IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. HCV 2853/2010

BETWEEN	**AGRO EXPO FARMS LTD**	**CLAIMANT**
AND	**ROCKWILL CONCRETE SERVICES LTD**	**DEFENDANT**

Ms. C. Davis for the Claimant

Mrs. G. Gibson-Henlin for the Defendant

Reasons for Judgment

Application to Discharge Freezing Order

Heard: July 26 and 27, 2010

Straw J

An exparte mareva injunction was granted on behalf of the claimant on June 21, 2010 preventing, *inter alia,* the defendant from disposing of or transferring, charging, diminishing or in any way howsoever dealing with assets belonging to or in the name or on account of business carried on by the company wheresoever situate in Jamaica and in particular from removing certain equipment located on premises known as part of Burlington Estate.

The order goes on to lists several pieces of equipment owned by the defendant and used in its business.

By way of an application filed on July 9, 2010, the defendant is seeking to have the said order discharged.

The substantial claim against the defendant relates to a breach of contract. The particulars of special damage are in the amount of $18,986,128.00.

The defendant through the affidavit of its representative, Mr. Arthur Williams, admits part of the money due to the claimant. This is approximately $6.4 million.
(Rent and quarry tax due for year 2009). It is admitted that the claimant has satisfied the condition of showing a good arguable case in order for the grant of a mareva injunction.

The defendant, however, takes issue with the granting of the mareva injunction for two reasons. Firstly, it is submitted that the claimant, through the affidavit of its representative, Mr. David Phillipson has not satisfied Section 17 (3) (3) of the Civil Procedure Rule (CPR) 2002 which reads as follows:

> 17 (3) (1) An application for an interim remedy must be supported by evidence on affidavit unless the court otherwise orders.
>
> (2) -------
>
> (3) The evidence in support of an application made without notice must state the reasons why notice has not been given.

Counsel for the defendant, Mrs. Gibson-Henlin, has submitted that, based on the circumstances of this case, no such reasons have been stated.

Ms. Davis, counsel for the claimant, has submitted that the very nature of a mareva injunction is that it has to be made without informing the defendant if the injunction is to be effective.

The court does agree that there must be some merit advanced for the necessity of

secrecy. In this case, the subject matter is not funds in a bank account that could be easily transferred but machinery that would have to be sold or otherwise dissipated. This is not impossible, however, and the court is prepared to infer that the need for urgency has been established bearing in mind that Mr. Phillipson is contending that Mr. Williams threatened to dispose of the company's assets so that the claimant would be unable to recover any judgment it obtained against it. It is alleged that he also told Mr. Phillipson that he had already identified buyers.

The second argument advanced by the counsel for the defendant is that the claimant has not satisfied the court that there is a real risk that the assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted. The claimant contends through the affidavit of Mr. Phillipson, that Mr. Williams threatened to dispose of all the equipment on the leased premises if a notice to quit was served in order to frustrate the recovery of any judgment debt. Mr. Williams states in his affidavit as follows:

> "13 It is true that the defendant owns equipment that is located on the claimant's property ---. However, I did not threaten the claimant's representative as alleged. I met with Mr. Phillipson on April 14, 2010 ---. The purpose of the meeting was to discuss changing from landlord and tenant relationship to a partnership because of some of the issues raised herein including the quarry taxes ---. Mr. Phillipson proposed to acquire 50% ownership interest in the defendant company. I refused to accede to his proposal. I did not threaten to remove or dispose of my company's equipment."

He further denied any intention to sell or transfer the equipment to avoid any judgment.

On the other hand, Mr. Phillipson, in the first affidavit (on which the exparte injunction was granted), stated that he served a notice to quit on the defendant on May 29, 2010. The notice to quit directed the defendant to leave the premises within 30 days.

It is to be noted that the assets which are the subject of the exparte injunction are on the leased premises. Mr. Phillipson further stated as follows at paragraph 14 of his affidavit:

> "Since receiving the Notice to Quit, in accordance with his threat, Mr. Williams has been seeking to make arrangements to move the equipment."

Mr. Williams' response is that he told Mr. Phillipson that he would not be able to move in thirty (30) days because that was insufficient time to move the plant and equipment which had taken six months to erect on the leased property. He has therefore not made attempts to remove or dispose of his company's equipment which is on the claimant's premises.

He also stated as follows at paragraph 22:

> "That in the ordinary course of business, we sell and purchase equipment from time to time. It is always in our contemplation in the ordinary course of business. This is because we do so to assist with our operational costs, servicing of debt and recurring obligation such as rent and to the bank or other third party suppliers or simply to fund the acquisition of new equipment."

In his affidavit in response (to the affidavit of Mr. Williams), Mr. Phillipson states at paragraph 11 that since the filing of his previous affidavit, he was informed by Leo Cousins of Lydford Mining Limited that the defendant has been speaking to him with respect to the sale of the defendant's crushing plant and that while no sale price was

agreed, he was informed by Mr. Cousins that the defendant is to date still pursuing the sale.

He also stated as follows at paragraphs 16 and 17:

> "16 --- I say that some of the assets listed by the defendant are in poor condition, and would be difficult to sell. Further, the defendant has not disclosed the liens on the assets, such that it is not possible to assess their real value."
>
> "17 --- I say that from a perusal of the Affidavits of Assets filed herein, the defendant does not have sufficient cash to pay to meet even one months rent. Its only other assets are in equipment and in the circumstances I verily believe that it will be sure to sell off its equipment to avoid paying the sums due to my company."

It is on the basis of the above assertions that Ms. Davis is submitting that there is a risk of the defendant dissipating its assets as there is a buyer pending in relation to the most valuable piece of asset – the crushing plant. She submits that if the defendant sells its assets in the ordinary course of business and the assets are dissipated, the claimant will have a real difficulty in enforcing any judgment. She further submits that based on the disclosure of assets filed by Mr. Williams on behalf of the defendant, the crushing plant is its most valuable asset and is valued at $51,000,000.00. She cited the case of **Bertram Watkis v Anthony Christopher Simms** SCCA No 48/1987 in support of her submissions.

In that case, the Court of Appeal found that the judge had material before him to support a finding of probable risk of dissipation or disposal of the assets with the intent to defeat the judgment.

In particular, (at page 11) Kerr JA found that the omission of the appellant/defendant to traverse allegations, (in particular, that they had given Jamaican addresses as their place of residence), left it open to the judge to draw sufficiently adverse inferences to support the conclusion that there was a real risk of disposition.

This was so, because the appellant deponed that he was resident in the USA and in his pleaded defence that he was a resident at the date of the agreement for sale.

What is clear from the authorities, is that there must be a real risk of disposition of the assets with the intent to defeat any judgment obtained (See **Half Moon Bay Ltd v Earl Levy,** suit No. CL1996/H012 delivered by Wolfe, CJ (as he then was on May 7, 1997); **Jamaica Citizens Bank Ltd v Dalton Yapp** 1994 31 JLR, pg 42).

In **Sime, a Practical Approach to Civil Procedure**, 5th Edition, (chapter 34, para. 34.1) Stuart Sime, the author, notes as follows:

> *"Given that a freezing injunction can only be ordered against an unscrupulous defendant who is prepared to dissipate assets to prevent the claimant recovering on any judgment obtained, the application has to be made without informing the defendant if the injunction is to be effective*."

Counsel for the applicant, Mrs. Gibson-Henlin, has submitted that the issue is with a defendant intending to prevent the recovery of any judgment obtained. She further stated that the claimant has not satisfied the court that there is a real risk that the defendant will remove assets from the jurisdiction or dissipate or dispose of them. She has asked the court to consider that the claimant has served the defendant with notice to quit the rental premises which means that he has to remove his property from the said premises and also that he does sell assets within the ordinary course of business.

In **Wheelbraker Air Pollution Control v Reynolds** 1985 37 WIR, 417 cited in **Half Moon** (supra) at pg 220, Carey JA in the Jamaican Court of Appeal emphasized that it was "not sufficient merely to assert a belief in the fear of the removal. The fear must be determined on the basis of the facts disclosed in the affidavit."

In **Half Moon Bay** (supra) the plaintiff's allegation was that there was a risk of removal of the proceeds of sale of a hotel owned by the defendant based on the fact that the said proceeds could be easily transferred out of the jurisdiction. Wolfe CJ said (at pg 12):

> *"This to my mind is not sufficient to establish the risk factor. No evidence has been adduced which suggests that the defendant is taking steps to dissipate the assets or remove them from the jurisdiction.*
> *----the plaintiff should depone --- to objective facts from which it may be inferred that the defendant is likely to remove his assets abroad or dissipate them; unsupported statements or expressions of fear have little weight, see* ***O'Regan v Iambic Production Ltd*** *(1989) New LJ 1378 DC."*

The claimant is relying on the assertion of a threat by the defendant to sell off his assets. This has been denied by the defendant who has asserted that he and the claimant were in discussion concerning a joint partnership but could come to no agreement and it was within this context that he was served notice to quit. The claimant has admitted that they were in discussion concerning the 'principle' of the claimant's participation in the business of the defendant in order to "find a way to decrease the defendant's growing indebtedness."

The assertion of the claimant in relation to the threat remains no more than an unsupported statement. The claimant is also relying on the assertion that the defendant

has begun to dismantle the bases on which certain of the equipment is mounted, so that they can be removed.

The defendant has denied this allegation. The court also has to bear in mind that the claimant has stated that this happened since the defendant received notice to quit and deliver up the premises within 30 days.

The claimant further relies on the assertion that Mr. Williams is seeking to sell the existing plant to one Mr. Cousins. This has not been denied by the defendant in any affidavit. However, he has stated that he does sell assets within the ordinary course of business. What is clear is that the defendant is not in a good economic position and owes money to the claimant which appears to be increasing. But this by itself, is not sufficient in order to persuade a court to grant a mareva injunction.

There must be solid evidence presented by the claimant to induce this court to believe that on a balance of probabilities, the defendant will remove assets from the jurisdiction or dissipate them in order to defeat any judgment obtained by the claimant (see **Half Moon, Bertram Watkis,** supra).

In coming to this conclusion, the court bears in mind the words of Sir Robert Megary VC in **Barclay-Johnson v Yuill** 1980 3 All ER 190 (at pg 194):

> "*It seems to me that the heart and core of the mareva injunction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in this action, if there is no real risks of this, such an injunction should be refused.*"

The court also considers **Iraqi Ministry of Defence and others v Arcepey Shipping Co. et al** 1981 1QB, pg 65 where it was held that the purpose of the mareva

injunction was not to improve the position of the claimants in the property of an insolvent debtor, but rather to prevent the injustice of a foreign defendant in English proceedings causing assets to be removed from the jurisdiction in order to award the risk of having to satisfy a judgment in pending proceedings in that country.

While the issue in the present case is not the removal of the assets from the jurisdiction, the underlying principle stands i.e., dissipating in order to avoid the risk of having to satisfy a judgment. Based on the evidence adduced by the defendant, it is my opinion that it is sufficient to displace any inference to be drawn from the evidence of the claimant's representative in relation to that issue.

It is the opinion of this court that allowing the mareva injunction to remain would merely serve the purpose of allowing the claimant to ensure that there will be assets available to satisfy any judgment obtained.

The court also bears in mind the hardships experienced by the defendant as expressed in the affidavit of Mr. Williams. He is also bound to leave the premises by virtue of a notice to quit and would not have the freedom to dispose of or transfer any of the assets as listed in the injunction in order to carry on in the ordinary course of business (see **Ninema Maritime Corporation v Traue Schiffahrtsgesellschaft** 1984 1 All ER 398).

However, the court is of the opinion that the hardship of the defendant is not to be given any great consideration as the defendant has admitted part of the claimant's claim.

It is for the reasons stated above that the mareva injunction granted on June 21, 2010 is hereby discharged.

Ruling

Application to discharge Exparte Freezing Order filed on July 9, 2010 is granted.

The claimant's application for the Freezing Order granted by Rattray J on June 21, 2010 to July 15, 2010 and further extended to July 27, 2010 is refused.

Costs of the application is awarded to the defendant to be agreed or taxed.

Leave to appeal granted to the claimant.