps to remove his assets, and in particular funds obtained by him from Financiera, out of the jurisdiction or otherwise seek to dispose of them'."

Then as to paragraph 10, His Lordship continues thus:

> "10. In paragraph 2 of the injunction it was ordered:
>
> > 'That the Defendant, whether by himself his servants or agents or otherwise howsoever be restrained until further order from causing or permitting any of the sums of US$70,050, US$ 1,000,000, US$ 1,000,000 and US$ 1,500,000 paid to him on or about 4th December 1979, 10th January 1980, 29th February 1980 and 18th March 1980 respectively or any property or

> other assets wherever situate which now directly or indirectly represent the sane (sic) or any part thereof from being sold, dealt with or otherwise disposed of in any manner whatsoever.'
>
> 11. On 10th June there was an application to set aside the injunction. The application failed. On 20th July 1983 Mr. Shiblaq was asked to resign, and did resign, from his appointment as an account executive with the firm of E.F. Hutton & Co.,
>
> 12. On 11th November 1985 the case came on for trial before Mr. Justice Saville in the Commercial Court. It lasted many days. On 14th February 1986 he gave judgment. Of the four items referred to specifically in the injunction, the plaintiffs failed on two, and two were not pursued. But they succeeded on three further claims which had been added by amendment in May 1985, long after the injunction had been granted. On 9th August 1986 judgment was entered in favour of the plaintiffs for the sum of $366,847 plus interest.
>
> 13. On 17th October 1986 there was a hearing as to costs. The learned judge took the view that the plaintiffs ought to bear a large proportion of their costs. It had been suggested that the appropriate proportion was 7 per cent. In the event the judge ordered that the plaintiffs recover 30 per cent of their Costs. But he made a special order with regard to the costs of the Mareva injunction. Since the application for the Mareva injunction had been mounted on the basis of claims which were either abandoned or decided against the plaintiffs, the judge held that the defendant should have his costs of the Mareva application." (Emphasis supplied)

Implicit in paragraph 28 are the reasons which accord with the analysis in this judgment. It runs thus:

> "28 Finally it was argued that, on Mr. Shiblaq's own evidence, he was ready to take up his job again as soon as the judge had given judgment in February 1986. This shows, it was said, that it was the Litigation which was the cause of his losing his job and not the injunction. But there is not the slightest reason to suppose that when Mr. Shiblaq gave that answer he had the possibility of a continuing injunction in mind, and in any event it would not have been the same injunction based on the four sums

> identified in Mr. Brister's affidavit, but a different injunction in a much smaller amount based on different sums."(Emphasis supplied)

Another case which illustrates that the sum frozen is an essential feature of the Mareva injunction is **Third Chandris Shipping Corporation and others v Unimarine SA** [1979] 2 All ER 972. In giving guidelines Lord Denning MR said at page 984:

> "(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 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."

Then **Barclay's Bank plc v Illingworth and Another** the judgment of the Court of Appeal delivered 10 May 1985, the Lexis transcript is a case which illustrates the circumstances which warrant an enquiry and assessment of damages. The relevant passages at page 5/7 run as follows from the judgment of Kerr LJ.

> "Sir Neil accepted the defendants' submissions that the Mareva injunction had been obtained quite improperly, as I have already mentioned. I need say no more about that. He ordered an inquiry as to damages and discharged it."

Then in ordering an enquiry and assessment, Kerr LJ. said at page 6/7:

> "Similarly, there could be an issue as to whether it is proper, for the reasons that I have indicated, to raise the claim for damages in relation to the Mareva injunction as a cross-claim in the pleadings or in some other way. However, what is agreed between the parties, very sensibly – and if it had not been agreed, I would have made an order to that effect – is that all these matters, including the inquiry as to damages on the Mareva, should come on for hearing at the same time so that they can all be considered together."

The context in which the enquiry and assessment of damages was made may be understood from the opening paragraph of the judgment which reads thus at page 2/7:

> "Kerr LJ: This is an appeal against a judgment given by Sir Neil Lawson, sitting as a Deputy High Court Judge, on the 19th February of this year. He ordered that the plaintiff bank recover L870,837.20 less L1,400.22, the deduction being irrelevant for present purposes, by way of summary judgment under Order 14. At the same time, he discharged a Mareva injunction which the plaintiffs had obtained improperly ex parte against the defendants and ordered an inquiry as to damages against the plaintiffs, pursuant to the plaintiffs undertaking in the order for the Mareva injunction.
>
> In view of that inquiry as to damages, the learned judge granted a stay of execution on the Order 14 judgment to the extent of L150,000. The defendants now appeal against that judgment. Their primary submission is that there should be unconditional leave to defend, but if not, then there should be a stay of execution on the judgment to the full amount and not limited to L150,000."

Here is how Kerr LJ put the bases for the Mareva injunction at page 5/7:

> "Unfortunately – and I say as little about this as possible—the affidavit supporting the application for that injunction was riddled with errors and conveyed what appears to have been a wholly false and highly damaging impression of the defendant's business. There is an issue as to whether that was done deliberately in order to deceive the court, as the defendant suggests, or whether it was simply based on very erroneous information. It appears from the evidence before us that the bank had evidently reported matters about the defendants to the police or had received information from the police. Police investigations followed without Mr and Mrs Illingworth ever having been involved in any criminal matters or police investigations before. Thereafter the bank and Mr and Mrs Illingworth were informed that the police did not intend to proceed with the matter." (Emphasis supplied)

If the emphasized words were to be a finding on assessment it would seem Kerr L.J. would have applied the statement of principle by Brett L.J. in **Smith v. Davy**

which will be adverted to hereafter. Equally, the learned Lord Justice may have had in mind the exceptional circumstances which relates to a banker's refusal "to honour a cheque when he has funds in hand for a trader". This was acknowledged by every Law Lord in **Addis v. Gramophone Co. Ltd.** [1909] A.C. 488 - at p. 491 by Lord Loreburn; p. 492, by Lord James; p. 495, by Lord Atkinson; p. 497, by Lord Collins; p. 502 by Lord Gorrel and p. 505 by Lord Shaw. The acknowledgement was either expressly stated or acknowledged by implication, by the express agreement with the speech from the woolsack. The principle was expounded with clarity in **Wilson v United Counties Bank Ltd.** [1920] A.C. 102 at 112. Lord Birkenhead L.C. said:

> "The objection was taken by the defendants that this finding of the jury cannot be supported without proof of special damage. In deciding this point, I do not lay down a rule of general law, but I deal with the exceptional language of an exceptional contract. The defendants undertook for consideration to sustain the credit of the trading customer. On principle the case seems to me to belong to that very special class of cases in which a banker, though his customer's account is in funds, nevertheless dishonours his cheque. The ratio decidendi in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, with allegation of special damage, reasonable compensation for the injury done to his credit. The leading case upon this point is that of **Rolin v. Steward** 14 C.B. 595. The direction of Lord Campbell to the jury has been generally accepted and treated as an accurate statement of the law. If it be held that there is an irrebuttable presumption that the dishonour of a trader customer's cheque in the events supposed is injurious to him and may be compensated by other than nominal damages, the conclusion would appear to follow almost a fortiori that such damages may be given where the defendant has expressly contracted to sustain the financial credit of a trading customer and has committed a breach of his agreement."

At page 134 Lord Atkinson approving the decision of Williams J. in **Marzetti v. Williams** (IB. & Ad. 427) quoted him thus:

> "I think it cannot be denied, that, if one who is not a trader were to bring an action against a banker for dishonouring a cheque at a time when he had funds of the customer's in his hands sufficient to meet it, and special damage were alleged and proved, the plaintiff would be entitled to recover substantial damages. And, when it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury, in estimating the damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract: just as in the case of an action for a slander of a person in the way of his trade, or in the case of an imputation of insolvency on a trader, the action lies without proof of special damage. It may be that the existence of this apparently indisputable presumption that the dishonour of a trader's cheque under the circumstances mentioned is necessarily injurious to him as trader, is the special feature which distinguishes this class of cases from others and makes them exceptional."

Then Lord Parmoor at page 140 said:

> "No evidence, however, was given of any actual damage, and the question arises whether in such a case general damages can be considered. On the whole, this case appears to me to come within the same category as when a banker having funds to meet a customer's cheque dishonours his draft, and where the amount ascertained of actual damages could not be, as estimated in money, a fair satisfaction for the wrong which the appellant Wilson has suffered consequent on the breach of duty by the respondent bank."

To my mind, the affidavit evidence of Yap and James Chan at pages 12-19 and 84-85 and 89-90 of the Record which states that Yap's drafts were not met when presented to the Miami branch of the Bank was sufficient to warrant an order for assessment of damages. The funds to meet those drafts were frozen by the Mareva injunction which was improperly sought.

As for the assets which the Mareva injunction in **Barclays Bank plc.** froze, here is how Kerr LJ. put it at page 4/7 of the transcript:

> "I now turn to the history of the proceedings. On the 29th June the plaintiff issued their writ for L89,000 odd, which was the debit balance on the No. 1 account at that date, as a result of the many cheques which had been dishonoured or stopped and the accumulation of interest. At present, there appears to be no dispute that, as a matter of arithmetic, that was correct. However, the plaintiffs did not serve that writ then because they wished to obtain ex parte a Mareva injunction against the defendants. This is a further unusual feature in this case, although it is quite usual that if one is going to apply for a Mareva, this is done before the writ is served in order not to alert the defendants. On the 4th July, 1984, the plaintiffs applied for a Mareva injunction preventing Mr and Mrs Illingworth from dealing with any of their assets within the jurisdiction, save and in so far as they amounted to more than the sum for which the writ was issued, which was, of course, fanciful in the sense that Mr Illingworth had no such assets. They obtained the injunction from Mr Justice Beldam ex parte." (Emphasis supplied)

Then to reiterate the learned judge ruled as follows at page 6/7:

> "Similarly, there could be an issue as to whether it is proper, for the reasons that I have indicated, to raise the claim for damages in relation to the Mareva injunction as a cross-claim in the pleadings or in some other way. However, what is agreed between the parties, very sensibly – and if it had not been agreed, I would have made an order to that effect – is that all these matters, including the inquiry as to damages on the Mareva, should come on for hearing at the same time so that they can all be considered together."

Then under the caption Dispositon the learned judge stated in part at page 7/7:

> "... There are to be two stages of pleadings; one for the action and one for the Mareva inquiries."

Here again the Mareva injunction was for a specific sum. However, it was found to have been obtained improperly and so the discretion to proceed to assessment for damages was granted as a matter of course.

It was in the light of the foregoing analysis, that this Court ordered an enquiry and assessment of damages at the conclusion of the hearing. So the order below had to be set aside. The authorities emphasise the sharp distinction between such damages which result from the issue of the injunction and those arising from the litigation. As for the issue of damages there is as yet no binding authority on the issue of exemplary damages in instances of the Mareva injunction.

Guidelines for the Supreme Court

To reiterate, at the conclusion of this hearing an order was made for the enquiry into and assessment of damages in terms of the summons, but no "directions as to pleadings and discovery at the enquiry" were given. Because of the importance and novelty of these proceedings in this jurisdiction, it seems prudent to give some guidelines before ordering the necessary directions. The learned judge below in conducting a hearing is concerned with causation and assessment. Lord Diplock provided a useful starting point on the basis on which an assessment is to be made on undertakings, as to damages in **F Hoffman La Roche & Co. AG and others v Secretary of State for Trade and Industry** [1974] 2 All ER 1128. At 1150, Lord Diplock said:

> "The court has no power to compel an application for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts; but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so; but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is

> made on the same basis as damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant, that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction. (See **Smith v Day** (1882) 21 CH D 421 at 427 per Brett LJ.)

In the light of this passage it is obligatory to refer to the relevant passage in **Smith v Day.** It reads:

> "Brett L.J. at pp 427-428 said:
>
> > 'Again, I am strongly of opinion that the question whether an inquiry as to damages should be granted is within the discretion of the Judge who originally tries the case, and that his discretion ought not lightly to be interfered with. In exercising this discretion the Court should act as nearly as may be on fixed rules, or by analogy to fixed rules. Now in the present case there is no undertaking with the opposite party, but only with the Court. There is no contract on which the opposite party could sue, and let us examine the case by analogy to cases where there is a contract with, or an obligation to the other party. If damages are granted at all, I think the Court would never go beyond what would be given if there were an analogous contract with or duty to the opposite party. The rules as to damages are shewn in **Hadley v. Baxendale**(1854) 9 Exch. 341 [156 E.R. 145]. If the injunction had been obtained fraudulently or maliciously, the Court, I think, would act by analogy to the rule in the case of fraudulent or malicious breach of contract, and not confine itself to proximate damages, but give exemplary damages. In the present case there is no ground for alleging fraud or malice. The case then is to be governed by analogy to the ordinary breach of a contract or duty, and in such a case the damages to be allowed are the proximate and natural damages arising from such a breach, unless as in **Hadley v. Baxendale,** notice had been given to the opposite party, of there being some particular contract which would be affected by the breach. This doctrine of notice has introduced some difficulty into these cases, and it is not settled what sort of notice is sufficient. Here an alleged agreement for a lease is relied on. In the first place I

> do not think the existence of such agreement proved. If it did exist, the next question is, whether the injunction so interfered with the erection of the buildings as to entitle the tenant to throw up the agreement. I am not satisfied that it did. But assume that it did, and that the agreement was broken in consequence of the injunction, still I agree with the Vice-Chancellor in thinking that the breach is not by reason of the injunction, but is a consequence too remote to be regarded. If any one obtains an injunction preventing another from proceedings with a building, he must be taken to have notice of everything in the building contract and all liabilities which the person stopped incurs to his contractor by reason of the stoppage, are a natural and immediate consequence of the injunction. But the fact that the injunction prevents the carrying out of an entirely independent agreement as to the property is too remote'." (Emphasis supplied)

It should be noted that Brett L.J. saw damages which would fall due on a breach of contract to be the same as that which would be assessed for liability in tort. Additionally, he equated those damages which included exemplary damages- as appropriate when there was an enquiry and assessment of damages in the circumstances of the instant case.

To appreciate the historical evolution of the undertaking as to damages recourse must be had to the following part of the speech of Lord Diplock in **Hoffmann-La Roche v Sec. of State** (supra) at pages 1149-1150. It runs thus:

> "The practice of exacting an undertaking as to damages from a plaintiff to whom an interim injunction is granted originated during the Vice-Chancellorship of Sir James Knight Bruce who held that office from 1841 to 1851. At first it applied only to injunctions granted ex parte, but after 1860 the practice was extended to all interlocutory injunctions. By the end of the century the insertion of such an undertaking in all orders for interim injunctions granted in litigation between subject and subject had become a matter of course."

Mareva Injunctions and Anton Piller Relief by Steven Gee Q.C. 4th edition at 151, suggests the practice originated earlier in the 19th century. So equity had resorted to the remedy of damages long before Lord Cairns Act. It is therefore appropriate to speak of equitable damages.

As regards the special case of the damages which may accrue from the wrongful issue of a Mareva injunction because the evidence on which it was based turned out to be not true, Neil LJ states the position thus at page 282 of **Cheltenham:**

> "(8) It seems that damages are awarded on a similar basis to that on which damages are awarded for breach of contract. This matter has not been fully explored in the English cases though it is to be noted that in **Air Express Ltd v Ansett Transport Industries (Operations) Ltd** (1979) 146 CLR 249 Aicken J in the High Court of Australia expressed the view that it would be seldom that it would be just and equitable that the unsuccessful plaintiff 'should bear the burden of damages which were not foreseeable from circumstances known to him at the time'. This passage suggests that the court in exercising its equitable jurisdiction would adopt similar principles to those relevant in a claim for breach of contract."

The significance of the undertaking was explained by North J. in **Attorney-General v Albany Hotel** (1882) 21 Ch.D. 421 at 468:

> "If it should subsequently appear that such an order had been improvidently made, it is difficult to see how, in the absence of such an undertaking, the defendant could recover from the plaintiff the damages which were really sustained by him by reason of the improper order of the Court."

Can there be an Award of Exemplary Damages in this case?

It is in the light of the above formulation that consideration must be given as to whether it is permissible to plead exemplary damages in the circumstances of this

assessment. To reiterate for emphasis in **Barclays Bank v Illingworth**, at page 5/7 Kerr LJ at the interlocutory stage found that "there is an issue as to what was done deliberately in order to deceive the Court as the defendant suggests, or whether it was simply based on very erroneous information." In the instant case there is a clear finding by Panton J. at the trial that Scott, the acting Managing Director, in giving evidence at the trial, attempted to send the court in the wrong direction and that his performance was a feint. An issue to be decided at the assessment of damages is whether such conduct as stated in Scott's affidavit, and reiterated at trial, was deliberate and designed to deceive the Court so as to warrant the rare remedy of exemplary damages.

If it is to be found that exemplary damages are appropriate in this case the learned judge might well find the following words of Lord Diplock in **Cassell & Co Ltd v Broome** at p. 871 useful. They run thus:

> "It should perhaps be pointed out that Lord Devlin did not suggest that in a case which clearly came within a category which justified an award of exemplary damages the jury should be invited to make separate awards in respect of the compensatory and the punitive element, although no doubt a judge sitting alone should do so. It was only in cases where it might be doubtful whether exemplary damages were permissible that he suggested that special verdicts splitting the total award might serve a useful purpose in avoiding the necessity of a new trial in the event of appeal."

A passage by Mustil J., (as he then was) in the **Third Chandris** case, (supra) gives useful guidance as to factors which might be relevant on assessment. The passage reads thus at page 978:

> "...The whole point of Mareva jurisdiction is that the plaintiff proceeds by stealth, so as to pre-empt any action by the defendant to remove his assets from the jurisdiction. This entails that the defendant finds that his

> bank account has been blocked before he has any idea of what is going to happen. This may have extremely serious consequences. Cheques or bills drawn on the account may be presented at a time when adequate funds are available to meet them, and may yet be dishonoured because the injunction inhibits the bank in making payment. Moreover the very secrecy of the procedure deprives the defendant of the opportunity to make a timely alternative arrangement for presentment or payment abroad. This dishonour of the defendant's paper may have disastrous consequences; and all this in a situation where the plaintiff has shown no more than an arguable case. An undertaking by the plaintiff for damages may not always be a sufficient indemnity for the loss the defendant may suffer. Again the blocking of an account may have very serious consequences for a defendant who is dependant on cash flow for his commercial survival. The case of a charterer provides an example. On a rising market the free use of his bank account is of crucial importance. Late payment of hire may lead to the loss of a charter. It is of no consolation to say that he can apply to have the ex parte injunction discharged, if by the time his application is heard the damage may have been done. These problems are not limited to the case where a block is placed on a bank account. The jurisdiction is frequently invoked in cases where the funds consist of a specific item; for example the proceeds of a claim from hull underwriters. This may be locked up for years whilst a court or arbitrator decides whether the plaintiff's good arguable case is in fact sound. In the meantime the defendant may have been forced out of business by an inability to employ his principal asset." (Emphasis supplied)

The modern exposition on exemplary damages was expounded by Lord Devlin in the context of the tort of intimidation in **Rookes v Barnard** [1964] 2 WLR 269 at 328. Speaking generally, he defined the first category of exemplary damages thus:

> "The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category – I say this with particular reference to the facts of this case – to oppressive action by private corporations or individuals. Where one man is more powerful than another it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might, perhaps, be said to be using it oppressively. If he

> uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. It is true that there is something repugnant about a big man bullying a small man and, very likely, the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not, in my opinion, punishable by damages."(Emphasis supplied)

In examining the pre 1964 cases Lord Hailsham in **Cassel v Broome** (supra) gave a salutary guideline thus at page 824.

> "It is this too which explains the almost indiscriminate use of 'at large', 'aggravated' 'exemplary', and 'punitive' before **Rookes v Barnard** [1964] 1 All ER 367, [1964] AC 1129 that the expressions 'aggravated' on the one hand and 'punitive' or 'exemplary' on the other acquired separate and mutually exclusive meanings as terms of art in English law."

When equity awarded damages it was recognized that it would reach areas the common law never knew. Equally, the necessary implication was that it would mould the concept of exemplary damages to circumstances where it was just and equitable to do so. Lord Wilberforce commented on this in **Johnson v Agnew** [1980] A.C. 367, 400 thus:

> "Since the decision of this House, by majority, in **Leeds Industrial Co-operative Society Ltd. v Slack** [1924] A.C. 851 it is clear that the jurisdiction to award damages in accordance with s. 2 of Lord Cairns' Act (accepted by the House as surviving the repeal of the Act) may arise in some cases in which damages could not be recovered at common law: examples of this would be damages in lieu of a quia timet injunction and damages for breach of restrictive covenant to which the defendant was not a party. To this extent the Act created a power to award damages which did not exist before at common law. But apart from these, and similar cases where damages could not be claimed at all at common law, there is sound

> authority for the proposition that the Act does not provide for the assessment of damages on any new basis."

In addition to the passage from Brett LJ. In **Smith v Day** (supra) which is an example of equity adapting the concept of exemplary damages where it was just and equitable to do so, Lord Delvin's formulation can also be adapted to the circumstances of this case. Firstly, to the passage from Brett LJ. It reads:

> "...If the injunction had been obtained fraudulently or maliciously, the Court, I think, would act by analogy to the rule in the case of fraudulent or malicious breach of contract, and not confine itself to proximate damages, but give exemplary damages."

Secondly, as to the application of Lord Devlin's formulation in the context of equitable jurisdiction it could be stated thus; if the respondent Bank either fraudulently, maliciously or inequitably sought and obtained a Mareva injunction which deprived Yap of his constitutional right pursuant to section 18 of the Constitution, to enjoy his property, then when the interlocutory injunctive relief is withdrawn and an assessment of damages ordered it may be open to the court in making its assessment to award exemplary damages. Attorneys-at-Law draft affidavits and as counsel move the Court for injunctions. They are "officers of the Court". As the Court is the judicial arm of government they can be likened to Lord Devlin's "servants of the government".

To this may be added Lord Atkinson's speech in **Addis v Gramophone Co. Ltd.** [1909] A.C. 488 at 495 which reads:

> "There are three well-known exceptions to the general rule applicable to the measure of damages for breach of contract, namely actions against a banker for refusing to pay a customer's cheque when he has in his hands funds of the customer's to meet it, actions for breach of promise of marriage, and actions like that in **Flureau v. Thornhill** (1776) 2 W. Bl. 1078, where the vendor of real estate,

> without any fault on his part, fails to make title. I know of none other."

Even if these categories are closed at common law, equity has enlarged the categories as Brett L.J. stated in **Smith v Day** (supra). The exceptions of which Lord Atkinson speaks were the award of aggravated or exemplary damages for breaches of contract in three instances to which he refers. That the category of exemplary damages at common law are not closed seems to be supported by **Royal Bank of Canada v W. Gott and Associates Ltd.** (2000) 178 DLR 4th 385 according to the case note by James Edelman in Vol. 117, October 2001 of the Law Quarterly Review. Additionally, Lord Collins in **Addis v Gramophone Co.** 1908-10 All ER Rep. 1 at page 7 seems to suggest the damages in **Lord Sondes v Fletcher** 106 E.R. 1396 and **Rolin v Stewart** 139 ER 245 at 248 could have been exemplary. These were contract cases on banking cited in argument. The other Law Lord, Lord Atkinson in **Addis** who addressed this issue in detail thought exemplary damages were not generally available in contract. If the matter is pleaded the learned judge on assessment will have to make a decision in the context of the pleadings, evidence and submissions of counsel who will put contrary arguments and the applicable law.

In this regard perhaps the following statement by Lord Diplock in **Cassell v Broome** [1972] 1 All ER 801at p. 871 ought to be repeated. It reads:

> "It should perhaps be pointed out that Lord Devlin did not suggest that in a case which clearly came within a category which justified an award of exemplary damages the jury should be invited to make separate awards in respect of the compensatory and the punitive element, although no doubt a judge sitting alone should do so."

It emphasizes that in so far as equity recognizes exemplary damages it will not be developed by judges instructing juries but by judges sitting alone.

After completing this judgment in draft, my brother Smith brought to my attention the observations of Scott J (as he then was) in **Columbia Pictures Inc v. Robinson** (1987) 1 Ch. 38 at 87 where the learned judge envisaged exemplary damages pursuant to an undertaking in damages in the context of an Anton Piller order. Additionally, he referred me to **Digital Corp. v Darkerest Ltd** (1984) 1 Ch. 512 at 516 also an undertaking in an **Anton Piller** case where Falconer J. seems to have approved the principle enunciated by Brett L.J. in **Smith v Day** in circumstances which warranted exemplary damages.

Conclusion

I am indebted to Mr. Dennis Goffe Q.C., and Miss Hilary Phillips Q.C., for their helpful submissions in this novel appeal. The assessment will be demanding and it will have important implications for bankers and their clients. Special mention must be made of the promptitude with which both counsel supplied the **Shiblaq** and **Air Express** cases which were requested by this Court. It only remains to give the directions necessary to dispose of this case. The appellant must file his pleadings within 14 days of this judgment, the respondent is accorded 14 days for reply, the assessment is to be conducted by a Supreme Court judge in open Court. The estimated time for hearing is four days. There is an order for speedy trial and there should be an expedited hearing so that if there is an appeal as well as a further appeal to the highest court, it would be possible for it to be heard together with, or consolidated with, the further pending appeal in the substantive action. This would result in a saving in costs. Liberty to apply by either party generally.

WALKER, J.A.:

The question for decision is whether Harrison J exercised his discretion rightly in dismissing the summons of the appellant, Dalton Yap, which prayed for an order for an inquiry as to damages.

On October 8, 1993, the plaintiff, Jamaica Citizens Bank Limited (now Union Bank of Jamaica Limited) (the "Bank") issued the writ in these proceedings. By this process the Bank claimed against the defendant, Dalton Yap, a former employee, for:

> "1. Damages for breach of contract of employment
>
> 2. Further and/or in the alternative, damages for conspiracy.
>
> 3. Further and/or in the alternative, damages for deceit.
>
> 4. Further and/or in the alternative, damages for negligence.
>
> 5. Costs.
>
> 6. Interest
>
> 7. An injunction to restrain the Defendant from disposing of and/or dealing with his assets wheresoever situate in so far as the same do not exceed the sum of US$400,000.00 until judgment."

Subsequently, in an Amended Statement of Claim a further claim for fraud was added. Also on October 8, 1993 the Bank applied for and obtained a Mareva injunction on the order of Reid J and on November 26, 1993 that injunction was discharged by order of Theobalds J.

The next event of note was that the Bank appealed the order of Theobalds J. That appeal was on February 14, 1994 allowed by this Court which restored the order of Reid J granting the Mareva injunction in the following terms:

"On an undertaking being given by the plaintiff or his attorney-at-law:

(1) To abide by any Order of the Court as to damages should the Court hereafter be of the opinion that the Defendant or any third party given notice of this Order have suffered any damages that the Plaintiff ought to pay.

(2) To pay reasonable costs and expenses incurred by any third party given notice of this Order in complying with the same.

IT IS HEREBY ORDERED THAT:

(a) The Defendant be restrained, whether by himself, his servants or agents or howsoever otherwise from disposing of and/or dealing with his assets wheresoever situate in so far as the same do not exceed the sum of US$400,000.00 and in particular from withdrawing or transferring the funds in his accounts at Jamaica Citizens Bank, until judgment or further order herein.

(b) Liberty to the Defendant and any Third party affected by the Order to apply on 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 enforced by any Court of the jurisdiction in which the Defendant's assets are situated and in particular, the Courts of the State of Florida in the United States of America".

The affidavit in support of the application which came before Reid J was sworn by Mr. Ewart Scott, Acting Managing Director of the Bank. In paragraph 6 (e) of that affidavit Mr. Scott deponed as follows:

"6. More specifically, the Defendant between April and August 1993:-

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(e) Authorised payments to the said Telemarketers totalling over US$400,000.00 which authorisation was either fraudulent or grossly negligent."

Further in paragraphs 8-15 of that affidavit Mr. Scott swore:

"8. The Defendant is the holder of two accounts (numbered 400000719 and 100001160) at the branch of the Plaintiff Bank in Miami, Florida, in the U.S.A. Between April and August of this year, various sums were deposited into those accounts, totaling US$412,137.00. The Defendant over the same period withdrew from those accounts US$356,478.00 some by cheque and some by wire transfer to Honk Kong, among other places. There is now a balance of US$84,536.63 in the said accounts. In addition, he has two Certificate of Deposit Accounts containing US$4,761.01 and US$5,229.88, respectively.

9. The Defendant also holds three accounts at the Plaintiff's King Street Branch, which as at today's date, have balances of US$5,136.80, J$411,608.00 and J$60,937.00, respectively.

10. I have been informed by the General Manager of the Plaintiff Bank's Miami Branch, William Hinds, and do verily believe that on the 4th October, 1993, the Defendant instructed the Branch to transfer some of the funds currently standing to his credit in the said accounts to another Bank, and that on the 5th of October, 1993, the Defendant attempted to withdraw some of the funds from these accounts.

11. I am advised by Mr. Loren Edwards, the Manager of J.C.B.'S King Street branch, and verily believe that at approximately 11:00 a.m. this morning, the Defendant called him and indicated that he wished to immediately close all his accounts, both at that branch and at the Miami branch.

> 12. As far as I am aware, and as far as the Plaintiff is aware, the Defendant does not have sufficient assets in this jurisdiction to cover the claim in this action.
>
> 13. As far as I am aware, the only liquid assets of the Defendant against which any judgment made against him could be executed are the funds currently held in the Plaintiff Bank's Miami Branch.
>
> 14. I am of the belief and the Plaintiff is of the belief that the Defendant is likely to remove or otherwise deal with those assets in such a manner as to frustrate any judgment which may be awarded against him, unless restrained by the Court.
>
> 15. In the circumstances, I humbly pray that this Honourable Court may see fit to grant the relief prayed for in the Summons herein."

In due course the case came on for trial before Panton J (as he then was) who after a lengthy hearing found that the defendant Yap was liable to the Bank on a breach of his contract of employment in an amount of US$106,226.04. At this trial the Bank abandoned three of its claims against the defendant and failed to prove others. Furthermore, in his judgment Panton J expressly exonerated the defendant Yap of the Bank's claims of fraud, deceit and conspiracy.

As a matter of record, the Bank appealed the judgment of Panton J and on June 15, 2000 that judgment was reversed by this Court. There is now pending a further appeal from our judgment to Her Majesty in Council.

An inquiry as to damages is an equitable procedure and the Court's discretion whether to order such an inquiry must be exercised in accordance with equitable principles. **Financiera Avenida S.A. v Shiblaq** (1990) CA Lexis Transcript E.W.J. No. 224 was a case, like the present case, in which a Mareva injunction was obtained on the basis of claims which at the trial were either abandoned or failed. In that case the law was stated by Lloyd L.J. (with whom Stocker L.J. and Sir George Waller agreed) thus:

> "Two questions arise whenever there is an application by a defendant to enforce a cross-undertaking in damages. The first question is whether the undertaking ought to be enforced at all. This depends on the circumstances in which the injunction was obtained, the success or otherwise of the plaintiff at the trial, the subsequent conduct of the defendant and all the other circumstances of the case. It is essentially a question of discretion. The discretion is usually exercised by the trial judge since he is bound to know more of the facts of the case than anyone else. If the first question is answered in favour of the defendant, the second question is whether the defendant has suffered any damage by reason of the granting of the injunction. Here ordinary principles of the law of contract apply both as to causation and as to quantum (per Lord Diplock in **F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry** [1974] 2 All ER 1128 at 1150, [1975] AC 295 at 361) ... In a simple case the trial judge may be able to deal with causation and quantum himself as soon as he has exercised his discretion. But in a more complicated case it may be necessary for him to order an inquiry as to damages either before himself, or before some other judge or before the master or registrar. Very occasionally he may find it necessary to leave over the exercise of the discretion."

Applying these principles of law to the present case, Harrison J was duty bound to consider all the circumstances of the case that was before him. These circumstances necessarily included the findings of Panton J as those findings related to, and impacted on, all aspects of the grant of the Mareva injunction. One such aspect would have been the extent to which Mr. Yap was restricted by the injunction in the use of his money and assets (US$400,000.00) when compared with the amount of Mr. Yap's liability (US$106,226.04) as found by the trial judge. The findings of Panton J were, in fact, all in favour of Mr. Yap, except for a single instance of a breach of his contract of employment with the Bank which accounted for the final judgment in favour of the Bank. Quite significantly, as it seems to me, Panton J found in favour of Mr. Yap on the Bank's claims of fraud, deceit and conspiracy. Harrison J appears to have come to his

judgment on the basis only that the Mareva injunction was justified on the grounds that it was mounted on evidence [in Scott's affidavit] which showed that the Bank had a good arguable case against Mr. Yap and that there was a risk of dissipation of Mr. Yap's assets. This is what Harrison J said in his judgment:

> " The evidence presented, also reveal that material facts, including the defendant's contract of employment, were put before Reid J for the grant of the Mareva injunction. It is quite evident that the learned Judge in making the order was satisfied that the Plaintiff had a good arguable case and that there was a risk that if the defendant was not restrained, he would deal with his assets in such a manner that any judgment which the plaintiff obtained might be unsatisfied.
>
> It is my considered view therefore, that although fraud was one of the issues at the trial, it was not the primary one. I also hold, that the plaintiff's failure to establish fraud on the part of the defendant did not mean that there was no merit in its case and for that reason the injunction ought not to have been granted. The plaintiff's success at trial in respect of the breach of contract of employment is an indication to me, that it did have a good arguable case."

For a start it accords with commonsense that a plaintiff may have a good arguable case on facts which do not justify the grant of a Mareva injunction. In approaching the matter in the way he did Harrison J failed to take due account of the conduct of the Bank at the trial, and in the process appears to have overlooked the fact that at the trial the Bank abandoned certain of its claims on the basis of which the injunction was obtained, and failed to prove others, notably the Bank's claims of fraud, deceit and conspiracy. Furthermore, it is apparent that Harrison J gave no consideration to the wide disparity between the extent to which Mr. Yap's assets were frozen (US$400,000.00) and the extent of Mr. Yap's liability (US$106,226.04) as found by Panton J. As to this aspect of the matter I do not say that in any case in applying for a Mareva injunction a plaintiff

should determine with mathematical precision the extent to which a defendant's assets should be frozen. That would be an impractical view to take of the matter. However, I am of opinion that in every case the extent to which it is sought to restrain a defendant in the use of his assets should bear a reasonable relation to the claim in respect of which a Mareva injunction is sought. A Mareva injunction is a powerful legal aid. As Peter Gibson L J observed in **Cheltenham and Gloucester Building Society v Ricketts and Others** (1993) 4 All ER 276 at pages 284-285:

> "The risk is particularly great with Mareva injunctions, granted as they are almost invariably ex parte, and frequently imposing severe restrictions on the respondents' right to spend their money or otherwise dispose of their assets: such injunctions can have the effect of ruining a thriving business or of otherwise causing substantial loss to the respondent and were vividly described by Donaldson LJ in **Bank Mellat v Nikpour** (1985) 2 FSR 87 at 92 as being, with the **Anton Piller** order, one of the law's 'two nuclear weapons'. The courts are properly concerned lest these weapons are used inappropriately and the undertaking in damages provides a salutary potential deterrent against their misuse."

Not having given due consideration to such matters it cannot, I think, be said that Harrison J exercised his discretion properly in adjudicating upon the summons that was before him. That being so, this Court is free to exercise the discretion afresh. For my part I would do so to order an inquiry as to damages in the Supreme Court.

On the question of damages, and in particular the nature of damages that may ...verable in an assessment of damages herein, I make no comment for the reason ... necessity for us to embark upon such an exercise in order to determine ...ver, I am in agreement with the directions proposed in the concluding ...gment of Downer J.A.

SMITH, J.A. (Ag.)

This is an appeal against the Order of Karl Harrison, J. made on 27th April, 1998, on an enquiry as to damages. On the 19th October, 2001, this Court allowed the appeal, set aside the order of Harrison, J. and ordered that there be an enquiry into and assessment of damages. We promised then to give written reasons for our decision. I have had the benefit of reading the reasons for judgment, in draft, of my brothers: Downer and Walker JJA, with which I agree. I wish, however, to add a word.

On 8th October, 1993 the respondent Bank filed a writ of summons against the appellant. On the same day the respondent applied ex parte, and obtained a Mareva injunction freezing the assets of the appellant to the tune of US$400,000.00, and in particular restraining him from withdrawing or transferring the funds in his accounts at the respondent's Bank until judgment or further Order. This application was supported by the affidavit evidence of Mr. Ewart Scott, the acting Managing Director of the respondent who made serious charges of dishonesty, fraud, deceit and conspiracy against the appellant. The respondent gave the usual undertaking as to damages or otherwise.

At the trial of the action Panton, J. (as he then was) found that the appellant had committed a breach of his contract of employment and was liable in respect of the losses arising therefrom. Accordingly, judgment was entered for the respondent for US$ 04 on the 22nd September, 1997. Some of the charges for fraudulent against the appellant at the ex parte application for the Mareva ound by the learned trial judge to be completely baseless. Others

On the 13th January, 1998, the appellant filed "Summons for Order to Proceed to Inquiry and Assessment of Damages". This summons went before Karl Harrison, J. who after carefully considering the evidence put before him and the submissions of counsel was not moved to exercise his discretion to make the order sought. He accordingly dismissed the summons. The short point in this appeal is whether Harrison, J. correctly exercised his discretion in dismissing the summons to proceed to enquiry and assessment of damages.

The discretion of the Court is, in these circumstances, a general one and must reflect an application of ordinary equitable principles – considerations such as laches, unfairness, hardship, the circumstances in which the injunction was obtained etc. Generally, the court will conclude that there should be an enquiry and assessment if it is shown that the injunction had been wrongly obtained, that is, that if matters in issue had been investigated at the interlocutory application, it would have appeared that the plaintiff was not entitled to relief and, accordingly, no injunction would have been granted or, alternatively, that an injunction would have been granted in materially narrower terms – see **The Principles of Equitable Remedies by IC SPRY 4th Edition.** The learned author of this work at p. 659 has this to say:

> "Although the court has a discretion, which is exercised according to equitable principles, by which it decides whether or not an order as to damages should be made, nontheless if it appears subsequently that the interlocutory or interim order in question should not have been granted and that the defendant has suffered a detriment through complying with that order, prima facie damages are awarded in order to provide proper compensation for that detriment."

In the instant case there can be no gainsaying the fact that the respondent was not entitled to the injunction which froze the assets of the appellant to the extent

of US$400,000.00. The injunction granted was clearly not properly applied for in the first place, as Ms. Phillips, Q.C. contended. At the most the respondent would probably obtain a Mareva injunction based on the claim for breach of contract but it would be a different injunction in a much smaller amount – **Financiera Avenida S.A. v. Shiblaq** (1990) E.W.J. No. 224.

There is the affidavit evidence of the appellant that he had suffered detriment as a result of the Mareva injunction. Thus, prima facie, the appellant is entitled to damages pursuant to the respondent's undertaking. For the appellant to fail, exceptional circumstances must be found in order to render the award of damages unjust – circumstances such as laches, or where the damages or detriment appears to be insignificant or any conduct on the part of the appellant that renders the award of damages inequitable – see **F. Hoffman – La Roche & Co. A.G. v. Secretary of State** (1974) 2 All ER 1128.

It seems to me that the learned trial judge failed to, or did not, adequately consider whether the particular injunction granted was properly applied for in the first place, in light of the fact that most of the charges of fraudulent conduct by the respondent against the appellant were either abandoned by the respondent or rejected by Panton, J. The fact that the respondent misled the Court whether intentionally or not, in its application for the Mareva injunction is of the utmost importance in this regard. The following passage from the judgment of Harrison, J. shows, in my opinion, that the learned judge did not attach much significance to the fact that the respondent misled Reid, J. in its ex parte application.

> " The evidence presented also reveal that material facts, including the defendant's contract of employment were put before Reid, J. for the grant of the Mareva injunction. It is quite evident that the learned Judge in

> making the order was satisfied that the Plaintiff had a good arguable case and that there was a risk that if the defendant was not restrained, he would deal with his assets, in such a manner that any judgment which the plaintiff obtained might be unsatisfied.
>
> It is my considered view therefore, that although fraud was one of the issues at the trial, it was not the primary one. I also hold, that the plaintiff's failure to establish fraud on the part of the defendant did not mean that there was no merit in its case and for that reason the injunction ought not to have been granted. The plaintiff's success at trial in respect of the breach of contract of employment is an indication to me, that it did have a good arguable case ...".

The learned trial judge should have considered whether an application for Mareva injunction should have been made at all in light of the subsequent conduct of the respondent in abandoning some of the allegations of fraud, dishonesty, deceit and conspiracy and the rejection by Panton, J. of the remaining charges of conspiracy, deceit and fraud. If the injunction was wrongly asked for, ordinarily there should be an inquiry as to damages upon the undertaking of the respondent – see **Graham v. Campbell** (1878) 7 Ch. D. 490.

In fairness to the learned trial judge it should be stated that in coming to his decision he placed great reliance on the judgment of this Court (Rattray P., Forte and Downer JJA) which restored the Mareva injunction after Theobalds, J. had discharged it. It was restored on the ground that the respondent had made out a good arguable case against the appellant and accordingly that the injunction was properly granted by Reid, J.

Turning to the issue as to whether it is permissible to plead exemplary damages in these proceedings, I must confess that I have had some doubt, but do not differ from my esteemed brother Downer, J.A. who entertains a stronger view than I

do on this point. I was instinctively disinclined to the view that exemplary damages may be pleaded in an assessment of damages pursuant to an undertaking moreso that the undertaking is given to the Court and not to the defendant. However recent authorities, i.e. after **Rookes v. Bernard** (1964) AC 1129, indicate that in appropriate circumstances aggravated or exemplary damages may be awarded to deter wrong doing on the part of the plaintiff – see **Digital Equipment Corp. and Another v. Darkerest Ltd. And Another** (1984) 1 Ch. 512 and **Columbia Picture Industries Inc. v. Robinson** (1987) Ch. 38.

DOWNER, J.A:

Directions

(i) Appellant to file and serve pleadings within 14 days hereof

(ii) Respondent to file defence within 14 days after appellant pleadings have been filed and served.

(iii) Assessment to be conducted by Judge in open Court

(iv) Speedy trial ordered

(v) Expedited hearing ordered

(vi) Estimated length of hearing 4 days

(vii) Liberty to apply