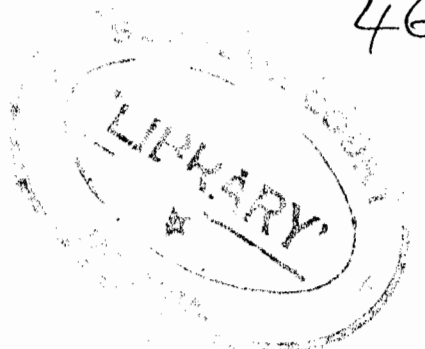




IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. H152 OF 1983

BETWEEN

STEPHEN HILL

AND

PLAINTIFFS

DOROTHY HILL

AND

MAURICE CROISAN

FIRST DEFENDANT

GIANNI COSENTINO

SECOND DEFENDANT

JEAN CARROZZA

THIRD DEFENDANT

Edward Ashenhiem for Plaintiffs

Miss Sonia Jones for Second and Third Defendants

First Defendant not served.

18th October 1983

CORAM: WOLFE J.

The Plaintiffs by writ of summons dated the 31st August 1983 commenced proceedings against the abovenamed Defendants. The writ is endorsed in the following terms.

"The Plaintiffs' claim is jointly and severally against the Defendants jointly and severally for:-

1. Damages for breach of a contract in writing dated 17th April 1983 between the Defendants and the Plaintiffs.
2. Repayment of monies advanced by the Plaintiffs to the Defendants or to one or more of the Defendants or for his or their account at his or their request.
3. Payment to the Plaintiffs or either of them of the share of the gross revenue and of other sales in Jamaica of the circus known as "Jumbo Circus" to which they are entitled. Further or in the alternative the Plaintiffs claim a reasonable sum for services rendered by the Plaintiffs in or about the performances in Jamaica of the said "Jumbo Circus". Further or in the alternative the

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Plaintiffs claim from the Defendants the payment of such amount on the basis of a quantum meruit.

4. A declaration that the Plaintiffs and each of them are entitled to an indemnity from the Defendants and each of them in respect of guarantees given and liabilities incurred by the Plaintiffs or either of them on behalf of the Defendants or any one or more of them and payment by the Defendants to the Plaintiffs of all amounts so guaranteed and of all amounts required to satisfy all liabilities aforesaid.

5. A declaration that the Plaintiffs and each of them are entitled to a lien over and on:-

- (a) the circus tent, benches, chairs and boxes.
- (b) the dancing waters equipment,
- (c) electrical equipment, stage lighting and sound equipment;
- (d) trailers; and
- (e) other goods, chattels, equipment, accoutrements, personal and/or moveable property; utilized in Jamaica for the circus known as the "Jumbo Circus"

6. An injunction preventing the Defendants or any of them or any of their servants and/or agents from removing the items, property and things or any of them mentioned in paragraph 5 hereof or any other assets of the Defendants or any of them out of Jamaica and/or out of the jurisdiction of this Honourable Court and/or out of the possession of the Plaintiffs or either of them.

7. Such further and/or other relief as may be just".

On the 18th September 1983 Patterson J. granted the Plaintiffs an interim injunction in the following terms.

It is hereby ordered.

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1. That the Defendants and each of them and their servants and agents and the servants and agents of each of the Defendants be and are hereby prevented for a period of twenty one (21) days from the date of this Order from removing the items property or things or any of them described in the schedule hereto or any of them described in the schedule hereto or any other assets of the Defendants or any of them out of Jamaica and/or out of the jurisdiction of this Honourable Court and/or out of the possession of the Plaintiffs or either of them.

S C H E D U L E

- (a) the circus tent, benches, chairs and boxes.
 - (b) the dancing waters equipment.
 - (c) electrical equipment, stage lightings and sound equipment,
 - (d) trailers; and
 - (e) other goods, chattels, equipment, accoutrements personal and/or moveable property utilised in Jamaica for the circus known as the "Jumbo Circus".
2. That the costs of the Summons Application and Order be costs in the cause.
 3. That the Plaintiffs undertake to abide by any order which the Court may make in regard to damages.

On the 21st day of September 1983 Master Sinclair, by and with the consent of the parties, extended the order made by Patterson J. with certain amendments thereto which in my view are not of material significance. This order was further extended by Morgan J. on the 30th day of September 1983.

In the summons before me the Plaintiffs seek the reliefs set out hereunder:

1. An injunction preventing the Defendants or any of them or any of their servants and/or agents until the trial of this action from removing the items property or things

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or any of them described in the schedule hereto or any other assets of the Defendants or any of them out of Jamaica or out of the jurisdiction of this Honourable Court or from transferring, disposing or parting with the possession of the same and/or from removing the same out of the possession of the Plaintiffs or either of them if and to the extent that the Plaintiffs or either of them have possession.

2. An Order pursuant to Section 664 of the Judicature (Civil Procedure Code) Law, that the second and third named Defendants be arrested and imprisoned for a period, not exceeding six months unless and until they have sooner given security that they will not go out of the Island without the leave of the court.
3. The issue pursuant to Section 665 of the Judicature (Civil Procedure Code) Law of a warrant to arrest the second and third named Defendants and deliver them to the keeper of some convenient prison, there to be kept until they have given bail or security in such sum as the court thinks fit for their appearance at any time when called upon while the suit is pending, and until execution or satisfaction of any decree that may be made against them in the suit.
4. An Order, pursuant to Section 666 of the Judicature (Civil Procedure Code) Law that the goods, chattels and effects of the Defendants and of each of them be forthwith secured and taken into the custody of the Bailiff, as a pledge or surety to answer the just demands of the Plaintiffs until the trial of such suit and judgment thereon.
5. Costs.
6. Certificate for Counsel.
7. Such further and/or other relief as may be just.

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By way of comment I would observe that the reliefs sought are not dissimilar in nature to the demand of Shylock. The Plaintiffs seek not only to restrain the Defendants from removing their goods out of the jurisdiction, but further thereto they would have the goods seized and the persons of the Defendants restrained as well.

The Plaintiffs are partners in a Partnership, Celebrity Concerts Caribbean. The Defendants are partners in the Celebrity Concerts Caribbean Productions who are the owners of a circus known as Jumbo Circus. The Plaintiffs and Defendants are contracting parties under an Agreement dated the 17th day of April 1983. There is no dispute as to the terms and conditions of the said Agreement.

The Agreement relates to the performance of the "Jumbo Circus" in Jamaica.

Financially the venture proved less of a success than the parties had bargained for and it is in these circumstances that the action herein has arisen.

It is contended for by the Plaintiffs that the Defendants are indebted to them in a sum not less than \$75,607.00 and possibly not more than \$153,286.00 (see paragraphs 12 and 13 of the first named Plaintiff's affidavit dated the 30th August 1983).

On the other hand the Defendants state that an amount of \$55,163.91 is due to the Plaintiffs. (see paragraph 21 of second Defendant's affidavit dated 7th October 1983).

The exercise of the Court's discretion, relative to the grant of the injunction, is sought on the basis that the Defendants are foreigners with no other assests in Jamaica, consequently if they were allowed to remove their assests outside of the jurisdiction any judgment which the Plaintiffs might obtain would remain unsatisfied.

Mr. Ashenhiem for the Plaintiffs placed reliance upon the decision in Mareva Compania Naviera S.A. v. International Bulkcarriers S.A. The Mareva 1980 1 A.E.R. 213.

Prior to the decision in The Mareva Jessel MR in Beddow v. Beddow

(1878) 9 Ch. D. 89 at 93 had this to say:

"I have unlimited power to grant an injunction in any case where it would be right or just to do so".

In The Mareva (Supra) at p.214 Lord Denning MR commenting upon the observation of Jessel MR in Beddow v. Beddow (Supra) said:

"There is only one qualification to be made. The court will not grant an injunction to protect a person who has no legal or equitable right whatever. That appears from North London Railway Co. v. Great Northern Railway Co. but subject to that qualification, the statute gives a wide general power to the Courts. It is well summarised in Halsburys' Laws of England:

'Now therefore, whenever a right, which can be asserted either at law or in equity, does exist, then, whatever the previous practice may have been, the Court is enabled by virtue of this provision, in a proper case, to grant an injunction to protect that right'.

"In my opinion", continued the Master of ^{the} Rails, "that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing and there is danger that the debtor may dispose of his assets so as to defeat it before judgment, the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets".

This decision followed the decision in Nippon Yusen Kaisha v. Karageorgis and another. [1975] 3 A.E.R. p. 282 at p. 283 Lord Denning MR said:

"We are told that an injunction of this kind has never been done before. It has never been the practice of the English Courts to seize assets of a Defendant in advance of judgment, or to restrain the disposal of them. We were told that Chapman J. in Chambers recently refused such an application. In this case also Donaldson J. refused. We know of course, that the practice on the continent of Europe is different. It seems to me that the time has come when we should revise our practice. There is no reason why the High Court or this court should not make an order such as is asked for here. It is warranted by Section 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which says the High Court may grant a mandamus or injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the Court to be just or convenient so to do. It seems to me that this is just such

a case. There is a strong prima facie case that the hire is owing and unpaid. If an injunction is not granted, these moneys may be moved out of the jurisdiction and the shipowners will have the greatest difficulty in recovering anything."

(emphasis mine).

At page 284 Geoffrey Lane L.J. said:

"In the circumstances which exist in this case there is no reason why the court should not assist a litigant who is in danger of losing money to which he is admittedly entitled. There is nothing in the rules, as far as we have been told, to prevent it. The circumstances demand that the injunction should be continued".

It is clear from the cases cited herein that the court is vested with the power to grant the injunction prayed by the Plaintiffs. However it must be noted that there are certain guidelines to be applied before the exercise of the discretion.

In Third Chandris Shipping Corporation and others v. Unimarine S.A. [1979] 2 A.E.R. 972 at p. 984, Lord Denning MR laid down the following guidelines:

"Much as I am in favour of the Mareva injunction, it must not be stretched too far lest it be endangered. In endeavouring to set out some guide lines, I have had recourse to the practice of many other countries which have been put before us. They have been most helpful. These are the points which those who apply for it should bear in mind.

- (i) The Plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know. See the Assios.
- (ii) The Plaintiff should give particulars of his claim against the Defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the Defendant.
- (iii) The Plaintiff should give some grounds for believing that the Defendants have assets here. I think that this requirement was put too high in the unreported case of MBPYL Corporation v. Intercontinental Banking Corporation. In most cases the Plaintiff will not know the extent of the assets. He will only have indications of them. The existence of a Bank Account in England is enough, whether it is in overdraft or not.

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- (iv) The Plaintiffs should give some grounds for believing that there is a risk of the assets being removed before the judgment or the award is satisfied"
- (v) The Plaintiff must, of course, give an undertaking in damages, in case they fail in their claim or the injunction turns out to be unjustified. In a suitable case this should be supported by a bond or security; and the injunction only granted on it being given, or undertaken to be given."

It is worthy of note that in all the cases referred to the Defendants were Registered Corporations. I am of the view that the principle extend to partnerships as well as to individuals.

Before applying the guidelines to the instant case let me deal with a submission made by Mr. Ashenhiem. It was submitted on behalf of the Plaintiffs that the question of the "balance of convenience" did not arise in the instant case. It was further submitted that the "balance of convenience" approach was appropriate only in cases where the court was dealing with the question of the preservation or not of a status quo.

With this submission I disagree. The very words of section 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which repeats section 25 (8) of the Judicature Act 1873 and upon which the decision in *The Maréva* is founded speak of convenience.

Section 45 of the Supreme Court of Judicature (Consolidation) Act 1925.

"A mandamus or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient".

(emphasis mine).

Applying the guidelines to the evidence adduced before me I am satisfied that the Plaintiffs have brought themselves within the stated guidelines and that in the circumstances of the case it is just and convenient to grant the injunction prayed.

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Having regard, however, to the nature of the assets and the loss which the Defendants may incur in having their assets seized pending the outcome of the action I am of the view that this is a proper case in which the Plaintiffs should be required to give security and this injunction is being granted on condition that security in the sum of \$100,000.00 by way of bond with a surety to be approved by Defendants' attorneys-at-Law be given within fourteen days hereof. The said bond to be filed in Court. In the event of the parties not being able to agree on surety the matter shall be referred to the Court to be decided.

The injunction relates only to property owned by C.C.C. Productions and to property owned by the Defendants and mentioned in the schedule to the summons herein save and except the animals and the trailers in which they are housed. This injunction does not extend to the property owned by individual performers other than the Defendants.

Re Reliefs as set out in paragraphs 2 and 3 of Summons.

"An Order pursuant to Section 664 of the Judicature (Civil Procedure Code) Law, that the Second and Third named Defendants be arrested and imprisoned for a period, not exceeding six months, unless and until they have sooner given security that they will not go out of the Island without the leave of the Court."

"The issue pursuant to Section 665 of the Judicature (Civil Procedure Code) Law of a warrant to arrest the Second and Third named Defendants and deliver them to the keeper of some convenient prison, there to be kept until they have given bail or security in such sum as the Court thinks fit for their appearance at any time when called upon while the suit is pending, and until execution or satisfaction of any decree that may be made against them in the suit."

Having granted the injunction as prayed at paragraph 1 of the summons I am of the view that it would be oppressive to accede to the other reliefs sought herein.

Where Defendants are restrained from removing their assets from the jurisdiction, thereby offering protection to the Plaintiff in the

event of a judgment in his favour then it is my view that the primary hardship which the Plaintiffs seeks to avert is adequately taken care of and any order to restrain the person of the Defendant is oppressive save and except in cases where the Defendants' presence is material to the recovery of what the Plaintiff claims. See Thomas v. Garcia

[7 J.L.R.] p. 76.

It was submitted on behalf of the Plaintiffs that Thomas v. Garcia was wrongly decided and should not be followed and further that it is not binding upon the Court being a judgment at first instance.

I am satisfied that the Learned Chief Justice in Thomas v. Garcia correctly interpreted the section under consideration. It follows therefore that the Plaintiffs having failed to satisfy me that the absence of the Defendants from the Island will prejudice them in the recovery of what is claimed the reliefs sought at paragraphs 2 and 3 of the summons are refused.

Re Paragraph 4 of Summons

"An Order, pursuant to Section 666 of the Judicature (Civil Procedure Code) Law that the goods, chattels and effects of the Defendants and of each of them be forthwith secured and taken into the custody of the Bailiff, as a pledge or surety to answer the just demands of the Plaintiffs until the trial of such suit and judgment thereon."

The Plaintiffs and Defendants are agreed that the Venture was not the financial success anticipated. The Defendants from all appearances are impecunious. The order that their assets in Jamaica be not removed out of the jurisdiction pending the determination of the action and further that the said assets be stored away would not be just and equitable.

It is my view that the Defendants should be allowed to use the equipment during the period of restraint to earn all income if they so desire. This might very well redound to the benefit of the Plaintiffs.

In any event to grant the relief sought would be to place too onerous a responsibility upon the Bailiff. The Bailiffs in Jamaica do

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do not have the facilities to carry out and supervise such an order.
This relief is also refused.

Costs of this application to be the Plaintiffs, to be taxed
or agreed. Certificate of Counsel granted.

It is further recommended that this action be set down for
trial at the earliest possible date.