JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS: 2,3,4,5, 45 & 46/2000

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	**PAUL CHEN YOUNG**	**1ST DEFENDANT/APPELLANT**
	AJAX INVESTMENT LTD	**2ND DEFENDANT/APPELLANT**
	DOMVILLE LTD	**4TH DEFENDANT/APPELLANT**
AND	**EAGLE MERCHANT BANK JAMAICA LTD**	**1ST PLAINTIFF/RESPONDENT**
AND	**CROWN EAGLE LIFE INSURANCE CO. LTD**	**2ND PLAINTIFF/RESPONDENT**

Emil George, Q.C. & Conrad George instructed by Roderick Gordon for the appellant Paul Chen Young

Abe Dabdoub & J.S. Dabdoub for the appellants Ajax Investment Ltd and Domville Ltd instructed by Dabdoub, Dabdoub & Co.

Michael Hylton, Q.C., Debbie Fraser and Michele Champagnie instructed by Myers, Fletcher & Gordon for the respondents Eagle Merchant Bank Jamaica Ltd & Crown Eagle Insurance Co Ltd

May 29, 30, 31 June 1, 2, 5, 6, 7, 8, 2000
& July 23, 2002

DOWNER, J.A.

(i) Introduction

These important interlocutory appeals from the orders of Ellis J, the Senior Puisne Judge, are concerned with claims by the appellants Paul Chen

Young ("Chen Young"), Ajax Investment Ltd ("Ajax"), and Domville Ltd ("Domville") to set aside the orders made in the Court below. The appellants seek to free the relevant properties of the Mareva Injunctions imposed on the three appellants and set aside the Statement of Claim as well as make a claim for Further and Better Particulars. The three claims are closely connected. If there are serious issues to be tried which is the basis for granting the Mareva Injunction, the Statement of Claim cannot be set aside. If the pleadings are properly drafted and the particulars are already supplied, the claim for Further and Better Particulars is superfluous. This is the logic of a conjoint hearing in this Court, and the reason for the assignment to one Judge in the Court below the management of the interlocutory proceedings. It is helpful to give a short description of the appellants, so as to understand the relationship between the parties on appeal.

Chen Young the first appellant is a financier who was a large shareholder as well as Chairman and Chief Executive of Eagle Merchant Bank Jamaica Ltd. He was also the Chairman and Director of Crown Eagle Life Insurance Co Ltd. There is affidavit evidence from Todd Shoalts, a forensic accountant at pages 226-227 of the Record, which states that Chen Young was a large shareholder and director of a number of companies, which he described as the Eagle Financial Network. The pivot of these companies was Jellapore Investment Ltd ("Jellapore") a miniscule but powerful company registered in the Cayman Islands. The bank ("Eagle") failed and the majority shareholding was taken over by Financial Sector Adjustment Company Ltd ("Finsac") which is a company incorporated pursuant to the Crown Property

(Vesting) Act with the Accountant General as the shareholder. Its purpose was to rescue a number of failed banks and insurance companies by protecting depositors and policy-holders so as to prevent the total collapse of the financial system. Crown Eagle is a life insurance company of which Chen Young was also a shareholder. It too has been taken over by Finsac. These two companies are the respondents on appeal.

Apart from Chen Young, the other appellant Ajax is a Provident Society incorporated pursuant to the Industrial and Provident Societies Act. Chen Young is a shareholder of Ajax which owns 51% of Domville Ltd. These two companies are Chen Young's secret holdings, seemingly outside the Eagle Financial Network. They are substantial real estate ventures and the respondents fear that by adroit share transfers Chen Young will realize his assets and remove his profits out of the jurisdiction. So close is the relationship between Ajax and the Merchant Bank that Chen Young's management fees earned by his employment to the Bank, were paid directly to Ajax. See page 494 of the Record.

As for the issues to be decided on appeal, the Notice and Grounds for appeal No. 2/2000 at page 9 of the Record, and No. 3/2000 at page 7 of the Record, concern refusal to grant Further and Better Particulars. Appeal No. 4 of 2000 at page 1 of the Record pertains to a refusal to strike out the Statement of Claim. Appeal No. 5 of 2000 at page 3 of the Record also pertains to a refusal to strike out the Statement of Claim with respect to Ajax and Domville. With respect to Chen Young and the two appellant companies the subject matter of Appeals No. 45/2000 and 46/2000 at pages 11 and 13

of the Record is the refusal to discharge the Mareva Injunctions. These appeals were heard together although there were separate hearings and orders in the Court below. To summarise, the subject matter of these interlocutory appeals, is firstly to secure Further and Better Particulars. Secondly, striking out of the Statement of Claim and thirdly and most importantly to discharge the Mareva Injunctions imposed on the appellants.

(ii) Should Cooke, J have awarded the ex parte Mareva Injunctions against the appellants?

The origin of this issue was the grant of an ex parte Mareva Injunction against all three appellants by Cooke, J on November 12, 1998. The material terms were as follows at pages 224 – 225 of the Record:

> "1. An injunction is granted restraining the First, Second and Fourth Defendants and each of them, whether by themselves or their servants or agents, or howsoever otherwise from disposing of and/or dealing with their assets wheresoever situate and from withdrawing or transferring any funds from their accounts wheresoever held until Judgment or further order herein;
>
> 2. The First, Second and Fourth Defendants and each of them do forthwith disclose with full particularity the nature of all such assets and their whereabouts and whether the same be held in their own name or by nominees or otherwise on their behalf and the sums standing in any accounts such disclosures to be verified by Affidavits to be made by the said Defendants and served on the Plaintiffs' attorneys-at-law within 14 days of service of this Order or notice thereof being given.
>
> 3. There be liberty to the First, Second and Fourth Defendants and any Third Party affected by the Order to apply on one clear day's notice to the Plaintiffs' 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 endorsed by any Court of the jurisdiction in which the First, Second and Fourth Defendant's assets are situated."

Some such proviso is inserted as a matter of course in Mareva injunctions.

This is how Kerr, L.J. put it in ***Babanaft International Co SA v. Bassatne and another*** [1989] 1 All E.R. 433 at 438:

> "We understand that this is nowadays a standard type of proviso to Mareva injunctions, and it is of course inserted for the benefit of third parties who may be affected by the freezing order. My reason for quoting it is that it illustrates that, although Mareva injunctions are orders made in personam against defendants, they also have an in rem effect on third parties. It shows that, save to the extent of the proviso, the order is binding on third parties who have notice of the injunction. Although the passage in the judgment of Lord Denning MR in ***Z Ltd v. A*** [1982] 1 All ER 556 at 562, [1982] QB 558 at 573 headed *'Operation in rem'* may well go too far in a number of respects, there cannot be any doubt that Mareva injunctions have a direct effect on third parties who are notified of them and who hold assets comprised in the order."

Neil, L.J. expressed a similar view at pages 449 and 450 as well as Nicholas, L.J. who said at page 453:

> "To meet this difficulty I can see no alternative but to grasp the nettle firmly, and write into the order, which applies only to property outside the jurisdiction, an express provision to the effect that nothing in the relevant part of the order is to affect any person other than the defendants personally. This will remove any extra-territorial vice which otherwise the order might have, or be thought to have. The order will be binding only on the conscience of the defendants."

The obligatory undertakings of the respondents were in the following terms at page 224 of the Record:

i. "Forthwith to serve copies of this Order upon the First, Second and Fourth Defendants.

ii. To abide by any Order of the Court as to damages should the Court hereafter be of the opinion that the First, Second and Fourth Defendants or any third party given notice of this Order have suffered any damages that the Plaintiffs ought to pay.

iii. To pay reasonable costs and expenses incurred by any third party given notice of this Order in complying with same"

The affidavit evidence on which the respondent bank and insurance company relied was from Todd Shoalts, a Chartered Accountant with Lindquist, Avey, McDonald Baskerville Company - a Canadian firm of forensic and investigative accountants. His evidence is to be found at pages 226-237 of the Record.

The first schedule at page 235 of the Record indicates that the master company in the Eagle Financial Network was Jellapore a company registered in the Cayman Islands. Jellapore Investment Ltd owns 51% of Crown Eagle and 18.5% is owned by Eagle Holdings and Investment. The next company to notice is Eagle Premium Growth Fund of which Crown Eagle Life Insurance Co Ltd the respondent owns 97%. Two other companies are relevant at this stage. The first is the respondent Eagle Merchant Bank of which 97% is owned by Eagle Premium Growth Fund. The other relevant company is Eagle Commercial Bank of which 100% is owned by Eagle Merchant Bank. Schedule 1, sets out the full extent of the

Eagle Financial Network, except for Ajax and Domville and lists 21 companies. Schedule 2 shows the associated companies of Crown Eagle Life and Schedule 3 shows the associated companies of Eagle Holdings and Investment, on the Corporate Ownership Chart. A most unusual feature of these companies is that the respondent Eagle Merchant Bank owns Eagle Commercial Bank. As a general rule it is the commercial bank which usually owns the Merchant Bank. This must have caused the regulator, the Bank of Jamaica, immense problems and it is strange that it was permitted in the first place. To control the Merchant Bank and the Commercial Bank, the Central Bank had to search beyond the seas to Jellapore. It was a curious arrangement. The Bank of Jamaica was aware of this extraordinary arrangement from 1993 when there was a sale of shares by Ajax in Eagle Commercial Bank and Eagle Merchant Bank. There was a polite enquiry by the Director of Bank Supervision and a reply from the Group Financial Controller in the office of Eagle Commercial Bank.

The ownership structure is a central issue in these appeals. The ownership structure of the Merchant Bank, is to be found at pages 510 – 515 of the Record. Equally curious is the fact that Crown Eagle Life was controlled by Jellapore which owned 51% of the shares. This also must have caused great problems for the regulator of insurance companies. The imprudence of having important financial institutions such as a Merchant Bank, a Commercial Bank and an Insurance Company controlled by a private company incorporated in a tax haven ought to have been evident to the regulators. An affidavit by Odia S. Reid exhibited on behalf of the

respondents during the course of the hearing is revealing. On December 5, 1996 Paul Chen Young wrote as follows to Bank of Jamaica:

> "Section 1 – Introduction Page 3
>
> (a) Jellapore Investments Limited is a privately owned, Cayman incorporated "Trust", and the Cayman Trustees have advised that the Deed ought not to be released to a third party, as to do so would be inconsistent with the terms of the Trust and its obligations to the beneficiaries.
>
> Given the foregoing, we are constrained from reproducing the document or turning same over."

Then there is this letter to Chen Young from Myers & Alberga which speaks for itself:

> "Dear Dr. Chen Young:
>
> **RE: Jellapore Investments Ltd**
>
> We act for Jellapore Investments Ltd, which has bought a number of shares from you in Crown Eagle Life Insurance Company Ltd and Paul Chen-Young & Co. Ltd.
>
> As you will recall, the company acquired these shares in exchange for debentures which were issued to you in each case.
>
> Jellapore Investments Ltd is a Cayman company of which you are neither a shareholder nor a director. It has no connection with you whatsoever and therefore we are unable to give you any information whatsoever concerning its directors or shareholders, nor are we able to give you a copy of its accounts.
>
> Yours faithfully
> MYERS & ALBERGA
>
> Per: Darryl Myers:"

Voluntary interrogatories were administered on the 5th January 2000 on Chen Young who now resides in Miami in an attempt to understand the structure of Jellapore Investment Ltd. See pages 94-96 of the Supplemental Record. The affidavit of Odia S. Reid reveals Finsac Ltd now owns 14,782,256 shares in Jellapore but it is still something of a mystery.

It is helpful to set out paragraphs 3, 4, 5, 8, 9 and 10 of the Statement of Claim. Todd Shoalts states in paragraph 9 of his affidavit at page 227 of the Record that, those averments therein were confirmed as a result of his investigation. The relevant paragraphs at pages 20, 21, 22 of the Record read as follows:

> "3. On or about March 12, 1997, Finsac Limited, a company which is wholly owned and funded by the Government of Jamaica, acquired a majority of the shares in and control of the Plaintiffs."

There is no opposition to this averment and there is confirmation of this from the appellants. This is acceptable. It would require minutes and resolutions of the Board of Directors, and the General Meeting to show that Chen Young was solely responsible for the breaches attributed to him. The natural inference would be that the decisions of Eagle Merchant Bank and Crown Eagle Insurance Company were the collective decisions of the Board of Directors or decisions taken at the Annual General Meeting. This ought to be easy to prove if proper records were kept and retained since it is admitted that Finsac is now in control of the two respondents. If documents were shredded, a whistle blower ought to be able to tell who did it. Also, if schedule 1 to Shoalts' affidavit is correct, then Finsac now controls Crown

Eagle Life, Eagle Premium Growth Fund, Eagle Merchant Bank and Eagle Commercial Bank.

Then paragraph 4 reads:

> "4. At all material times prior to March 12, 1997 the First Defendant controlled the Plaintiffs through his shareholdings in and/or control of other companies which held shares in the Plaintiffs."

For example of 2,206 Ajax shares, 2201 were owned by the Chen Youngs and Paul Chen Young & Co. Ltd., owned 1,799: (see page 507 of the Record), It will be shown that Ajax sold its shares in Eagle Merchant Bank to Jellapore. Of personal shareholding in the Merchant Bank, Chen Young owns over 2 million shares. Jellapore Investments Ltd owns over 12 million shares. One other corporate body which owns shares of over a million is O'Gaskell Enterprises - they own 1,445,959 shares. There is no detailed evidence at this stage of the ownership structure of Crown Eagle except to say that Jellapore owns 51% and Chen Young controls Jellapore. Further, consideration will be necessary when dealing with the request for Further and Better Particulars and the prayer for Striking out of the Statement of Claim.

Paragraphs 4 and 5 reads:

> "4. At all material times prior to March 12, 1997, the First Defendant controlled the Plaintiffs through his shareholdings in and/or control of other companies which held shares in the Plaintiffs.
>
> 5. At all material times until his resignation on March 14, 1997, the First Defendant was a director, the executive chairman and the chief executive officer of the First Plaintiff and a director and the chairman of the Second Plaintiff and he received a salary from the First Plaintiff for his services."

Paragraphs 4 and 5 of the Statement of Claim explain what is meant by control of a company. It means being a director and in the case of the respondents and the appellants being the dominant or largest shareholder. These averments speak of the power and authority of Chen Young. The master company Jellapore is incorporated beyond the seas. Here are the answers given by Chen Young on this issue at pages 94-95 of the Supplemental Record:

> "9. In answer to the eighth interrogatory, namely, whether I was involved in acquiring Jellapore Investments Limited formerly Road Repairs Limited, I SAY that I was involved in it to the extent that it was important for my assets to be dealt with in such a way as to be tax efficient for the benefit of my family and I was, therefore, anxious that it should be carried out properly and in accordance with legal advice obtained."

Be it noted that Chen Young refers to Jellapore as his assets although the firm of Myers and Alberga gives a different version. The right hand did not know what the left hand was doing or Myers and Alberga did not know that the Bank of Jamaica was entitled to the information as the Central Bank could resort to its statutory powers.

Then Chen Young continued thus:

> "10 In answer to the ninth interrogatory, namely, whether any funds were deducted from any account which I own or control to pay for the acquisition of Jellapore Investments Limited, I SAY that I do not have any specific recollection of how legal and other bills were paid. Doubtless, such details form part of the Attorneys' file, which I am advised may be subject to privilege.

11. In answer to the tenth interrogatory, namely, whether I have 'ever been a Trustee under the Paul Trust dated August 4, 1993 in relation to Jellapore Investments Limited,' I SAY that I have no recollection of being a trustee under the Paul Trust.

12. In answer to the eleventh interrogatory, namely, whether I have ever given instructions or directions to the trustee of the Paul Trust, I SAY that I recall corresponding with my Attorney, who works with the Trustee, in relation to the tax planning structure.

13. In answer to the twelfth interrogatory, namely, whether I know who named or appointed the beneficiaries under Paul Trust, and, if so, their names, I SAY yes that the Paul Trust was part of a tax planning structure created by my Attorneys in Grand Cayman. The Trustee was Dextra Bank and Trust Company, but I believe that the Paul Trust is no longer operative. I do not recall precisely how the beneficial interest was treated, but believe that the beneficiaries were members of my family. I have asked the Trustee for details of the beneficial interest but have not yet received them. I will confirm such details upon receipt, and in any event within the next two weeks.

14. In answer to the thirteenth interrogatory, namely, what consideration Ajax received for the transfer of its shares in the First Plaintiff to Jellapore Investments Limited, I SAY that no consideration was received by the Second Defendant." [Emphasis supplied]

Chen-Young in a later affidavit dated 6th June 2000 gave some corrections thus:

"1. I refer to my first five Affidavits in this matter and make this Affidavit by way of clarification of a discrepancy arising between a statement made by me in a letter dated 5th April 1993 to the Bank of Jamaica, and the answer contained in paragraph 14 of my Fourth Affidavit herein sworn in answer to the Interrogatories dated 5th January 2000 served upon me by the Plaintiffs.

2. In my letter to the Bank of Jamaica, I said that there had been a cash consideration for the transfer of the Shares in the First Plaintiff held by the Second Defendant when they were transferred to Jellapore Investments Limited, which is owned by my family trust. In answer to the 13th interrogatory, I said that no consideration was received by the Second Defendant for the said transfer.

3. In fact, I believe that both answers are correct, but incomplete and liable to be misunderstood without explanation. I was advised that it would be appropriate from a tax planning point of view for the Second Defendant to transfer to Jellapore Investments Limited its shares in the First Plaintiff, and that this should be done in the most tax efficient way. Accordingly, the Second Defendant sold to Jellapore for $1,000.00 an option to purchase its holding in the First Plaintiff's shares for $1.2 million. The option was duty exercised, but Jellapore Investments Limited paid nothing directly from its own resources to the Second Defendant for the shares. Instead, a capital distribution by the First Plaintiff in the sum of $1,014,420.98 payable on those shares was paid to the Second Defendant, leaving a small balance. This amount was paid directly to the Second Defendant, and not through Jellapore Investments Limited.

4. I apologise for having failed to give a more complete answer when asked, but did not appreciate that anything turned on the question and did not address my mind to it in sufficient detail. There was never any intention on my part to be misleading."

Continuing with the Statement of Claim paragraph 8 reads:

> "8. The Second Defendant is an Industrial and Provident Society formed pursuant to the Industrial and Provident Societies Act. At all material times the First Defendant was a member of the Second Defendant and controlled the Second Defendant."

The shareholding of Ajax will be detailed shortly. There ought also to be minutes available to strengthen these averments but they have not been proffered at this stage of the proceedings.

The detailed structure of Ajax comes from Chen Young's answers to the voluntary interrogatories of 5th January 2000 at page 94 of the Supplemental Record. Here they are:

> "2. In answer to the first interrogatory, namely, whether I was one of the original shareholders of the First Plaintiff, I SAY YES.
>
> 3. In answer to the second interrogatory, namely, whether I gave instructions for the incorporation of Ajax Investments Limited, I SAY YES.
>
> 4. In answer to the third interrogatory, namely, whether I have been a shareholder of Ajax Investments Limited at any time, I SAY YES.
>
> 5. In answer to the fourth interrogatory, namely, whether I was the majority shareholder, I SAY YES.
>
> 6. In answer to the fifth interrogatory, namely, whether I gave instructions for Ajax Investments Limited to be converted from a company into an industrial and provident society, I SAY YES.
>
> 7. In answer to the sixth interrogatory, namely, when it was done, I SAY I do not recall but I believe that Mrs. Pamella Phillips would be able to provide these details as it was she that I had asked to convert Ajax Investments Limited into an industrial and provident society."

Here is concrete evidence from Chen Young that he controlled Ajax:

8. "In answer to the seventh interrogatory, namely, why it was done, I SAY that it was done for tax planning reasons."

As for the detailed shareholding in Ajax here is how it was recorded at page 507 of the Record:

"Listing No. 3

AJAX INVESTMENTS LIMITED
(INDUSTRIAL AND PROVIDENT SOCIETY)

	MEMBER	NUMBER OF SHARES
1.	Paul Chen-Young	1
2.	Michelle Chen-Young	400
3.	Paul Chen-Young & Company	1,799
4.	Derrick Milling	1
5.	Albert Chen-Young	1
6.	Daisy Coke	1
7.	George Barrington Johnson	1
8.	Oliver Chen	1
9.	Norman Lai	1
		2,206"

It is to be noted that while Chen-Young owns 1 share Paul Chen Young & Co. Ltd., who owns 1,799 shares is 64.3% owned by Jellapore. So Jellapore controls Ajax and Ajax controls Domville. It is important to grasp this to appreciate that Ajax and Domville are an integral part of the Eagle Financial Network.

Paragraph 10 reads:

> "The Fourth Defendant is and was at all material times a company incorporated under the laws of Jamaica. At all material times the shares in the fourth Defendant were beneficially owned by the Second Defendant (51%) and the Third Defendant (49%)."

Bearing in mind Jellapore is a company incorporated in a tax haven, the share holdings will have to be examined with particularity with the assistance of expert evidence. The shareholding may be bearer shares. If this is so it is an excellent way to conceal the ownership.

Although the affidavit evidence of Chen Young was not before Cooke, J., it is convenient to advert to it as neither of the appellants i.e. Ajax nor Domville is listed in the schedules to Todd Shoalts' affidavit. This is an odd omission, because Chen Young has revealed that the Ajax shareholding in Eagle Merchant Bank was transferred to Jellapore without any consideration. On the other hand the Group Financial Controller in Eagle Commercial Bank at page 502 of the Record wrote to the Bank of Jamaica in part as follows:

> "In relation to the transfer of shares in Eagle Merchant Bank by Ajax Investments Limited:
>
> (i) Details of beneficial shareholders of Jellapore Investments Limited are as stated to you in letter from Dr. Paul Chen-Young dated 1st April, 1993.
>
> (ii) Details of beneficial shareholders of Ajax Investments Limited are as shown in Listing 3.
>
> (iii) Ajax Investments sold its shares in Eagle Merchant Bank to Jellapore Investments for cash consideration.
>
> (iv) Details of the discretionary trust under which Jellapore's shares are held and administered by Dextra Bank of Cayman are as shown in the attached copy of the draft Trust document.
>
> (v) We have enclosed certified accounts of Jellapore dated December 30, 1992. As this is a newly formed entity it was impractical to obtain audited accounts at

> this time, we trust the certified statements will satisfy your needs.
>
> (vi) The ownership structure of Eagle Merchant Bank since the transfer of shares to Jellapore is as shown in Listing No. 4." [Emphasis supplied]

So the detailed structure and ownership of Jellapore is known to the Central Bank and during the hearing the affidavit of Odia S. Reid has provided further information.

In his affidavit Chen Young states that he is a director of and shareholder in Ajax and Domville. This is how he states the relationship between Ajax and Domville at page 292 of the Record:

> "That Ajax Investments Limited is the registered holder of 51% of the ordinary shares of Domville Limited, the fourth Defendant herein which is the registered proprietor of approximately 67 acres of land in the Parish of Saint Ann registered at Volume 1050 Folio 888 and Volume 1198 Folio 244 of the Register Book of Titles and that the said land is worth not less than JA$9,000,000.00."

Todd Shoalts' affidavit makes specific reference to two issues namely the case pertaining to 24-26 Grenada Crescent and the transaction relating to First-Equity Corporation. The minutes of the Board of Directors of Eagle Merchant Bank relating to the Grenada Crescent transaction are exhibited at page 285 of the Record. The members of the Board of Directors were as follows:

Dr. Paul Chen-Young	- Chairman
Mrs. Daisy Coke	- Deputy Chairman
Mrs. Michelle Chen-Young	- Director
Sen. Oswald G. Harding	- Director
Mr. George B. Johnson	- Director
Mr. Geoffrey Messado	- Director

Mr. Derrick Milling - Director
Mr. Stanley Moore - Director

As for the Greneda Crescent transaction the minutes read as follows at page 287 of the Record:

> "Renovation of 24-26 Grenada Crescent
>
> A memorandum from Mr. Croskery was tabled giving an estimate from Edward Young & Co. of $4.8M for the ground floor, $5.4M for the first floor and $4.5M for the third floor. Subject to Mr. Goldson's verification, the Board agreed with the renovation expenditure."

There is nothing in this extract to show that Paul Chen Young played any special role in this decision other than being Chairman of the Board. However, there is further evidence on this issue which must be considered which involves Ajax and by implication Domville. The property in issue 24-26 Grenada Crescent was leased to Eagle Merchant Bank and the lessor was Ajax. It is important to know that the lessor Ajax is ultimately controlled by Jellapore through Paul Chen Young & Co. Ltd. Eagle Merchant is also ultimately controlled by Jellapore through Crown Eagle Life and Eagle Premium and Growth Fund. Jellapore is controlled by Paul Chen Young. The member of the Committee who signed the lease was Paul Chen Young. See page 259 of the Record.

There is an item in the minutes which is of importance since Mr. George, Q.C. has raised the issue of the Moneylending Act in relation to the lending of money by Crown Eagle to Domville. The minutes MB162 of July 4, 1995 at page 287 of the Record reads:

"IPF Loans

These loans are to be disbursed through Crown Eagle and a report should be circulated as a Management Report.
The documentation should be perused by Mrs. Phillips, who should also make an application for exemption from the provisions of the Moneylending Act for Crown Eagle."

So the Board and in particular its Chairman and Secretary who happens to be a lawyer knew of the Moneylending Act. If therefore after averring that the Domville loan transactions were a joint venture agreement, then in these interlocutory proceedings the Moneylending Act is advanced as a defence for the first time, it is now open to Crown Eagle to explore when the decision on the loan was taken. Was it at a Board Meeting of the Merchant Bank as was the IPF loan? Was there a request that an exemption from the Moneylending Act be sought by Crown Eagle? Some of the answers are provided by Geoffrey Messado which will be referred to hereafter. If there was no such request for exemption can Chen Young as the dominant shareholder in Domville benefit from the wrongdoing of the Chairman of Crown Eagle? It must be acknowledged that Chen Young had a fiduciary duty to Crown Eagle. So the evidence suggests there was a conflict of duty here.

Returning to the evidence before Cooke, J on this issue where the allegation is that Chen Young has caused the expenditure in relation to Grenada Crescent; be it noted Mrs. Daisy Coke, an Actuary and Deputy Chairman of the Board, is the Chairman of the Public Services Commission and by virtue of that office she is a member of the Judicial Services Commission. She is also credited with ownership of 50% of Eagle Holdings

and Investments in Schedule 3 of Todd Shoalts' affidavit at page 237 of the Record. Also a member of the Board, is Senator Oswald Harding, a former Attorney General. So this was a Board with outstanding members. This point was stressed by Mr. George, Q.C. for Paul Chen Young. On the other hand did Chen Young declare his interest in the contract having regard to his controlling interest in Ajax? There is no indication in the minutes of 11th March 1997 at page 289 of the Record that this was done. Moreover in his affidavit of assets at page 293 of the Record Chen Young states:

> "18. That I hold one share in each of the following companies namely, PCY Limited and Ajax Investments Limited and that both these shares are worth approximately $250,000.00 as in the case of Ajax Investments limited it is one share of a total of 1,805 shares and in the case of PCY Limited it is one share of a total of 400 shares."

However, Chen Young has failed to disclose that Paul Chen Young & Co. Ltd. owns 1,799 shares and that Jellapore a family company owns 64.6% of Paul Chen Young & Co. Ltd. These are factors to take into account, when considering the respondents' fear that Chen Young would dispose of his assets in Jamaica if the Mareva Injunction were to be discharged.

It is pertinent to advert to the general law pertaining to a Director's breach of fiduciary duty for which the equitable remedy is compensation. Paragraph 6 of the Statement of Claim reads as follows:

> "The First Defendant at all material times had a fiduciary duty to each of the Plaintiffs including but not limited to a duty to:
>
> a. act in their best interests;
>
> b. act in good faith;

c. cause them to only enter into contracts which were in their best interests;

d. exercise his powers as director and executive chairman and chairman respectively for proper purposes only;

e. not place himself in a position where there would, or alternatively, could be a conflict of interest between this duty to the Plaintiffs and his personal interests;

f. ensure that the Plaintiffs carried on business in accordance with their respective articles and memorandum of association, the Companies Act, the Financial Institutions Act (in the case of the First Plaintiff) and other relevant legislation and regulations;

g. ensure that the Plaintiffs were provided with adequate and proper security in respect of any loans or other credit facilities advanced by the Plaintiffs."

Then paragraph 11 reads:

"**The Breaches**

11. In breach of his aforesaid fiduciary duty to the First Plaintiff, the First Defendant:

(a) caused or allowed the First Plaintiff to enter into the transactions described below and referred to as 'the Grenada Crescent transactions';

(b) caused or allowed the First Plaintiff to enter into the transactions described below and referred to as 'the First Equity transactions';."

The other area of fiduciary duties concerns the Domville Loan transactions.

The relevant paragraph of the Statement of Claim reads at pages 36-37 of the Record:

"37. On or about December 18, 1992, by an agreement in writing ('the Agreement') the

Second Plaintiff agreed to lend and the Fourth Defendant agreed to borrow certain sums.

38. Pursuant to the Agreement:

1. The Fourth Defendant executed an instrument of mortgage and deposited the duplicate Certificates of Title for the Property with the Second Plaintiff.
2. The First Defendant executed an instrument of guarantee;
3. The Second Plaintiff disbursed various sums to the Fourth Defendant.

39. In breach of the terms of the Agreement and of the said instrument of guarantee, the First and Fourth Defendants have failed to repay the said loans or any part thereof, and as at September 30, 1998, the First and Fourth Defendants were indebted jointly and severally to the Second Plaintiff in the sum of $7,038,826.01."

The way the respondents' meetings were organized, the loan could well have been sanctioned by the Merchant Bank's Board of Directors. Eagle Merchant was the visible controlling company while Jellapore was the secret controlling one.

Paragraph 40 specifies fraud and breaches of fiduciary duties. This reads:

"Fraudulently and in breach of his aforesaid fiduciary duties, the First Defendant caused or allowed;

a. The said duplicate Certificates of Title to be returned to the Fourth Defendant;
b. The aforesaid instrument of mortgage to be removed from the Second Plaintiff's possession;
c. The Second Plaintiff's file on the transaction to be removed from the Second Plaintiff's possession;".

In this context it would be Chen Young's fiduciary duty to Crown Eagle to have the mortgage registered on Domville's Certificate of Title and also against Domville at the Companies Registry. Failure to do this would mean that Domville could secure another mortgage to the prejudice of Crown Eagle by showing an unencumbered title. This is a particular, which would require the appropriate pleading at paragraph 40 of the Statement of Claim. It would also particularize the conflict of interest pleaded at paragraph 6(e) to (g) of the Statement of Claim.

Against this background, it is pertinent to advert to the general role of the fiduciary duties of a director. ***Gower's Principles of Modern Company Law (Fifth Edition)*** states the position with clarity at page 551. It reads thus:

> "In the first place it should be noted that whereas the authority of the directors to bind the company as its agents normally depends on their acting collectively as a board, their duties of good faith are owed by each director individually. One of several directors will not as such be an agent of the company with power to saddle it with responsibility for his acts, but he will be a fiduciary of it. To this extent, directors again resemble trustees who must normally act jointly but each of whom severally owes duties of good faith towards the beneficiaries."

Mr. Hylton, Q.C. helpfully cited ***In re Lands Allotment Company*** [1894] 1 Ch. 616. In emphasizing that directors were trustees Lindley, L.J. said at page 631:

> "Then, when the Legislature passed an Act of Parliament – the *Trustee Act,* 1888 (51 & 52 Cict. c. 59) protecting trustees against actions for breaches of trust, how can it be with any reason said that directors are not to have the benefit of

> this statute? I cannot go that length. I am satisfied that the statute does apply."

Earlier on the same page the learned Lord Justice said:

> "Then, if it was an improper transaction, all those directors who were parties to this improper investment, for in this point of view it was improper, would naturally and obviously be liable to make good the money."

Then Kay, L.J. said at page 641:

> "... and the only question is who were the persons who really did concur in making that investment, a thing beyond the powers of the company, and all the directors who did concur in that misapplication of the funds of the company to the extent of £5200 would be jointly and severally liable."

The answers of Geoffery Messado to the interrogatories administered by Domville must play a vital role in relation to paragraphs 6 and 40 of the Statement of Claim alleging fraud or breach of fiduciary duties. They are as follows at page 373-379 of the Record:

> "Q. a Did the Second Plaintiff disburse the funds which it agreed to lend the Fourth Defendant on or about the 18th December, 1992? If so, how, when and to whom was the disbursement made?
>
> A. The loan was for the purpose of settling a debt which Domville Limited owed to Mount Investments Limited. The Second Plaintiff undertook this liability as at December 18, 1992."

Then after detailing the disbursements the questions and answers continued thus:

> "Q. c Who prepared the instrument of mortgage which the Second Plaintiff claims was executed by the First Defendant? Was more

than one copy of the instrument of mortgage prepared?

A. Attorney-at-law Mrs. Pamella Phillips. Yes, more than one copy of the instrument of mortgage was prepared.

Q. d On what date and in the presence of whom was the instrument of mortgage executed?

A. The mortgage was prepared in October of 1993. I cannot say in whose presence it was executed.

Q. e Was the instrument of mortgage stamped? If so, when was it stamped? If not, why was the instrument of mortgage not stamped?

A. I do not know.

Q. f Was the instrument of mortgage registered? If so, when was it registered? If not, why was the instrument of mortgage not registered?

A. The instrument of mortgage was not registered because it was removed from the Second Plaintiff's files.

Q. g Is the Second Plaintiff aware that the First Defendant has on behalf of the Fourth Defendant requested proof of disbursement of the sums claimed by Second Plaintiff?

A. Yes.

Q. h Is the Second Plaintiff aware that the First Defendant has on behalf of the Fourth Defendant stated that the Fourth Defendant is prepared to pay such sums as the Second Plaintiff can prove were disbursed to the Fourth Defendant?

A. Yes.

Q. i Is the Second Plaintiff in a position to provide proof of disbursement to the Fourth

> Defendant of any of the sums claimed as principal?
>
> A. Yes."

This principle of fiduciary duty must apply to Chen Young as to the three transactions in issue namely the Grenada Crescent transaction, the Domville loan and the transaction with First Equity Corporation. In all three matters, the respondents have made out a good arguable case.

As for the Minutes of 11th March 1997 at page 290 of the Record. It reads as follows:

> "PART SURRENDER OF LEASE – 24-26 GRENADA CRESCENT
>
> Existing Lease had been approved by the Board. Directors noted however that they had not been aware of all the terms of the Lease.
>
> The proposal was to surrender the option to renew the lease for the 2nd and 3rd floors prior to the November 30th, 1997 expiry date. On the Board querying whether such a decision at this time would be in keeping with the Undertakings given to the BOJ, the Chairman noted that FINSAC had agreed to honour all existing agreements and in view of this therefore should have no objection to an amendment of the lease allowing for early termination." [Emphasis added]

Then the minutes continued thus:

> "It was noted by the Board that any Agreement allowing for early termination must be on an 'arms length' basis as the option to renew carried a value and after discussion it was noted that the following should be incorporated into the Agreement which should then be brought back to the Board for consideration and approval.
>
> 1. The surrender of the option to renew the lease for further term of 6 years by the Bank together with

> the Bank's acknowledgement that partitions and fixtures would remain in place in accordance with the terms of the existing lease, in consideration for reduction in the rental of the first floor by $1 million.
>
> 2. Rent free occupation of the second floor commencing April 1st and up to and including Sept 30th, 1997.
>
> 3. Rent free occupation of part of the 3rd floor commencing April 1st and up to and including Sept 30th.
>
> 4. The Bank would be responsible for maintenance charges in respect of all three floors occupied." [Emphasis supplied]

There is some evidence here of Chen Young's responsibility on this issue and paragraphs 11 and 12, 16 to 19 and 20 to 23 of the Statement of Claim set out the averments dealing with the Grenada Crescent transaction. All these paragraphs are set out earlier or will appear later in this judgment.

The minutes of March 11th 1997 at page 289 of the Record are also important to ascertain how the collapse of the Eagle Financial Network was considered by the Board of Directors of Eagle Merchant Bank. They read:

> "STATUS OF ECB OVERDRAFT AND NEGOTIATIONS WITH GOVERNMENT
> The Chairman noted that the purpose of the meeting was to brief Directors on the status of negotiations with Government (FINSAC) in regard to the request for financial assistance to deal with Crown Eagle's cash flow/liquidity problem and the resulting overdraft at ECB."

A pertinent point to note is that this was a special Board Meeting of the Merchant Bank dealing with the problems of the overdraft at Eagle Commercial Bank. Were there also minutes of the Commercial Bank on this issue?

Then the minutes continued:

> "It was hoped that the injection of funds by Government would have been on the basis of their obtaining 51% equity leaving the existing shareholders with 49%. However, this position had changed, with the recent run on the Bank. The Government's position now was that in view of the existing deficit they should be given 100% control of the Group for $1.00 in exchange for assumption of all assets and liabilities of the Company.
>
> The Chairman noted that the networth of CEL was negative, however, because all other Companies except for CEL were profitable he had asked that shareholders be given an option to repurchase the shares, once the Government elected to sell the shares at a later date.
>
> The Chairman indicated that Government was of the view that a right of first refusal only could be considered as the combined networth of the Group was negative.
>
> After discussion it was agreed that the terms set out by the Government should be accepted so long as all assets and liabilities were assumed in exchange for the 100% control given up by the shareholders.
>
> The major concern was protection of policyholders and depositors and there was therefore the need for a decision to be made quickly and communicated to Government." [Emphasis added]

There are five points to note in these minutes. Firstly the "run on the Bank" must have been referring to the run on Eagle Commercial Bank. Secondly, Crown Eagle Life is connected with a group of associated companies explained in Schedule 2 of Todd Shoalts' affidavit. They are Ciboney Group, Ciboney Hotel Developers, Ciboney Investments and Ebony Ltd. Thirdly, it is odd that associated companies could have such a powerful impact on the Eagle Financial Network so as to make the group insolvent. Fourthly, for all the

skills of the forensic accounting profession, Todd Shoalts was unable to state in Schedule 1 the ownership of Eagle Merchant Bank Cayman Ltd. The shareholding was perhaps in bearer shares. Fifthly, even the astute forensic accountant seems not to have grasped the importance of Ajax and Domville. These private companies had an intimate connection with the Eagle Financial Network through Paul Chen Young & Co. Ltd., and Jellapore. They could have a leasing agreement with the Merchant Bank or loan agreement with Domville for the benefit of Paul Chen Young. They were not among the companies sold to Finsac for $1. One of the issues in this case involves the ultimate fate of those companies Ajax and Domville which are subject to the Mareva Injunction. It is reflected in the prayer at paragraphs 10 and 11 of the Statement of Claim which reads as follows:

> **"THE PLAINTIFFS ALSO CLAIM**
>
> **Against the First, Second and Fourth Defendants**
>
> 10. An injunction restraining the First, Second and Fourth Defendants and each of them, whether by themselves or their servants or otherwise howsoever from disposing of and/or dealing with their assets wheresoever situate and from withdrawing or transferring any funds from their accounts wheresoever held until judgment or further order herein;
>
> 11. An order that the First and Fourth Defendants and each of them do forthwith disclose with full particularity the nature of all such assets and their whereabouts and whether the same be held in their own name or by nominees or otherwise on their behalf and the sums standing in any accounts such disclosures to be verified by Affidavits to be made by the said Defendants and served on the Second Plaintiffs attorneys-at-law

> within 14 days of service of this Order or notice thereof being given."

Be it noted that the above minutes was signed by the Deputy Chairman Mrs. Daisy Coke. It is arguable from these minutes that the negotiations with Finsac were done by Chen Young. If this were a trial it would be for the trial judge to interpret these minutes. At this stage it seems that the respondents have a good arguable case against Chen Young.

Turning to the issue of First-Equity Corporation ("FEC") paragraph 24 of Todd Shoalts' affidavit reads as follows at page 232 of the Record:

> "24. Based upon the aforesaid investigations I am able to confirm that FEC is a Miami based securities broker/dealer which was first acquired by the EFEs in 1993 and was formerly owned by the First Plaintiff. FEC was sold by the First Plaintiff in or about July of 1998. FEC was originally purchased in the name of Eagle Investments & Securities which subsequently transferred its shares in FEC to the First Plaintiff." [Emphasis supplied]

The following three paragraphs are also important:

> "25. The sum of US$3,060,824.00 was paid to Alan Pareira for his shares and a further sum of US$2,686,508.00 was injected by the First Plaintiff into FEC between August 1993 and January 1996 to fund its operations. At the time of the purchase the assets of FEC were reported to be approximately US$1,500,000.00.
>
> 26. The First Plaintiff held four trading accounts and Eagle Holdings Cayman Limited a subsidiary of the First Plaintiff, held one trading account with FEC. A total of US$14,405,000.00 was advanced by the First Plaintiff to these accounts (net of repayments to the First Plaintiff). Out of these accounts approximately US$2,251,000.00 was transferred to third parties whose identity we have been unable to

> confirm and a loss of approximately US$2,081,000.00 was suffered as a result of trading in IBM shares.
>
> 27. The First Defendant held one trading account with FEC. In March and April of 1995, the First Plaintiff transferred funds and securities having a total value of approximately US$591,000.00 to the First Defendant's said trading account. The First Defendant lost all of these funds in speculative trading in IBM options in July, August and September of 1995." [Emphasis added]

This evidence traces how Eagle Merchant Bank, of which Eagle Commercial Bank is a subsidiary, eventually acquired First Equity Corporation and it gives some indication of Chen Young's special role, which could make him liable for the averments in the Statement of Claim. At a trial, evidence would have to be adduced as to the basis of the transfer of funds from the Merchant Bank to Chen-Young. These transactions also raise the issue of the fiduciary relationship between Chen Young in Eagle Merchant Bank. The amounts are very substantial and indicates the concern of the respondents that in order to avoid paying millions of U.S. dollars if judgment went against the appellants, Chen Young would remove his assets from this jurisdiction if the Mareva Injunctions were removed with respect to the three appellants.

The respondents averred in paragraphs 13, 14 and 15 of the Statement of Claim as follows:

> " 13. Further and in the alternative, the First Defendant in breach of the terms of his contract of employment, caused or allowed the First Plaintiff to enter into the Grenada Crescent Transactions and the First Equity Transactions.

14. In breach of his aforesaid fiduciary duty to the Second Plaintiff the First Defendant caused or allowed the Second Plaintiff to enter into the transaction described below and referred to as 'the Domville Loan transaction.'

15. Further and in the alternative, the First Defendant fraudulently and/or negligently and in breach of his duty of care to the Second Plaintiff caused or allowed the matters particularized in paragraph 40."

There is certainly evidence, which amounts to an arguable case of Chen Young's direct involvement in the Domville transaction, and this will be addressed later.

The other affidavit before Cooke J at the ex parte stage was that of Patrick Hylton. It runs thus from page 112-113:

"2. I am the managing director of Finsac Limited ('Finsac') is a company established and funded by the Government of Jamaica for the purpose of assisting troubled financial institutions. I am also the chairman of the First Plaintiff. In March 1997, Finsac acquired a controlling interest in the Plaintiffs.

3. Prior to March 1997, the First Defendant, Dr. Paul Chen-Young was the chairman and controlling shareholder (directly or indirectly) of the Plaintiffs. He also controls the Second Defendant, and through it, the Fourth Defendant. Dorit Hutson, who is the other shareholder in the Fourth Defendant, is his business partner and companion.

4. In the course of a review of the records of the Second Plaintiff after Finsac acquired control, an outstanding loan to the Fourth Defendant was noted.

5. On November 6, 1997, Dr. Hugh Bonnick, the then executive chairman of Finsac met with the First Defendant and demanded repayment of the debt. I am advised and verily believe

> that the First Defendant denied that it was a debt, and insisted that neither he nor the Fourth Defendant had signed any loan documents. The First Defendant wrote to Dr. Bonnick the following day, and I exhibit hereto a copy of his letter dated November 7, 1997, as **'PH1'.**"

Then the affidavit continues thus:

> "6. Exhibited as **'PH2'** is a copy of a letter from the Second Plaintiff's lawyers to the First Defendant's lawyers dated September 29 1998. I am advised by the Second Plaintiff's lawyers and verily believe that there has been no response to that letter. There have been other meetings with the First Defendant, however, and he has continued to deny that there was a debt and to maintain that there was a joint venture between the Second Plaintiff and the Fourth Defendant.
>
> 7. Finsac has obtained copies of the following documents from the Second Plaintiff's former attorneys, and I now exhibit:
>
> **PH3** - Letter of Commitment dated 18/12/92.
>
> **PH4** - Undated instrument of guarantee signed by Dr. Paul Chen Young
>
> **PH5** - Resolution of Domville Ltd dated 18/12/92
>
> **PH6** - Undated 'Certificate of entry' Executed by Domville Ltd."

The above exhibits are so important that they must be referred to in some detail to appreciate that there is a serious issue to be tried with respect to this transaction.

PH3 reads at pages 128-130 of the Record:

"December 18, 1992

The Directors
Domville Limited
29 Lyndhurst Roadscent
KINGSTON 5

Dear Sirs:

Re: Proposed Crown Eagle Loan of $843,155.00

This Letter of Commitment serves to confirm that Crown Eagle Life Insurance Co. Ltd. (CEL) is prepared to grant a Loan of $846,154.14 to Domville Limited upon the following terms and conditions:

1. Amount of Loan	$843,155.00
2. Type of Loan:	Demand
3. Purpose of Loan:	To take out existing facilities with Mount Investments Limited.
4. Interest Rate:	27% per annum on an 'Effective' basis with interest payable monthly on the outstanding principal balance. However, CEL reserves the right to vary this rate in relation to any periodic changes in local money market conditions.
5. Repayment:	Principal and interest due in one year.
6. Commitment Fee:	Waived
7. Security:	(a) Promissory Note executed by the Borrower.
	(b) First legal mortgage over 47 acres of land in Wakefield, St. Ann, registered at Volume 1198; 1050; Folio 888, 224, respectively.
	(c) Borrowing Resolution.

8. Disbursement:	The loan will be available for disbursement upon completion of the above security documentation to the satisfaction of our attorneys-at-law.
9. Other Costs:	All stamp duties and attorney's fees in connection with the perfection and arrangement of the securities shall be for the account of Domville Limited.
10. Late Payment:	Any late payment of principal and interest will bear an interest rate at 5 percentage points above the effective loan rate if payment is not received within the first seven working days of the due date of payment.

11. This loan commitment shall expire on December 20, 1992, if not accepted beforehand.

Yours truly
CROWN EAGLE LIFE INSURANCE CO. LTD."

The relevant questions and answers of Geoffrey Messado had been adverted to previously.

Then part of PH4 reads as follows at page 137 of the Record:

"IN WITNESS WHEREOF this Guarantee has been executed under seal by the Guarantor at 24-26 Grenada Crescent, Kingston 5 in the parish of Saint Andrew.

Dated the day of 19

SIGNED, SEALED & DELIVERED
By the said PAUL L. CHEN YOUNG
in the presence of:"

PH5 at page 139 reads as follows:

"DOMVILLE LIMITED
BORROWING RESOLUTION

RESOLVED:

1. That the Company, DOMVILLE LIMITED, DO BORROW from CROWN EAGLE LIFE INSURANCE COMPANY LIMITED, a company duly incorporated under the Companies Act of Jamaica and having its registered office at 24-26 Grenada Crescent, Kingston 5 in the parish of Saint Andrew (hereinafter called 'the Lender') the sum of EIGHT HUNDRED AND FORTY-THREE THOUSAND ONE HUNDRED AND FIFTY-FIVE DOLLARS ($843,155.00) with interest thereon at the rate of PER CENTUM PER ANNUM (% p.a.) to be secured by:

(a) Demand Note in the amount of $843,155.00 duly executed by two Directors of the Company;
(b) First legal Mortgage over the Company's properties at Wakefield in the parish of Saint Ann registered at Volume 1050 Folio 244 and Volume 1198 Folio 888 of the Register Book of Titles.
(c) Personal Guarantee of Paul L. Chen-Young.

2. THAT the Mortgage be stamped initially to cover EIGHT HUNDRED AND FORTY-THREE THOUSAND ONE HUNDRED AND FIFTY-FIVE DOLLARS ($843,115.00) (sic) with the Lender having the right to upstamp the Mortgage if the indebtedness is increased for any reason whatsoever.

3. AND THAT Demand Note, Mortgage, and all other relevant documents be sealed with the Common Seal of the Company and signed on behalf of the Company by two Directors or a Director and the Secretary.

4. AND THAT the Demand Note, Mortgage, and all other relevant documents prepared by the Lender's Attorney-at-law and produced to the Meeting be and are hereby approved.

We, and
Director and Director/Secretary of the Company respectively HEREBY CERTIFY the above is a true and correct copy of the Resolution passed by the Directors of the Company at a Board Meeting duly convened and held on the day of

DATED the 18th day of December 1992

Domville limited

Director
Director/Secretary"

Then PH6 reads at page 141 of the Record:

"CERTIFICATE OF ENTRY
DOMVILLE LIMITED

WE, DOMVILLE LIMITED, (hereinafter called 'the Company), DO HEREBY CERTIFY that a Mortgage dated the day of 19, given by the Company to CROWN EAGLE LIFE INSURANCE COMPANY charging all the Company's estate and interest in the properties located at Wakefield in the parish of Saint Ann registered at VOLUME 1198 FOLIO 888 and VOLUME 1050 FOLIO 244 of the Register Book of Titles to secure and stamped to cover the sum of EIGHT HUNDRED AND FORTY-THREE THOUSAND ONE HUNDRED AND FIFTY-FIVE DOLLARS ($843,155.00) has been duly entered in the Company's Register of Mortgages and Charges and that there are no other charges of any kind on the property charged by the said Mortgage appearing in the said Register on the date hereof.

DATED the day of 19

DOMVILLE LIMITED

Director

Director/Secretary"

These documents will have to be assessed against Chen Young's evidence that the loan was part of a joint venture agreement. There is an arguable case on this issue.

In this Court Mr. George, Q.C. raised the issue of the loan, being in breach of the Moneylending Act. I have adverted to this issue previously and

indicated that there are good contrary arguments to those submitted by Mr. George. Those arguments raise the issue of the fiduciary relationships. The proper resolution of these issues is best decided by a trial judge in the first instance.

A feature to note is that Domville is controlled by Ajax which is ultimately controlled by Jellapore. Crown Eagle was ultimately controlled by Jellapore.

Then the affidavit continues thus:

> "8. I also exhibit copies of the following certificate of title:
>
> **PH7** - Volume 1198 Folio 244
>
> **PH8** - Volume 1050 Folio 888."

In view of the above analysis it was correct for Cooke, J to have awarded the ex parte Mareva Injunction against the three appellants.

(iii)a. Should Ellis J have discharged the ex parte Injunction against Chen-Young granted by Cooke J?

The summons to discharge the Mareva Injunction with respect to Chen-Young the first appellant reads as follows:

> "1. the Order of the Honourable Mr. Justice Cooke dated 12th November 1998 by which a Mareva Injunction was granted against the First, Second and Fourth Defendants be discharged in so far as it relates to the First Defendant;
>
> 2. the costs of this application be payable forthwith to the First Defendant." [Emphasis added]

Here is the summons to discharge in respect of the Second and Fourth Appellants, Ajax and Domville, at page 466 of the Record:

"A. The Mareva Injunction granted by the Honourable Mr. Justice Cooke on the 12th day of November, 1998, BE SET ASIDE AND DISCHARGED IN SO FAR AS IT RELATES TO THE SECOND AND FOURTH DEFENDANTS.

B. The costs of and occasioned by this application be payable forthwith to the Second and Fourth Defendants.

C. Such Further and/or other relief as This Honourable Court may deem just."

These summonses were necessary as Cooke, J exercised his discretion correctly in awarding the exparte Mareva Injunction.

The affidavit of Conrad Elias George at page 442 of the Record in so far as applicable reads as follows:

"2. The facts relied upon by the First Defendant in support of his contention that the injunction should be discharged are that:

i. There was no underlying factual basis for the allegations of fraud and/or breach of fiduciary duty, without which the injunction could not have been granted. The plaintiffs have consistently failed properly to particularise the allegations of fraud and breach of fiduciary duty contained in the Statement of Claim;

ii. The Plaintiffs failed to disclose arguments available to the Defendants in opposition to the case presented by the Plaintiffs in their application for the injunction;

iii. the Plaintiffs failed to give full and frank disclosure of all matters relevant to the cross-undertaking in damages at the time of the application, in particular, they did not disclose that neither of the Plaintiffs was at the time of the application good for the cross-undertaking in damages;

> iv. neither of the Plaintiffs has discharged its obligations to keep the Court informed of any material changes in the circumstances or state of either of them in so far as it relates to its viability or its ability to honour the cross-undertaking in damages;".

Then the affidavit continues thus:

> "3. In relation to i above, I refer to the Statement of Claim and to the Requests for Further and Better Particulars of the Statement of Claim, which the Defendants have served on the Plaintiffs and to the Orders made in this regard. Despite having made allegations of fraud and breach of fiduciary duty in the Statement of Claim, the Plaintiffs have been unable to particularise them."

With respect to this issue, it will be addressed when the claim to strike out the Statement of Claim and the demand for Further and Better Particulars are dealt with. Then the affidavit further continues thus:

> "4. In regard to ii. Above, I refer to the Affidavit of Mr. Keith Senior, Managing Director of the First Plaintiff at the time the injunction was granted on 12th November 1998, in which he answers the First Defendant's Interrogatories. Mr. Senior's Affidavit provides information which was material to the application for the injunction, but which does not appear in the evidence which was put before the Court at the time."

The affidavit discloses a concern that the Eagle Merchant Bank and Crown Eagle will not be able to satisfy the undertaking in damages if the injunction is discharged. Here are the relevant paragraphs which express the concern which seem to be a real fear:

> "6. The Defendants have not found it easy to obtain information regarding the true state of the Plaintiffs' financial situation. However, recent news reports, copies of which are produced and shown to me marked 'CEG2', would indicate that the Plaintiffs were both

> of the Group for $1.00 in exchange for assumption of all assets and liabilities of the Company.
>
> The Chairman noted that the networth of CEL was negative, however, because all other Companies except for CEL were profitable he had asked that shareholders be given an option to repurchase the shares, once the Government elected to sell the shares at a later date.
>
> The Chairman indicated that Government was of the view that a right of first refusal only could be considered as the combined networth of the Group was negative."

So Chen Young knew of the insolvency of both respondents. So did Cooke, J as these minutes where exhibited to Todd Shoalts' affidavit before the learned judge. I find no merit on this aspect of non-disclosure.

Bearing in mind that the relevant Auditor's report on Crown Eagle the 2nd respondent relied on by both parties was before this court; the following passage at page 111 of the Supplemental Record is of importance:

> "As disclosed in note 2, the financial statements have been prepared in conformity with generally accepted accounting principles which contemplate the continuation of the company and the group as going concerns. However, the company and the group sustained substantial losses during the years ended June 30, 1997 and 1998. There is a shareholders' deficit of $15,168,729,000 (1997: $11,032,692,000) for the company and $16,255,329,000 (1997:$11,987,710,000) for the group and a mismatch of assets and liabilities which created and continues to create liquidity problems. In Ciboney Group Limited, as a consequence of certain events of default, the long-term lenders have demanded immediate repayment of outstanding loans, with which demands that group has been unable to comply, and one lender has appointed a receiver over certain of that group's assets and has indicated the possibility of disposing of certain assets on which its loan is secured. The ability of the company and

insolvent at the time the injunction was granted. This fact was not disclosed to the Court when the Plaintiffs applied for the injunction as no evidence was placed before the Court in support of the cross-undertaking in damages. In fact, the Plaintiffs' undertaking is worthless and the Defendants are utterly exposed on the question of the damage which they have suffered as a result of the injunction and which the Court may, in the future, order the Plaintiffs to pay.

7. With effect from 1st August 1999, most of the employees of the Second Plaintiff were made redundant on the ground of the cessation of the operations of that company, preparatory to its portfolio of business being transferred to Guardian Life of Trinidad, leaving the Second Plaintiff without a business and/or any means of generating revenue. A small number of employees was kept on to effect the transfer and cessation of operations. A copy of the bundle of Daily Gleaner reports relating to this matter is produced and shown to me marked 'CEG3'.

8. It must be that such transfer and cessation would have had a deleterious effect upon the already doubtful ability of the Second Plaintiff to support the cross-undertaking in damages. These events took place some months ago, but the Second Plaintiff has taken no steps to bring them to the attention of the Court."

Are these concerns really serious? The minutes of Eagle Merchant Bank are pertinent in this context and they must be reiterated. They read:

"It was hoped that the injection of funds by Government would have been on the basis of their obtaining 51% equity leaving the existing shareholders with 49%. However, this position had changed, with the recent run on the Bank. The Government's position now was that in view of the existing deficit they should be given 100% control

> the group, to continue as going concerns depends upon their resolving the matters related to the demands for immediate repayment of loans by lenders and the attendant receivership, attaining future profitable operations and obtaining continued financing."

As for the status of Crown Eagle the report at page 118 of the Supplemental Record reads as follows:

> "The company
>
> The company is incorporated under the Laws of Jamaica and these financial statements are presented in Jamaican dollars. Up to March 13, 1997 it was a 50.97% subsidiary of Jellapore Investments Limited, which is incorporated in the Cayman Islands. On March 14, 1997 Finsac Limited (Finsac) a company fully owned and backed by the Government of Jamaica reached an agreement to acquire majority shareholding in the company. It is now a 86.36% subsidiary of Finsac Limited, which is incorporated in Jamaica."

These auditors have identified the ownership of Pier 1 Development Ltd as a subsidiary of Crown Eagle Insurance at page 120 of the Supplemental Record. If there is a trial it is anticipated, there will be available a similar Auditor's Report on Eagle Merchant Bank for the Court's consideration. As to whether the averments of fraud and breach of fiduciary duties are relevant, that issue is best treated after there is an examination of whether the Statement of Claim or part of it is to be struck out.

It is now proposed to refer again to the other averments concerning the Domville loan in the Statement of Claim. It is necessary to contrast these averments to those in the Defence. They read in part at page 36 of the Record thus:

"**The Domville Loan Transaction**

36. The Fourth Defendant is, and was at all material times, the registered proprietor of lands comprised in Certificates of Title registered at Volume 1198 Folio 244 and Volume 1050 Folio 888 ('The Property').

37. On or about December 18, 1992, by an agreement in writing ('the Agreement') the Second Plaintiff agreed to lend and the Fourth Defendant agreed to borrow certain sums.

38. Pursuant to the Agreement:

1. The Fourth Defendant executed an instrument of mortgage and deposited the duplicate Certificates of Title for the Property with the Second Plaintiff.
2. The First Defendant executed an instrument of guarantee;
3. The Second Plaintiff disbursed various sums to the Fourth Defendant. [Emphasis added]

39. In breach of the terms of the Agreement and of the said instrument of guarantee, the First and Fourth Defendants have failed to repay the said loans or any part thereof, and as at September 30, 1998, the First and Fourth Defendants were indebted jointly and severally to the Second Plaintiff in the sum of $7,038,826.01."

The relevant paragraphs of the Defence and Counterclaim are as follows:

"**THE DOMVILLE TRANSACTION**

28. Paragraph 36 of the Statement of Claim is admitted.

29. Save that the Fourth defendant admits that by a letter bearing the date December 18, 1992 and referenced 'Proposed Crown Eagle Loan of $843,155.00' the Second Plaintiff

offered to lend and the Fourth Defendant agreed to borrow the sum of $843,155.00 upon the terms and conditions set out therein the Fourth Defendant denies Paragraph 37 of the Statement of Claim.

30. Paragraph 38 of the Statement of Claim is denied.

31. The First and Fourth Defendants deny that the Fourth Defendant is indebted to the Second Plaintiff as alleged in 39 of the Statement of Claim. Further and in the alternative while making no admission as to the sums set out in the Particulars they say that that despite repeated requests made on the Second Plaintiff, the Second Plaintiff has failed to provide proof of the disbursement of the sum claimed."

Be it noted that the specific averment that the first defendant Chen Young executed an instrument of guarantee is met with a bare denial. Chen Young in effect is saying prove your case.

As for the particulars supplied it will be necessary to cite the following questions and answer at page 321 of the Record:

"25. As to Paragraph 37

25.1 Please state what sums it is alleged the Second Plaintiff agreed to lend and the Fourth Defendant agreed to borrow pursuant to the Agreement.

Answer

$843,155.00.

26. As to Paragraph 38

26.1 The date on which it is alleged that the instrument of mortgage was executed;

Answer

The Instrument of Mortgage was executed on or about the 18th day of December, 1992.

26.2 The date on which it is alleged that the Certificates of Title for the Property were deposited with the Second Plaintiff.

Answer

The Certificates of Title for the property were deposited with the Second Plaintiff on or about the 18th day of December, 1992.

26.3 Please state the date upon which it is alleged the guarantee was executed and its precise terms.

Answer

The Instrument of Guarantee was executed on or about the 18th day of December, 1992.

26.4 Please specify

26.4.1 The date or dates upon which it is alleged the Second Plaintiff disbursed various sums to the Fourth Defendant;

Answer

See the attached schedule."

When the averments and particulars of the Domville transaction are considered there is at least one serious issue – the breach of the fiduciary relationship to be tried. The amount at that stage claimed up to 30th April 1999 is to be found at page 360 of the Record.

Further, the interest continues to accrue so this is a substantial sum and should be a factor to be taken into account to determine if the Mareva

Injunction ought to be discharged against Chen Young. At this stage I would say that it ought not to be discharged, but there are other matters to be considered.

(iii)b. Should the Mareva Injunctions against Ajax Investment Ltd and Domville Ltd be discharged?

The affidavit of Jalil Dabdoub, in so far as material at page 472 of the Record reads:

> "I have examined the Affidavit of Todd Shoalts sworn to on the 30th day of October, 1999 and filed herein on the 13th day of November, 1999, one day after the grant of the Mareva Injunction herein and ostensibly in support of the Mareva Injunction and Anton Piller Order and in particular Paragraphs 19-22. There is no allegation made against the Second Defendant or any allegation that the First Defendant acted on behalf of the Second Defendant. In fact there is no Affidavit, which has been filed in support of the Mareva Injunction, which discloses any wrongdoing on the part of the Second Defendant. Further it is only in the Affidavit of Patrick Hylton that there is a prayer for a Mareva Injunction to be issued against the Second Defendant. No where in the said Affidavit of Mr. Patrick Hylton is there any complaint made in respect to the Second Defendant." [Emphasis supplied]

The affidavit of Todd Shoalts must be revisited to ascertain if the above paragraph is true in substance and in form. Paragraph 19 of his affidavit reads:

> "24-26 Grenada Crescent Kingston 5
>
> 19. I have examined the records of the First Plaintiff in relation to 24-26 Grenada Crescent including the following documents which are exhibited hereto at pages 4-55 of the said exhibit marked 'TSI' for identification:

a. Instrument of Lease dated May 22, 1992 between the Second Defendant as Lessor and the First Plaintiff as Lessee which is a lease of the 2nd and 3rd floors for the period December 1, 1991 to November 30, 1997;

b. Instrument of Lease dated June 23, 1995 between the Second Defendant as Lessor and the First Plaintiff as Lessee which is a lease of the 1st floor (excluding the passage leading to the 2nd and 3rd floors and common areas thereof) for the period May 1, 1995 to November 30, 1997;

c. Copies of certificates of title registered at Volume 956, Folios 507 and 508 and at Volume 955 Folios 507 and 508;

d. Minutes of a meeting of the Board of Directors of the First Plaintiff on July 4, 1995 in which an expenditure of $14,700,000.00 for construction costs was approved;".

There is an obligation to refer to the following paragraphs:

"20. I have been advised by Keith Senior, managing director of the First Plaintiff and do verily believe that while the said Minutes of March 11, 1997 refer to certain consideration to be extended by the Second Defendant which would have amounted to approximately J$3,300,000.00 in favour of the First Plaintiff, same was never formalised and the First Plaintiff has not received any of the benefits referred to.

21. My review of the First Plaintiff's documents has revealed that the total amount expended by the First Plaintiff in respect of alterations, improvements and additions to the Grenada Crescent Premises is approximately J$64,500,000.00.

22. The First Plaintiff has been faced with claims made by EB Young the Contractor and Edward Young Associates the Architect. The

> First Plaintiff has been prejudiced in its ability to answer these claims by inadequate documentation to determine whether the First Plaintiff should in fact be answerable at all and if so the terms of the agreements between the First Plaintiff and these third parties."

Then paragraphs 16-19 of the Statement of Claim at pages 23 – 24 of the Record read:

> "16. The Second Defendant is and was at all material times the registered proprietor of premises known as 24-26 Grenada Crescent in the parish of Saint Andrew and comprised in Certificates of Title registered at Volume 955, Folios 507 and 508 of the Register Book of Titles ('the Grenada Crescent Premises').
>
> 17. The Grenada Crescent Premises includes a four storey office building in New Kingston.
>
> 18. By instruments of Lease dated May 22, 1992 and June 23, 1995, ('the Leases') the Second Defendant leased the 1st, 2nd and 3rd floors of the Grenada Crescent Premises to the First Plaintiff. The First Plaintiff will at the trial refer to the Leases for their full terms and effect.
>
> 19. Between 1995 and 1997, the First Plaintiff purchased furniture for, and made substantial alterations, improvements and additions to the Grenada Crescent Premises in the sum of approximately J$64,512,468.00 at the direction and at the request of the First and Second Defendants, including to areas which were not subject to the Leases."

Then paragraphs 20 – 23 read as follows:

> "20. The Leases did not require the First Plaintiff to make the said alterations, improvements and additions and the First Plaintiff received no, or no commensurate benefit therefrom.

21. In 1995 the First Plaintiff retained the services of EB Young Limited as contractors and Edward Young Associates as Architect for the alterations to the Grenada Crescent Premises and the Services of Keith Ryan & Company for the purchase of the furniture without maintaining any document setting out the terms on which they were retained and without implementing any system to ensure that the sums claimed by them were properly incurred or expended.

22. On March 11, 1997, the day before Finsac acquired control of the First Plaintiff, the First Defendant caused the Plaintiff to surrender its option to renew the lease in relation to 2nd and 3rd floors of the Grenada Crescent Premises without receiving any benefit or consideration for doing so. The action was in breach of the duty owed by the First Defendant to the First Plaintiff and was designed to secure a personal benefit to the First and Second Defendants at the expense of the First Plaintiff. In the premises the first Plaintiff has been deprived of the value of the aforesaid option and has undertaken substantial construction, alterations, improvements and additions from which it has not benefited.

23. On or about November 30, 1997, the First Plaintiff vacated the Grenada Crescent Premises. The First and Second Defendants have since occupied the Grenada Crescent Premises and enjoy the benefits of the alterations improvements and additions effected by the First Plaintiff."

Earlier paragraphs in the Statement of Claim set out the averments against the Second Defendant thus:

"10. The said sum of J$64,512,468,00 being the sums expended to date by the First Plaintiff for the improvements, additions and alterations to premises known as 24-26 Grenada Crescent, Kingston 5 in the parish of St. Andrew and comprised in certificates of title registered at Volume 955 Folio 507 and Volume 955 Folio 508.

> 11. An indemnity against any claims in relation to any improvements additions alterations or furniture done or supplied to the said premises."

With respect to Domville Ltd the affidavit evidence of Patrick Hylton at paragraph 3 at page 112 of the Record reads as follows:

> "3. Prior to March 1997, the First Defendant, Dr. Paul Chen Young was the chairman and controlling shareholder (directly or indirectly) of the Plaintiffs. He also controls the Second Defendant, and through it, the Fourth Defendant. Dorit Hutson, who is the other shareholder in the Fourth Defendant, is his business partner and companion."

The evidence of Chen Young's assets

Paul Chen Young in compliance with the order of Cooke J gave an affidavit as to assets. He states that he is a director of Ajax and Domville.

Here is how he states the relationship between Ajax and Domville at page 292 of the Record:

> "That Ajax Investments Limited is the registered holder of 51% of the ordinary shares of Domville Limited, the Fourth Defendant herein which is the registered proprietor of approximately 67 acres of land in the Parish of Saint Ann registered at Volume 1050 Folio 888 and Volume 1198 Folio 244 of the Register Book of Titles and that the said land is worth not less than JA$9,000.000.00."

The bulk of the assets owned by Ajax and Domville is real estate. Chen-Young is the dominant shareholder in these two entities and the respondents fear he will dispose of his shareholdings. Significantly, Chen-Young has never denied that he would remove his assets if the Mareva Injunctions are discharged. See ***Wheelabrator Air Pollution Control vs. FC Reynolds*** unreported SCCA 91/94 delivered 13th March 1995 where the

Mareva Injunction is imposed on the assets of a party who resides outside the jurisdiction. ***TBS Private Bank International SA v. Chabra and another*** [1992] 2 All E.R. 245 also shows how the Courts approach the issue where the defendant resides abroad and has interest in a company where it is possible that the assets will be spirited out of the jurisdiction. At page 254 Mummery, J said:

> "If no injunction is made against the company, there is a real risk that it will dispose of assets so as to defeat the plaintiff's chances of satisfying the judgment that it may obtain. The effect of the company disposing of its assets would also be indirectly to reduce the value of any shareholding which Mr. Chabra had, and may still have, in the company. The disposal would have the direct effect of diminishing the prospects of any assets vested in the company which may be Mr. Chabra's beneficial assets, being available in the United Kingdom to meet the plaintiff's judgment."

Then at page 256 the learned judge continued thus:

> "In these circumstances, if an injunction against Mr. Chabra is inadequate to protect the plaintiff from the risk that assets vested in the company may become unavailable to satisfy the judgment obtained against Mr. Chabra, an injunction should be made against the company to prevent it from dissipating assets. An injunction against Mr. Chabra alone, either in relation to his own assets or the company's assets, is inadequate. He is out of the jurisdiction: the court does not know what personal assets he has. It is no safeguard to the plaintiff to have an injunction against Mr. Chabra restraining him from directing or procuring the company from disposing of its assets when it may turn out that the plaintiff has no means of enforcing such an injunction against Mr. Chabra.
>
> Likewise, I am of the view that there is no practical protection to the plaintiff in restraining the company from aiding and abetting Mr. Chabra to act in breach of the order against him. There may

be circumstances in which the company could aid and abet the breach of such an order without there being any effective sanction against it.

In brief, the most realistic and practical form of relief in this case is to restrain the company from disposing of, or dealing with, assets until it is established whether the plaintiff is entitled to a judgment against Mr. Chabra and until it is established which, if any, of the assets apparently vested in the company are available to satisfy any judgment obtained against Mr. Chabra."

The Grounds of Appeal

In relation to Chen Young the grounds of appeal with respect to the Mareva Injunction are as follows at page 11 of the Record:

"1. The Learned Judge was wrong in law alternatively, the Learned Judge wrongly exercised his discretion in declining to discharge the Mareva Injunction against the First Defendant by refusing to apply the rule that there is an absolute duty in equity to give full and frank disclosure to the Court of all material facts on an application for a Mareva Injunction, and that any Mareva Injunction granted without such disclosure should be revoked, and the Learned Judge was wrong in holding that this is the law of England but not of Jamaica on the ground, unsupported by evidence, that dissipation of assets is easier in Jamaica than it is in England.

2. The Learned Judge was wrong in law in holding that the duty to disclose all material facts on an *ex parte* application for a Mareva Injunction is not of overriding importance in Jamaican law as it is in English law, and that in Jamaica the most important factor is the likelihood of dissipation of assets.

3. The Jamaican Constitution enshrines the right of every individual to the unhindered

> enjoyment of property, subject to prescribed circumstances. The imposition of Mareva restrictions without all of the protections afforded by the principles of equity is not permitted by the Jamaican Constitution, and the Learned Judge was wrong in law and in breach of the Jamaican Constitution in holding that the equitable principles hereinbefore referred to, do not form part of the law of Jamaica."

The grounds of appeal with respect to Ajax and Domville are similar in substance although differently worded. The wording reads as follows at pages 13-14 of the Record:

> "1. The Learned Judge erred in Law in concluding, without having heard any evidence or receiving the benefit of expert opinion on the subject, that it is easier to dissipate assets in Jamaica than it is in England.
>
> 2. The Learned Judge erred in Law in concluding that the equitable principles applicable to the granting and discharge of Mareva Injunctions in Jamaica are different to those applicable in England.
>
> 3. The Learned Judge misdirected himself as to the Law of Jamaica in holding that the Jamaican cases place more emphasis on the likelihood of dissipation of assets than on non-disclosure of material facts and that while the English cases show that where there is non-disclosure of material facts Mareva Injunctions are invariably discharged, this is not the case in Jamaica."

(iv) The judgment of Ellis J, and the relevant Law on the issue of Mareva Injunctions

The basis on which Ellis J refused to discharge the ex parte Mareva Injunctions was two fold. To understand the reasoning of the learned judge

it is best to cite the relevant passages from his judgment at page 103 of the Supplemental Record. The first passage reads:

> **"Material Non-Disclosure**
>
> The cases which defendants cited on this area are English cases. I respect those decisions as very applicable to English circumstances. I would distinguish those decisions from the Jamaican decisions in that I consider the Jamaican cases as more fitting to our circumstance geographically and economically. The English cases which deal with the discharge of (an injunction) place great emphasis on non-disclosure. In those cases, where Plaintiffs do not fully disclose material facts the Marevas are invariably discharged much. This is not so in the Jamaican decisions where more emphasis is placed on the likelihood of the dissipation of assets.
>
> I find myself being propelled towards an acceptance of Jamaican cases.
>
> In any event on the question of non-disclosure I am of the opinion that a plaintiff is not required to disclose and produce every material which would be demanded in full plenary trial.
>
> The application for Mareva is not a trial. It is the seeking of injunctive remedy **pending a plenary trial.**"

The second passage at page 104 of the Supplemental Record reads:

> **"It is geographically easier to remove from and thereby dissipate assets in, our jurisdiction than it is in England and that may** be the reason that emphasis is placed on material non-disclosure in the English cases.
>
> That is not to say that material non-disclosure is not a relevant consideration but in Jamaica I do not hold it to be the prime consideration.
>
> In the light of the above comments I am constrained to dismiss the application.

Applications for the Discharge of Mareva dismissed.

Costs to the plaintiff to be agreed or taxed."

The Respondents prudently filed a Respondents Notice at page 153 of the Supplemental Record which reads as follows:

> "(1) The Respondents have an arguable case with a fair chance of success
>
> (2) The evidence disclosed a risk that the Appellants might dissipate their assets before the case came to trial."

This is an excellent summary of the basis for awarding a Mareva Injunction: See ***Jamaica Citizens Bank Ltd v. Dalton Yap*** [1994] 31 JLR 63 at 65 approving this principle as expounded by Kerr, L.J. in ***Z Ltd v. AZ & AA-LL*** [1982] 1 Q.B. 5581 [1982] 1 All E.R. 336, [1982] 2 WLR 288. During the submissions it was stressed by Mr. George Q.C. that by freezing his assets, Chen Young was hindered in continuing his career as a Merchant Banker. If he is free to deal with his assets the logical place to continue his career as a Merchant Banker is in the Cayman Islands. Apart from Jellapore, Eagle Merchant Bank Cayman Ltd is part of the Eagle Financial Network. The forensic accountant lists the ownership as unknown. Maybe this is a polite description where the shareholding is in the form of bearer shares. If the substantial assets of Ajax and Domville were freed then cash could be realized to fund Eagle Merchant Bank Cayman Ltd. This is the logical inference to be drawn from the facts and circumstances of this case.

It is not possible to ascertain the precise basis on which Cooke J awarded the ex parte Mareva injunction. He gave no reasons for his decision. However there was a good arguable case. With respect to the

Domville loan, the respondents, as was adverted to earlier in this judgment, established that there was evidence which implicates both Domville and Chen Young who gave the guarantee for the loan. The evidence before Ellis, J from a letter signed by Chen Young states that the transaction was not a loan to Domville but a joint venture. See page 120 of the Record. This does not seem to weaken the documentary evidence which was cited earlier which shows that Chen Young signed the guarantee. On this basis alone the grant of the Mareva Injunction was a proper exercise of a discretion by Cooke and Ellis, JJ on the ground that the respondents have a good arguable case. The good arguable case relates to the breach of fiduciary duty by Chen Young in inducing Crown Eagle Life to enter into a loan agreement when there was an arguable conflict of interest.

As for the contention that there was a material nondisclosure, the previous analysis of the evidence makes it clear that the minutes of the Board meeting of the Bank showed that the Eagle Financial Network was insolvent and that Finsac was taking over two insolvent entities with a view to protecting the depositors and policyholders. There was no failure to disclose. In fact the disclosure came from the minutes of the Bank which was dated March 11, 1997 so this contention about non-disclosure has no merit, despite the prolonged submissions by the appellants.

Regarding the matter of dissipation of assets Chen Young has chosen to reside in the United States. The head of Finsac has expressed fears that Chen Young will dissipate his shareholdings in Ajax, Domville, as well as other assets, and so this Court has to ascertain if there is any basis for

those fears. This court can take judicial notice that the failed financial institutions have cost taxpayers $120b. The Eagle Merchant Bank, Eagle Commercial Bank and Eagle Permanent Building Society were prominent failures. The forensic accountant Todd Shoalts has given affidavit evidence of payments of substantial sums being paid to persons who cannot be identified. Here is how the matter was stated at page 232 of the Record:

> "26. The First Plaintiff held four trading accounts and Eagle Holdings Cayman Limited, a subsidiary of the First Plaintiff, held one trading account with FEC. A total of US$14,405,000.00 was advanced by the First Plaintiff to these accounts (net of repayments to the First Plaintiff). Out of these accounts approximately US$2,251,000.00 was transferred to third parties whose identity we have been unable to confirm and a loss of approximately US$2,081,000.00 was suffered as a result of trading in IBM shares."

The master company Jellapore Investment Limited registered in the Cayman Islands, was capitalized at only US$57,054.00 and the chartered accountant, Jack Ashenheim at page 504 of the Record states that:

> "1. The company was incorporated on 19th October, 1989 but has commenced to do business at the date of this Balance Sheet.
>
> 2. These accounts are shown in U.S. Dollars at a conversion rate of J$22.20 : US$1.00"

Be it noted that the date of the Balance Sheet is 30th December, 1992. It is arguable that Jellapore is a shell company, although it was a Master company in the Eagle Financial Network. There is evidence from Chen Young previously cited, that the purpose of Jellapore was to manage his assets in a tax efficient way. Furthermore, Chen Young has stated that the Paul Trust is connected to Jellapore. Further, he knew of a bank

account in the name of Jellapore with the Royal Bank of Canada, Cayman but that he had no specific recollection of it. Further, Chen Young had promised to supply the names of the beneficiaries of the Paul Trust and this list has been supplied. It was exhibited during the course of the hearing in this Court in the affidavit of Odia S. Reid. There is another company in the Eagle Financial Network, Eagle Merchant Bank Cayman Limited and the forensic accountant states that the ownership is unknown. To reiterate this may be the way accountants say that the shareholding is by way of bearer shares.

It is against this background that there are sound grounds for acknowledging that there are genuine fears that the shareholdings in Ajax and Domville might be dissipated if the Mareva Injunction were to be discharged.

There is yet another aspect stressed by counsel for the appellants. They submit that if the appellants succeed in their case and demonstrate that the Mareva injunction ought not to have been granted then they think it proper to pose the question: How will the appellants secure the equitable damages resulting from the undertaking given to the Court by the respondents?

At first blush this seems an attractive argument. There is a useful passage in ***Mareva Injunctions and Anton Piller Relief***, second edition by Steven Gee in Chapter 9 captioned ***The Undertaking in damages***. This text was cited by Mr. George, Q.C. The following passage at page 99 states:

> "Even though the plaintiff is impecunious, the court may, in rare cases where the merits are strongly in favour of the plaintiff, in the exercise of its discretion, still decide to grant the relief sought, accepting the risk that the undertaking may not be honoured if called upon in due course. ***Allen v. Jambo Holdings*** [1980] 1WLR 1252. Alternatively, the court may require the undertaking to be fortified ***Baxter v. Claydon*** [1952] WN 376; ***Harman Pictures NV v Osborne*** [1967] 1 WLR 723 at p. 739; ***Commodity Ocean Transport v. Basford Unicorn*** [1987] 2 Lloyd's Rep 197 at p. 198; ***Re DRP Futures Ltd*** [1989] 1 WLR 778; by the provision either of an unlimited undertaking given by someone other than the plaintiff, or a limited undertaking, the amount of the limit being in the discretion of the court. Ordinarily that limit would be fixed by reference to a reasonable estimate of what losses might be suffered by reason of the order by the party or parties covered by the undertaking. ***Re DPR Futures Ltd*** [1989] 1 WLR 778 at page 786."

This principle was expounded in this jurisdiction in ***Jamiculture v. Black River Upper Morass Development Co. Ltd Et al*** [1989] 26 JLR 244.

The respondents are subsidiaries of Finsac. I am certain if Mr. Hylton, Q.C. and Michelle Champagnie had asked that the undertaking be waived, the waiver would have been seriously considered. Alternatively, counsel could have sought an undertaking from the Attorney General and it would have been given. I do not think these issues entered the mind of the Court below.

We are in the realm of constitutional law and I am sure that in the event the appellant succeeds in having the injunction discharged the Attorney General "as the Principal legal adviser to the government" would advise the Government to honour the undertaking. Having regard to the foregoing in the circumstances, I would ask counsel for the

respondents to seek such an undertaking from the Honourable Attorney General.

The principle of someone other than the parties giving an undertaking is illustrated in ***Babanaft International Co SA v. Bassatne and another*** [1989] 1 All E.R. 433 at 438.

As for the constitutional issue Chapter III at Section 18(2)(h) reads:

> "(2) Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property –
>
> ...
>
> (h) in the execution of judgments or orders of courts."

Having regard to the foregoing, I would uphold the order of Ellis, J albeit for different reasons from those advanced by the learned judge. We will return to this issue of the Mareva Injunction when the prayer for Striking out the Statement of Claim and the request for Further and Better Particulars are addressed. In particular, the issue of whether it was just and convenient to issue the injunction must be considered.

(v) Should the order of Ellis J on the matter of Further and Better Particulars be affirmed?

The learned judge gave no reasons for his Order dismissing the summons for Further and Better Particulars. That Order must therefore be examined to ascertain if it can be affirmed. Here is the Order dated 1st October 1999 at page 361 of the Record in so far as is material.

> **"IT IS HEREBY ORDERED THAT:**
>
> 1. No Order is made in relation to Paragraphs A,B,C,D,E and F.

2. That the Plaintiffs give the best particulars possible in relation to the following:

   G. As to Paragraph 19 of the Statement of Claim

   1. Give details of the request or requests allegedly made by the Second Defendant?

   (a) Were these requests in writing?
   (b) To whom were these requests made?
   (c) In relation to the Second Defendant by whom were these requests made?
   (d) Was the direction or directions in writing?
   (e) To whom was the direction or directions given?
   (f) In relation to the Second Defendant by whom were these directions given?
   (g) Are the Particulars of Expenditure documented? If so, please supply same, setting out precisely and in detail for each section of the premises, the dates and amount expended at the direction and at the request of the Second Defendant for:

   (1) furniture
   (2) substantial alterations
   (3) improvements
   (4) additions.

3. No order as to Paragraphs H to N of the Summons.

4. That the Costs of this Application be costs in the Cause."

The relevant summons is set out at pages 56-61 of the Supplemental Record.

One advantage of addressing the issue of the Mareva Injunction initially was that, since some of the requests for Further and Better Particulars were really requests for evidence, the evidence was adduced by the respondents in its affidavits established that they had a good arguable

case. The requirement for a good arguable case was laid down in ***Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft mbH & Co KG The Niedersachsen*** [1984] 1 All E.R. 398 at page 405 per Mustill, J and affirmed by Kerr, L.J. at page 415.

The learned judge below was right to refuse the request at A on the basis that it was averred that Chen Young was a member of Ajax and Chen Young himself has stated that he is a member of and served on the management committee. The evidence shows that he is the dominant or controlling shareholder.

As regards Chen-Young's role in the Grenada Crescent Transaction at B and C the averments in the Statement of Claim are that Chen Young was a trustee for the Bank and that he failed in his fiduciary duties to the Bank. That was sufficient and there is a specific averment at page 21 of the Record, which reads:

> "(e) not place himself in a position where there would, or alternatively, could be a conflict of interest between his duty to the Plaintiffs and his personal interests;".

Regarding the details requested at D concerning Chen-Young's contract of employment and the details of the fiduciary relationship at E between Chen-Young and the respondents, it is true that paragraphs 13 and 14 of the Statement of Claim require particulars, but they are supplied in other paragraphs in the Statement of Claim.

Concerning the request for particulars pursuant to paragraph 15 of the Statement of Claim that paragraph expressly refers to paragraph 40 of the Statement of Claim.

The learned judge was right to reject the request for Further and Better Particulars at ABCDE and F. Regrettably, he gave no reasons for so doing, although he is obliged to do so. Reasoned judgments are an essential part of the judicial function. Litigants are entitled to know why an adverse decision was made against them and this Court which is a Court of rehearing is entitled to the judge's reasons as part of the Record in performing its appellate duties. The rules require counsel to take a note when these reasons are delivered orally but a judge ought also to require his clerk to take a note of his reasons, so that he may compare counsel's note with that of his clerk. Additionally, the basis of the common law is the reasoned decisions of judges of the Superior Courts. Judges rely on them as precedents and lawyers turn to them so as to advise their clients. These basic understandings were expressly ignored in this case and it is necessary to reiterate them to ensure that the constitutional requirement of a "fair hearing" is maintained in the Supreme Court and this Court.

There does not appear to be any cross-appeal with respect to paragraph 2 of the Order below ordering the Respondents to give the particulars in relation to averment in paragraph 19 of the Statement of Claim. However, the issue must be addressed to prevent confusion, especially as this will be a long and complex trial. If this interlocutory appeal is a pointer it will also be keenly contested.

The index to the Record shows that there were at least four requests by the defendants/appellants for Further and Better Particulars and requests

were made with respect to paragraph 19 of the Statement of Claim, which reads.

> "Between 1995 and 1997, the First Plaintiff purchased furniture for, and made substantial alterations, improvements and additions to the Grenada Crescent Premises in the sum of approximately J$64,512,468.00 at the direction and at the request of the First and Second Defendants, including to areas which were not subject to the Leases."

Then the pleader sets out the particulars of expenditure.

Be it noted that the plaintiffs/respondents supplied detailed particulars in most instances and the answers take up many pages of the Record. With respect to requests pursuant to paragraph 19, they were made at pages 302, 304, 389, and 412. As regards the first set of requests pursuant to paragraph 19, after supplying the answers to the type of furniture purchased, the price paid, the period during which payments were made and the company to which payments were made, there were further answers. These answers related to the dates the furniture was delivered, the alterations made to the structure and the cost as well as the period during which the renovations took place.

The following requests were made at page 304 of the Record:

> "10.2 Please give details of each such alleged direction and alleged request stating:
>
> 10.2.1 When it was allegedly given/made;
> 10.2.2 To whom it was allegedly given/made
> 10.2.3 If by the Second Defendant, by which individual it is alleged to have been given/made on its behalf
> 10.2.4 Whether each such alleged request was oral or in writing;

10.2.5 The precise words used in each such alleged direction or request or, failing that, the gist of the words used."

Then the answer was as follows:

"Answer

Directions and/or requests were made and given by the First Defendant on his own behalf and on behalf of the Second Defendant on divers dates between 1995 and 1997. They were made and given to various employees of the First Plaintiff and of the other contracting parties. Save as aforesaid, the Plaintiffs are unable to give further particulars at this time."

The answers to the above were given on May 4, 1999.

Then on 29th October, 1999 the appellants sought as follows:

"G. As to Paragraph 19 of the Statement of Claim

1. Give details of the request or requests allegedly made by the Second Defendant?

(a) Were these requests in writing?
(b) To whom were these requests made?
(c) In relation to the Second Defendant by whom were these requests made?
(d) Was the direction or directions in writing?
(e) To whom was the direction or directions given?
(f) In relation to the Second Defendant by whom were these directions given?

Answer

The following are the best particulars that the Plaintiffs can give:

(a) The requests were not in writing.
(b) The requests were made to various employees of the 1st Plaintiff.
(c) The requests were made by the 1st Defendant.
(d) The directions were not in writing.
(e) The directions were given to employees of the 1st Plaintiff.

(f) The directions were given by the 1st Defendant."

Then on 3rd December 1999 the appellant again sought particulars with respect to paragraph 19 thus at page 412 of the Record:

"As to paragraph 19 of the Statement of Claim

(g) Are the particulars of Expenditure documented? If so, please supply same, setting out precisely and in detailed for each section of the premises, the dates and amounts expended at the direction and at the request of the Second Defendant for:

(1) furniture
(2) substantial alterations
(3) improvements
(4) additions

Answer

The Plaintiffs can give no better particulars than have already been given in the statement of claim and in the responses to Second to Fourth Defendants' request for particulars filed herein on May 4, 1999."

The upshot of all this is that the respondents have already supplied the best particulars of which they can give since the Order of Ellis, J dated 1st October 1999, and the latest response was dated 3rd December 1999. The response is sufficient.

The learned judge also rightly refused the request for particulars as to Paragraph H to N. H to N represent paragraphs 20 – 40 of the Statement of Claim. Particulars were supplied with respect to Paragraphs 20 –23 concerning the lease. The requests as to paragraph 34 concern artwork, which does not concern us at this stage. With respect to

paragraphs 37, 39, 40 they concern the Domville transaction. The answers to those requests, were appropriate.

The Order below is affirmed for two reasons. The particulars supplied in this case were ample. Many of the particulars were given in great detail. Further, in affirming the Order for the Mareva Injunction this Court was compelled to examine the affidavit evidence adduced by both sides to ascertain if a good arguable case was made out by the respondents.

Additionally, because this case was "case managed" by Ellis J the learned judge made an Order that the affidavit evidence of witnesses be exchanged. These pre-trial arrangements were made so that the case could proceed with dispatch with both sides being well prepared for a trial.

The grounds of appeal in relation to Chen Young are as follows at pages 7-8 of the Record:

> "AND FURHER TAKE NOTICE that the grounds of this appeal are that the learned judge was wrong in law, alternatively, the learned judge wrongly exercised his discretion in not ordering the Plaintiffs to provide the particulars sought as:
>
> 1. all of the facts alleged against the first defendant in the statement of claim are pleaded in support of an overall allegation of breach of fiduciary duty, which must be specifically pleaded and fully particularised;
>
> 2. the alternative pleas of negligence and breach of contract also require the particularity sought by the summons;
>
> 3. all allegations of fraud must be specifically pleaded and fully particularised;
>
> 4. the directions ordered in this action to the effect that statements of witnesses of fact will be exchanged before the trial and will

stand as evidence in chief, with no supplemental questions being permitted without leave, necessitate full pleading of all facts to be relied upon so as to ensure that the other parties are able to deal with such facts in their witness statements in advance of the trial;

5. the appellant will seek to amend or add to its Grounds of Appeal."

Then the Grounds of Appeal with respect to Ajax and Domville read as follows at pages 9 – 10 of the Record:

"AND FURTHER TAKE NOTICE that the grounds of this Appeal are that the Learned Judge was wrong in Law, or alternatively the Learned Judge failed to exercise his direction in not ordering the Plaintiffs to provide the particulars sought as:

1. The First Plaintiff's claim is against the First and Second Defendant jointly and severally for the sum of $64,512,468.00. This claim is contingent upon and tied to general allegations of breach of fiduciary duty allegedly owed the First Plaintiff by the First Defendant, allegations of fraud or alternatively negligence on the part of the First Defendant and the Second Defendant is therefore entitled to know the facts on which the Plaintiffs intend to rely to prove the allegations, which facts must be specifically pleaded and fully particularized.

2. The Second Defendant is entitled to have the particulars requested in relation to Paragraphs 15 and 20 of the Statement of Claim.

3. The claim against the First and Fourth Defendant jointly and severally to recover the sum of $7,038,826.01 together with interest thereon allegedly loaned to the Fourth Defendant by the Second Plaintiff. In seeking to ground its claim the Second Plaintiff alleges breach of fiduciary duty, fraud or alternatively negligence on the part of the First Defendant and the Fourth Defendant and the First and

Fourth Defendants are entitled to know the facts on which the Second Plaintiff intends to rely to prove the allegations of breach of fiduciary duty, fraud and negligence, which facts must be specifically pleaded and particularized.

4. The Fourth Defendant is entitled to full particulars of the disbursements allegedly made to it and how and to whom such disbursements were made.

5. The Fourth Defendant is entitled to the full particulars requested in relation to Paragraph 40 of the Statement of Claim.

6. The directions ordered in this action to the effect that statements of witnesses of fact will be exchanged before the trial and will stand as evidence in chief with no supplemental questions being permitted without leave, necessitate full pleading of all facts to be relied upon in order to ensure that the other parties are able to prepare their case in advance of trial in order to deal with such facts at trial.

7. The Appellants will seek leave to amend or add to the Grounds of Appeal.

Dated this 10th day of January, 2002."

It is necessary to deal with ground 4 in the Chen-Young's appeal, and ground 6 in the Ajax and Domville appeals, to appreciate the wisdom of the learned judge's ruling in the interests of saving time without sacrificing the interest of justice.

Here are the learned judge's relevant directions in this matter of 6th September 1999 at page 67 of the Supplemental Record:

"3. On January 17, 2000, each party shall deliver to the other parties a written statement from each witness (other than expert witnesses)

whom that party may call as a witness at the trial of the action.

4. On January 31, 2000, each party shall deliver to the other parties a written statement from each expert whom that party may call as a witness at the trial.

5. All statements shall be in affidavit form and must comply with the rules of evidence relating to viva voce evidence.

6. On February 7, 2000, each party shall deliver to the Trial Judge and to the other parties a list of the witnesses whom that party proposes to call at the trial. In the event that a party is unable to obtain a statement from a witness and nonetheless proposes to subpoena that witness to give evidence at the trial, that witness' name shall also be included on the list. The statements of those witnesses who are to be called (save for those referred to in the previous sentence) shall also be delivered to the Trial Judge at this time.

7. If a witness whose statement has been delivered pursuant to paragraph 3 or 4 above is called at the trial his statement will stand as his examination in chief. With the leave of the Court Counsel for the party calling that witness may however ask additional questions in chief. Cross-examination and re-examination will proceed in the usual way.

8. No witness may be called at the trial without the leave of the Trial Judge if his name was not disclosed pursuant to paragraph 6 above."

These are admirable directions but the appellants see them as an occasion to ask for more particulars and that claim must be rejected as it is without merit. With respect to grounds 1, 2, 3 of Chen Young's appeal, the matters have been dealt with extensively and similar reasoning is to be applied to grounds 1 – 5 of the Ajax and Domville appeals.

The law on Further and Better Particulars

In ***Sandra Atlas Bass, John McGrath, Arthur Roth v. Avalon Investments Limited*** (unreported) SCCA No. 20/88 delivered 24th October, 1988 Carey, J.A. had this to say on the issue of pleading in the context of a claim for Further and Better Particulars at page 4:

> "By Section 168 of the Civil Procedure Code Law, 'every pleading shall contain and contain only a statement in summary form, of the material facts on which the party pleading relies for his claim or defence but not the evidence by which they are to be proved.' The purpose of pleadings is to enable the opposite party to know what is being alleged against him so that the parties are aware of what the content is all about. The court is entitled to know what are the issues. They fulfill the function of defining the issues. Cotton, L.J. in ***Phillips v. Phillips*** [1878] 4 Q.B.D. at p. 139 stated the general rule:
>
> > 'In my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they have to meet when the case comes on for trial.'
>
> An important requirement is the need to plead 'facts' and not 'evidence':
>
> > 'It is an elementary rule in pleading that when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation.' [Per Lord Denman, C.J. in ***Williams v. Wilcox*** (1838) 8 A & E at p. 331]."

Since the appellants, in one instance, have sought the names of the employees of Crown Eagle, the following passage from Vaughn Williams,

L.J. in ***Knapp v. Harvey*** [1911] 2 K.B. 725 at 729 illustrates the principles which guided the learned judge below:

> "Now we start in this case with the admission very properly made by the defendant's counsel that, generally speaking, it is not admissible for a litigant to ask in an interrogatory the names of persons who are going to be his opponent's witnesses. In this case an order for particulars was applied for, and obtained, by the defendant, and particulars were accordingly given by the plaintiff. Those particulars are not, as it appears to me, by way of supplement to the statement of claim, as particulars sometimes are, for instance, in a case where fraud is alleged generally, and particulars of the fraud are ordered to be given. I think they are particulars given in order to prevent the party who obtained the order for them from being taken by surprise at the trial. I am far from saying that, because the defendant obtained an order for these particulars, it necessarily follows that he is not also entitled to an order for interrogatories, but I think that the fact that the defendant has obtained these particulars ought to be taken into consideration in determining the question which we have to consider, namely, whether these interrogatories are really put for the purpose of obtaining the names of the plaintiff's witnesses, or are put for the purpose of better understanding the circumstances of the case which the plaintiff is going to set up. In my opinion we ought to bear these particulars in mind in determining that question, because they seem to me to shew that the defendant has already obtained by means of them just that sort of subject-matter of information the obtaining of which in some cases may prevent an interrogatory that involves the giving the names of witnesses from being an interrogatory merely for the purpose of obtaining the names of witnesses."

The comprehensive statement on the function of particulars is to be found at 18/12/2 of the 1979 White Book. It reads:

"**Functions of Particulars** – This Rule imposes on the parties a primary obligation to state in their pleadings all the 'necessary particulars' of any claim, defence or other matter pleaded, and if any pleading does not state such particulars or states only some or insufficient or inadequate particulars, the Rule enables the Court to order a party to serve either (1) particulars or further and better particulars of any claim, defence or other matter pleaded, or (2) a statement of the nature of the case relied on, or (3) both such particulars and statement. It is therefore an essential principle of the system of pleading that particulars should be given of every material allegation contained in the pleading.

The function of particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises and incidentally to reduce costs. This function has been stated in various ways as follows:

(1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved (*per* Lindley, L.J., in ***Duke v. Wisden*** (1897), 77 L.T. 67, 68; *per* Buckley, L.J., in ***Young & Co. v. Scottish Union Co.*** (1907), 24 T.L.R. 73, 74; ***Aga Khan v. Times Publishing Co.,*** *[1924] 1 K.B. 675, 679);

(2) to prevent the other side from being taken by surprise at the trial (*per Cotton, L.J., in* ***Spedding v. Fitzpatrick*** (1888), 38 Ch. D. at p. 413; ***Thompson v. Birkley*** (1882), 31 W.R. 230);

(3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial (*per* Cotton, L.J., *Ibid,; per* Jessel, M.R., in ***Thorp v. Holdsworth*** (1876), 3 Ch. D. 637, 639; ***Elkington v. London Association for the Protection of Trade*** (1911), 27 T.L.R. 329,330);

(4) to limit the generality of the pleadings (*per* Thesigner, L.J., ***Saunders v. Jones*** (1877), 7 Ch. D. 435) or of the claim or the evidence (***Milbank v. Milbank,*** [1900] 1 Ch. 376, 385);

(5) to limit and define the issues to be tried, and as to which discovery is required (***Yorkshire Provident Life Assurance Co. v. Gilbert*** [1895] 2 Q.B. 148; *per* Vaughn Williams, L.J. in (***Milbank v. Milbank,*** [1900] 1 Ch. 376, 385);

(6) to tie the hands of the party so that he cannot without leave go into any matters not included (*per* Brett, L.J., in ***Phillips v. Phillips*** (1878), 4 Q.B.D. 127,133; ***Woolley v. Broad,*** [1892] 2 Q.B. 317, see (n) 'All material facts' to r. 7, *supra*; and ***Woolley v. Broad,*** [1892] 2 Q.B. 317). But if the opponent omits to ask for particulars, evidence may be given which supports any material allegation in the pleadings ***(Dean of Chester v. Smelting Corp.,*** [1902] W.N. 5; ***Hewson v. Cleeve,*** [1904] 2 Ir. R. 536)."

The respondents, the Merchant Bank and Crown Eagle having discharged their duties in supplying the particulars requested, should have the appeal on this aspect dismissed.

(vi) Was Ellis J right in refusing to strike out the Statement of Claim?

The learned trial judge gave reasons on the Summons to Strike out the Statement of Claim but stated he was not obliged to do so. A judge's decision is important. An equally important matter is the reasons for arriving at that decision.

It is pertinent to set out the judgment to ascertain if we can derive any assistance from it. A point to note is that that this judgment was delivered on 28th December 1999 some three months before the learned judge made his order affirming the Mareva Injunction on 9th March 2000. It commences thus at page 89 of the Supplemental Record:

> "There is authority that whichever way I decide I am not obliged to give reasons.
>
> Both Mr. George, and Mr. Dabdoub in advocating their pleas to have paragraphs of the Statement of Claim struck down, have been quite skilful in their advocacy. Equally Mr. Hylton for the Plaintiffs has mounted strong arguments against the Defendants' contentions.
>
> Authorities and textbooks learning have been submitted. It is a trite statement that the Court's jurisdiction to Strike out must be sparingly exercised. The rationale for that is that a litigant should be allowed to establish claimed rights by the usual course of a trial.
>
> When an application is made for an order for striking out pleadings or Statement of Claim, the Court must decide whether or not that case or the case presented by the pleadings is so manifestly unarguable that a trial would be a waste of time."

It would have been helpful if the learned judge had cited the authority, which sanctioned the delivery of a judgment without giving reasons for the decision.

Then the learned judge continues thus:

> "The statement that the jurisdiction to strike out must be sparingly exercised does not mean that a pleading cannot be struck out.
>
> The conditions which are requisite to establish a situation for striking out are stringent. In

> reviewing the arguments in these applications and examining the authorities put forth by the parties, I am constrained to say that the Defendants have not satisfied the burden to strike out pleadings in the Statement of Claim or the Statement of Claim itself as contended for by the Defendants.
>
> The Applications, therefore are refused. Since the applications are refused, the matter will go to trial and it would not be prudent for me to give more reasons at this stage.
>
> The Applications are refused, Costs to the Plaintiffs to be agreed or taxed. Leave to Appeal granted."

It is important to reiterate that there were three separate hearings in the Court below. The order refusing Further and Better Particulars was made on 1st October, 1999. Those for refusing to strike out the Statement of Claim were made on 28th December 1999, while the order affirming the Mareva Injunction was made on 10th March 2000. On the other hand in this Court, the initial submissions were on the Mareva Injunction, and this was followed by submissions on Further and Better Particulars and thereafter submissions on Striking out the Statement of Claim.

Before deciding whether the learned judge's approach was justified, it is appropriate to turn to the Summons to Strike out the Statement of Claim at page 84 of the Supplemental Record filed on behalf of Chen Young. It reads:

> "1. the Statement of Claim be struck out on the grounds that it is vexatious and/or frivolous and/or an abuse of the process of the Court and/or that it discloses no reasonable cause of action and/or in the inherent jurisdiction of the Court; alternatively
>
> 2. the paragraphs of the Statement of Claim set out in the Schedule hereto be struck out on the

grounds that they are vexatious and/or frivolous and/or an abuse of the process of the Court and/or that they disclose no reasonable cause of action and/or in the inherent jurisdiction of the Court;

3. the plaintiffs' action against the First Defendant be dismissed and the First Defendant be at liberty to sign judgment herein for its costs of the Defence and of this application to be taxed, if not agreed;

4. that there be further or other relief;

5. that the costs be the First Defendant's in any event."

Then the summons of Ajax to strike out the Statement of Claim reads in so far as is material reads at page 394 of the Record:

"... for an Order that the Plaintiffs Statement of Claim as it relates to the Second Defendant be struck out on the grounds that:

1. It discloses no reasonable cause of action against the Second Defendant;

2. It is frivolous and vexatious; and

3. It is an abuse of the process of the Court

Alternatively, for an Order that the Statement of Claim as it relates to the Second Defendant be struck on the ground that:

1. The Plaintiffs have failed to provide adequate and sufficient Further and Better Particulars as requested by the Second Defendant.

And that the Plaintiffs Action against the Second Defendant be dismissed and that Judgment be entered for the Second Defendant for its costs including the costs of this Application to be taxed or agreed."

I cannot trace the summons on behalf of the Fourth Defendant/Appellant Domville, but I assume it is in similar terms to that filed for Ajax. The learned judge's Order dated 28th December 1999 dismissing the claims of Chen Young is at page 325 of the Record while that for Ajax and Domville dated 28th December 1999 is to be found at page 326 of the Record.

Why it is not necessary to write a detailed judgment dismissing this aspect of the appeal

The initial submission in this case as to whether there was a good arguable case to sustain the Mareva Injunction made it necessary to examine the affidavits of both sides at the inter-partes hearing before Ellis, J. Further, having determined that the averments in the Statement of Claim together with the Further and Better Particulars served were sufficient the necessary implication was that these were additional facts which permitted the respondents Eagle Merchant Bank and Crown Life to proceed to trial. The learned judge did not have this advantage as the inter-partes hearings on the Mareva Injunction, was subsequent to the summons for Further and Better Particulars and the summons to Strike Out. In these circumstances we were bound to affirm the order of the learned judge below which dismissed the summons of the appellants to strike out the Statement of Claim as showing no reasonable cause of action.

The headnote in ***Dyson v. The Attorney-General*** [1911] 1 K.B. at 410 summarises the position well. It reads:

> "Order xxv., r. 4, - which enables the Court or a judge to strike out any pleading on the ground that it discloses no reasonable cause of action was never intended to apply to any pleading which

> raises a question of general importance, or serious question of law."

Equally we were bound to dismiss the summons which claimed that the Statement of Claim was frivolous and vexatious or that it was an abuse of the process of the Court because of the finding that there was a good arguable case to sustain the Mareva Injunction.

The delay in delivering this judgment is unusual and regrettable. Since the year 2000 there has been a significant increase in the number of long and difficult appeals partly as a result of the financial crisis in which a number of the banks and insurance companies became insolvent.

(vii) Conclusion

Mr. George cited the following passage by Donaldson L.J. from ***Bank Mellat v. Nikpour*** [1985] FSR 87 at p. 92 which reads:

> "The rule requiring full disclosure seems to me one of the most fundamental importance, particularly in the context of the Draconian remedy of the Mareva Injunction. It is in effect, together with the Anton Piller order, one of the law's two 'nuclear' weapons. If access to such a weapon is obtained without the fullest and frankest disclosure, I have no doubt at all that it should be revoked."

This passage appears at page 127 in ***Mareva Injunctions and Anton Piller Relief.*** I do not find that the submissions on full disclosure pertinent in the special circumstances of this case because Chen Young knew that Eagle Merchant Bank and Crown Eagle were insolvent so did Cooke, J and Ellis, J.

The strong point however made by Mr. George is that this was a commercial case with no special aspect as regards law enforcement as was the case in ***F. Hoffman-La Roche and Co. A.G. and Others v. Secretary***

of State for Trade and Industry [1975] A.C. 295. There must be someone to give this undertaking so that Chen Young will not be prejudiced if he is successful at the trial. Moreover it was submitted on his behalf that he was unable to pursue his career as a merchant banker as long as the Mareva Injunction was imposed on him and his two companies Ajax and Domville. It is a serious point and it must be addressed.

Mr. Hylton, Q.C. responded that the respondent companies were subsidiaries of Finsac Ltd and that this company is willing to give the undertaking. This Court is entitled to take judicial notice that, the Finsac assets have been sold to a Texan Merchant Bank and that Financial Institution Services Ltd, the less well endowed sister of Finsac will assume its responsibilities. This would not be fair to Chen Young. This court must be even-handed.

The solution proposed by this Court is that the Attorney-General should give the undertaking in the Supreme Court in the usual form with a copy filed in the Registry of this Court so that Chen Young would not be prejudiced if he succeeds at the trial. If there is compliance with this directive within fourteen days hereof, the injunction will continue until the trial is determined.

There are two other aspects which must be addressed before disposing of this case. Firstly it must be considered whether it was just and convenient to issue and affirm the Mareva Injunction. This is an important case whereby the Merchant Bank and Crown Eagle are challenging Chen Young's conduct as a director of these two institutions, which became insolvent under his watch.

Further, he is being charged with breach of fiduciary duties and negligence as well as other serious charges. If these charges are sustained, there will be serious consequences for his preferred career as a merchant banker, as well as his assets. It was therefore appropriate to restrict Chen Young's rights to his property, as it was rightly feared that he would remove his assets from this jurisdiction if judgment went against him and his two companies, especially since he now resides in Florida. If he were free to dispose of his assets there would be no means to satisfy a judgment if he lost at the trial stage. This would be regrettable as the issues in this case are of general public importance. The tax-payers have had to meet a bill of One Hundred and Twenty Billion Dollars ($120b) to rescue the depositors and policy-holders in the failed banks and insurance companies.

Secondly, there is an obligation for the respondent bank and insurance company to proceed to trial with dispatch. It was put thus in ***Mareva Injunction and Anton Piller Relief*** (supra) at page 93:

> "**5.8.2** A plaintiff who obtains a Mareva injunction is under an obligation to proceed expeditiously with the action. If he does not do so, the court will regard this as a factor supporting discharge of the injunction. ***Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc*** [1988] 1 WLR 1337, CA. If the plaintiff decides, after obtaining the Mareva, that he does not wish to proceed with his claim, even temporarily, then he ought of his own motion to seek discharge of the injunction. It is an abuse of the process of the court for the plaintiff to obtain a Mareva, not to proceed with prosecution of the action, but to retain the Mareva in force and then to recommence prosecuting the action in order to obtain security prior to third parties. ***Town and Country Building Society v. Daisystar Ltd*** [1989] NZLR 1563. In these circumstances, if a plaintiff is in doubt as to

> whether to proceed he could seek directions, although of course this alerts the defendant to the argument that he has delayed for too long."

It should be explained too, that both the written and oral submissions stated that Chen Young has returned all the works of Arts, which were in dispute. So this was not an issue on this appeal.

To conclude, the appeals are dismissed. The orders with respect to Mareva Injunctions are varied. The orders refusing Further and Better Particulars are affirmed and the orders refusing to strike out the Statement of Claim. The appellants are to pay the agreed or taxed costs.

HARRISON, J.A.

I agree.

PANTON, J.A.

I agree.

DOWNER, J.A.

ORDER

1. **Appeals dismissed.**
2. **Orders granting Mareva Injunctions varied to the extent that the orders are affirmed provided that -**

(a) there is the usual undertaking for damages to be given in the Supreme Court by the Hon. Attorney-General within fourteen days hereof. A copy of the undertaking is to be filed in the Registry of this Court.

(b) if the undertaking is not given within the time stipulated the injunctions are to be discharged.

3. Orders refusing Further and Better Particulars are affirmed.

4. Orders refusing to strike out Statement of Claim are affirmed.

5. Liberty to apply.

6. Costs of the appeals to the respondents, and to be paid by the appellants, to be taxed if not agreed.

7. Certificate for two counsel.