IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO C L.1999/ J 103

BETWEEN	JORRIL FINANCIAL INC.	PLAINTIFF
A N D	BARDI LTD.	1ST DEFENDANT
A N D	BASTION HOLDINGS LTD.	2ND DEFENDANT

AND

SUIT NO. C.L. 1999/ J 104

BETWEEN	JORRIL FINANCIAL INC.	PLAINTIFF
A N D	JORRIL FINANCIAL LIMITED	DEFENDANT

Allan Wood and Miss Daniella Gentles for the Plaintiffs
instructed by Livingston, Alexander and Levy

Dennis Morrison, Q. C. and Samuel Harrison for the Defendants Bardi Ltd.
and Jorrill Financial Ltd instructed by DunnCox

Maurice Manning for the second Defendant Bastion Holdings Ltd
instructed by Nunes, Scholefield, DeLeon and Co.

Lance Hylton and Miss Lorraine Bartlett, as representatives of the Plaintiffs
Alfred McPherson as representative of the Beneficiaries.

HEARD: February 20 and 21; April 8 - 10, May 13 and 15;
October 7 - 9 and 11, 2002;
January 16, 2003.

N. E. McINTOSH, J.

Paul Hargreaves Geddes, who died on June 9, 1999, is described, simply, in his last will and testament, as a Company Director. However, in his business lifetime, Mr. Geddes would perhaps have been better described as a Giant in the Jamaican business sector. He had the

controlling interests in several companies and, until his later years, when he divested himself of a substantial portion of his shareholdings, was a major shareholder in the local company, then named Desnoes and Geddes Limited.. He and his wife, Margie Geddes were also the only shareholders in the Defendant Company, Bardi Limited, each holding 50% of that Company`s shares.

On his death, Mrs. Geddes became the sole beneficiary of his estate. However, as part of his estate planning, Mr. Geddes had established a trust in the British Virgin Islands, to benefit his children and grandchildren. He had had a series of promissory notes prepared in June and August of 1994 and had endorsed and transferred the notes to Securities Trust and Management Services Limited, to be held in that trust. The notes, which, by my reckoning, numbered twenty-four (24), were payable, on demand and were subsequently endorsed by Securities Trust and Management Services Limited to the Plaintiff.

In effect then, Mrs. Geddes` inheritance was subject to the demand on the promissory notes and this demand was made by letter addressed to Bardi Limited, on August 9, 1999, by the Plaintiff`s Attorneys-at Law.

The only response received from the Defendant, Bardi Limited, was a letter stating, inter alia, that the company was having "our legal counsel review the documents that were sent" and asking that it be noted that "the assets of the Jorril Trust are part of a legal suit being heard in the Privy Council at the end of this year."

The plaintiff therefore sought the assistance of the court in having these demands met and, to this end, filed Suits numbered C.L. 1999/J103 and C.L. 1999/J104, on November 8, 1999, together with applications for Mareva injunctions to restrain the defendants Bardi Ltd. and Jorril Financial Ltd:

> "until the determination of this action or further order whether by themselves or by their servants, agents or

> otherwise howsoever, from removing from the jurisdiction any of their assets within the jurisdiction."

and also to restrain the said defendants :

> "until the determination of this action or further order whether by themselves or by their servants, agents or otherwise howsoever, from disposing, mortgaging, pledging, transferring, assigning, charging or otherwise dealing with any of their assets whether real or personal, wherever situated and whether within the jurisdiction or outside of the jurisdiction
>
> 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 unless and until this Order shall be declared enforceable or recognized and enforced by any Court of the jurisdiction in which the Defendant`s assets are situated.."

The injunctions were granted as prayed and when each Defendant failed to file a defence to the actions the Plaintiff filed summonses dated November 1, 2000, seeking summary judgment in each Suit, as well as a continuation of the Mareva injunctions, until execution of the judgments. These summonses were later amended and the amended summonses filed on December 12, 2001.

On November 16, 2001, the Defendant had filed a summons seeking a variation of the injunction, in relation to Suit number C.L. 1999/ J103 only and when this hearing commenced on February 20, 2002, the Court was concerned with the applications in that Suit. The parties were then Jorril Financial Inc. as Plaintiff and Bardi Ltd. as Defendant. However, that position changed when the hearing resumed on the 8th of April, 2002, on an application by Bastion Holdings Ltd. to be joined as a party, in relation to the applications concerning the Mareva injunction, so that on the grant of said application, Bastion Holdings Ltd. became the second Defendant in that Suit.

Arising from this joinder, the Plaintiff sought and was granted leave to further amend its application for summary judgment in Suit number C.L. 1999/ J103 and a further amended

summons dated the 19th day of April, 2002, was filed naming Bastion Holdings Limited as 2nd Defendant and including Bastion Holdings Ltd. in the relief sought.

Then, on the 15th of May, 2002, with the consent of the parties, the aforementioned Suit was consolidated with Suit No. C. L. 1999/ J104 and the matter continued as a hearing of the Plaintiff's application for summary judgment in each case and the first Defendant's application, in relation to Suit No. C.L. 1999/ J103 only, to vary the terms of the Mareva injunction.

APPLICATIONS FOR SUMMARY JUDGMENT
SUIT NO. C. L. 1999/ J103.

In this application the Plaintiff first seeks an order that :

> "1. Final Judgment be entered in favour of the Plaintiff against the Defendant, pursuant to Section 79 of the Judicature Civil Procedure Code Law, for the sum of United States Seven Million Two Hundred and Eighty Thousand Nine Hundred and Eighty-Seven Dollars and Two Cents (US $7, 280, 987. 02) together with interest on the sum of United States Four Million Four Hundred and Seventy- Four Thousand Three Hundred and Twenty-six Dollars (US $4, 474, 326.00) at a rate of 12% per annum from the 2nd November, 1999 to the date of payment as claimed in the Statement of Claim, on the ground that there is no Defence to the Claim."

The Statement of Claim pleads a debt on eighteen (18) promissory notes, all endorsed by Paul Geddes to the order of Securities Trust and Management Services Ltd. and, thereafter, by the said Securities Trust and Management Services Ltd to the Plaintiff.

SUIT NO. C.L. 1999/ J104

In this application, the Plaintiff seeks the following order:

> "1. Final Judgment be entered in favour of the Plaintiff against the Defendant pursuant to Section 79 of the Judicature (Civil Procedure Code) Law, for the sum of United States One Hundred and Ninety-Seven Thousand, Seven Hundred and Sixty-Six Dollars and Eighty-Six Cents (US $197, 766. 86), together with interest on the sum of United States One Hundred and Twenty Thousand Dollars (US $120, 000.00) at the rate of 12 % per annum from the 2nd November, 1999 to the date of

> payment as claimed in the Statement of Claim, on the ground that there is no Defence to the Claim."

The Statement of Claim, in this Suit, pleads a debt on six (6) promissory notes. These too were endorsed by Mr. Geddes to the order of Securities Trust and Management Services Ltd. and by the latter, to the Plaintiff.

It was always the Plaintiff's understanding that the debt was admitted and that the only issue was the Defendant's ability to pay and the quantum of a possible settlement. The supporting affidavits of Lance Hylton, Director of Coverdale Trust Services Limited which wholly owns the Plaintiff company, clearly attest to this, particularly his affidavit sworn to on the 18th of January, 2002, where, in paragraph 8.1, he deposed as follows:

> "Demand for payment of the Promissory Notes was first made on the Defendant by the Plaintiff through our Attorneys, in August, 1999 and at no point has the Defendant ever denied the validity of the Promissory Notes..... In fact, the debt has been admitted and the only issue has been about the defendant's ability to pay and the quantum of a possible settlement"

However, in response to the Plaintiff's application, the Defendant sought, for the first time, to challenge the validity of the promissory notes. In her affidavit on behalf of the Defendant Bardi Limited, Miss Paula Jackson, who described herself as "the personal assistant of Paul Geddes from February, 1997 until his death in 1999," challenged the genuineness of the signature of Paul Geddes, appearing on the promissory notes and hence the validity of the notes.

The plaintiff met this challenge with an affidavit from Miss Monica Ladd who had prepared the notes on the instructions of Mr. Geddes and had witnessed their execution. She had become familiar with his signature over a period of several years and was able to speak to its deterioration in the latter years of his life.

Clearly, Miss Ladd was better able to attest to the genuineness of Mr. Geddes' signature and to the validity of the promissory notes. Furthermore, Mrs. Geddes, Director of the Defendant company, gave evidence that, after receiving the demand for payment on the notes,

the Defendant had taken legal advice and, being of the view that the debt had to be paid, had taken steps in an effort to raise the necessary funds to meet the demand. So the challenge was not pursued and, in closing addresses, learned Queen's Counsel for the first Defendant, Mr. Dennis Morrison, admitted that, as far as the applications for summary judgment were concerned, the first defendant could not contend that "on the material before the Court it is not open to the Court to make the Orders", as prayed.

He submitted that Miss Jackson's affidavit does raise some questions as to the authenticity of the promissory notes but went on to say that the primary contention of the First Defendant, as it relates to the steps taken to raise the necessary funds, was in fact an acknowledgment of the genuineness of the debt.

I agree with Mr. Morrison that the court has all the material necessary for the Orders for Summary Judgment, as prayed. Accordingly, the orders are made in terms of paragraph 1 of the amended summons for summary judgment, in each Suit.

PLAINTIFF'S APPLICATION FOR THE CONTINUATION OF THE MAREVA INJUNCTION IN SUITS NUMBERED C.L. 1999/ J103 AND C.L.1999/ J104

By paragraph 2 of the amended summons, in relation to suit numbered C. L. 1999/ J103, the Plaintiff seeks the following:

> " as against the First and Second Defendants and each of them it be ordered directed and declared that :
>
> i) the Mareva Injunction granted in this action on 8th November, 1999 is to remain in place and is to continue until the execution of the Judgment and payment to the Plaintiff in full of the Judgment debt, interest and costs.
>
> ii) the Mareva Injunction granted in this action on the 8th November, 1999 is not varied or modified and continues to apply to all stocks in Desnoes and Geddes Limited, owned or held in the name of the first defendant and to all bonus shares and dividends which have been paid or accrued in respect of such stocks since the grant of the aforesaid injunction.

> iii) the Mareva Injunction granted in this action on 8th November 1999 is not varied or modified by reason of an agreement dated 1st October, 1999 made between the Defendants for the sale by the 1st Defendant to the 2nd Defendant of 10,949,446 stocks in Desnoes and Geddes owned and held in the name of the 1st Defendant....."

and, in paragraph 3 of the summons in suit number C. L. 1999/ J104, the Plaintiff seeks an order that :

> " The Mareva injunction granted on the 8th day of November, 1999 remain in place and continue until execution of the judgment and payment in full of the judgment debt, interest and costs."

DEFENDANT'S APPLICATION TO VARY THE TERMS OF THE MAREVA INJUNCTION IN SUIT NO. C.L. 1999/ J103.

On the other hand, the First Defendant's application is for an order that:

> "1. The Mareva Injunction ordered herein on 8th November, 1999 be varied to permit the completion of the agreement for sale of shares made 1st October, 1999 between Bardi Limited and Bastion Holdings Limited;
>
> 2. The proceeds of such sale be paid into a joint interest-bearing account in the names of the Attorneys-at-Law for the Plaintiff and the Defendant, pending the determination of these proceedings;
>
> 3. That the time for filing and serving a declaration of assets by the defendant be extended to the date hereof."

This is the application in which the 2nd Defendant, quite understandably, declared an interest. In support of that interest, an affidavit was sworn to on the 4th of April, 2002 and filed on the 9th of April, 2002 by Albun Whittaker, described as a Director, an investor and the principal of Bastion Holdings Ltd.

In paragraph 12 of his affidavit, Mr. Whittaker states that:

> "The concern of Bastion Holdings Limited is that Orders may be made by this Honourable Court which are damaging to the company's interest without the company having any opportunity to put before the Court material and the submissions to protect their interest under the stamped Agreement for Sale of shares, consequently the company is obliged to ask for leave to intervene so as to be heard"

On the application of the Plaintiff's Attorney -at- Law, this Court made an order on the 10th of April, 2002, for Mr. Whittaker to attend on May 13, 2002, to be cross-examined and to produce certain documents in relation to Bastion Holdings Ltd., such as a copy of its Memorandum and Articles of Association, of Registers of Directors and Shareholders, of bank statements for Bastion Holdings Ltd. and another company known as Heritage and Hinton and the counterfoil for the cheque made payable to the first defendant, dated 1st October, 1999, in the sum of US$500,000.00 as a deposit on the purchase price of the shares.

However, on the 13th of May,2002, Mr. Whittaker did not attend and the court was informed that he had made an attempt to comply with the order of the court but was prevented from so doing because of a medical condition. As an alternative route and so as to facilitate the continued conduct of the hearing, an order was made for the requested documents to be exhibited to an affidavit in the first instance and for Mr. Whittaker to attend on a subsequent date.

The hearing was adjourned on the 15th of May, 2002, for continuation on October 7, 2002, on which date Mr. Whittaker was to attend. When the hearing reconvened, however, Mr. Whittaker`s attorney-at-law informed the court that his client was now of the view, after taking legal advice, that his attendance was un-necessary as it would be of no assistance to the court

This, in my view, was contempt at its highest. Mr. Whittaker, it seems, was no longer anxious to be heard but was now satisfied to be silenced by his contempt. He was afforded the opportunity to purge his contempt but he opted to remain silent, in continued undisguised

contempt of this court. His contempt received the initial condemnation of the court in an order for costs made against him for the two adjournments occasioned by his absence and the submissions which he was so anxious to make were never heard.

The applications concerning the Mareva Injunction therefore fall to be determined on the basis of the several affidavits filed on behalf of the Plaintiff and the first Defendant, as well as the viva voce evidence of Mrs. Margie Geddes, Mr. Malcolm McDonald and Mr. Christopher Berry, who all attended for cross-examination, pursuant to orders of the court. The documents produced on behalf of the 2nd defendant also form a part of the material for the consideration of the court.

In her affidavit, sworn to on the 23rd of November, 2001, in support of the 1st Defendant's application, Mrs. Margie Geddes referred to the Defendant's shareholdings in Desnoes and Geddes, amounting to 10,000,000 stock units, as its principal assets. She contemplated selling these shares on the Jamaica Stock Exchange, but on advice from an Attorney-at-Law, Mr. Malcolm McDonald who in turn sought advice from an Investment Company, she considered a private buyer to be a possibility and accordingly contacted a friend, Mr. Albun Whittaker, an investor and the principal in Bastion Holdings Ltd. She was confident that Mr. Whittaker had the financial resources to complete the sale to him of the aforementioned stock units.

The market value of the stock on the Jamaica Stock Exchange, at the time, was $7.00 per share and sale at that price would realize proceeds amounting to J$76,646,122. It is Mrs. Geddes' affidavit evidence that "at the time of the demand for payment (on the promissory notes) this was the only secure avenue for me to realize such a substantial sum to be paid towards the debt claimed by the plaintiff."

She continued in paragraph 14 of her affidavit:

> "An agreement for sale of the above described D & G Shares was accordingly entered into between Bardi Limited and Bastion

> Holdings Limited for a sale price of J$76,646,122..... A deposit of J$20,000,000, was paid upon signing, with the balance of J$56,646,122 to be paid in full, before 30th September, 2004, with interest thereon at 10% per annum until payment. The balance is secured by a deposit of the Stock certificates for the above described D & G shares, as well as the share certificates for 100% of the shares of Bastion Holdings Limited and a share transfer duly executed by the holder."

Mrs. Geddes further deposed that the agreement was sent to Mr. Whittaker in George Town Grand Cayman for execution and that the duly executed agreement was returned, on or about November 24, 1999.

This then is the agreement which the first defendant is seeking the leave of the court to complete, by a variation of the terms of the November 8, 1999 Order.

In his closing submissions Mr. Morrison, Q. C., traced the modern emergence of the Mareva injunction with references to cases such as **Nippon Yusen Kaisha v Karageorfis [1975] 1WLR 1093** and

Mareva Compania Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd`s Report 509.

He outlined the grounds on which the Courts have discharged and, alternatively, have varied the terms of Mareva Injunctions, as gleaned from the authorities and quoted from the judgment of Lloyd, J, in **SCF Finance Co. Ltd. v Masri and another [1985] 2 All E.R. 747, as follows:**

> "It is now well settled that an injunction will be varied where necessary to enable a defendant to pay his ordinary trading debts as they fall due, or to meet his ordinary living expenses."

Similarly, Sir Robert Megarry, V. C. had this to say, in **Barclay-Johnson v Yuill [1990] 1 E.L.R. 1259, 1264:**

> "It is not enough for such an injunction merely to forbid the defendant to remove them from the jurisdiction for otherwise he might transfer them to some collaborator who would then

> remove them; accordingly, the injunction will restrain the defendant from disposing of them even within the jurisdiction. But that does not mean that the assets will remain sterilized for the benefit of the plaintiff, for the court will permit the defendant to use them for paying debts as they fall due."

Mr. Morrison submitted that the ground on which the first defendant seeks a variation of this injunction falls squarely within these recognized parameters. Although, strictly speaking, the first defendant's obligation to the second defendant under the Agreement for Sale is not really a debt, a variation may lie not only to allow a defendant to meet business debts but to honour business commitments in general. However the commitment relied on by the defendant must be bona fide and must arise in the ordinary course of business. He went on to say that even where the defendant has established a legal basis for the variation, a discretion still resided in the tribunal of law to determine whether or not it is an appropriate case in which to exercise its jurisdiction.

In **Coney Island Amusements Inc. v Good Times Shows Inc. and Others [1984] 36 WIR, 79,** Williams, CJ (Ag) considered the bases on which a Mareva order is made and then expressed the view that, in any event, there is a further question which the Tribunal of law must pose and that is:

> "whether it is just and convenient to grant the relief sought and this must depend on a consideration of all the circumstances"

Mr. Morrison then reviewed a number of cases in which applications were made for variation of mareva injunctions:

In **Iraqi Ministry of Defence and others v Arcepey Shipping Co SA (Gillespie Brothers & Co. Ltd. Intervening) The Angel Bell [1980] 1 All E.R. 480**, Robert Goff, J, recounted the policy considerations underlying the grant of a mareva injunction and in assessing the strength of the case for the intervenors said:

> "...it does not follow that, having established the injunction, the court should not thereafter permit a qualification to it to allow a transfer of assets by the defendant if the defendant satisfies the court that he requires the money for a purpose which does not conflict with the policy underlying the Mareva jurisdiction... I find it difficult to see why, if the plaintiff has not yet proceeded to judgment against a defendant but is simply a claimant for an unliquidated sum, the defendant should not be free to use his assets to pay his debts....It is not to be forgotten that the plaintiff's claim may fail, or the damages which he claims may prove to be inflated. Is he in the meanwhile, merely by establishing a prima facie case, to preclude the bona fide payment of the defendant's debts?"

In the instant case the plaintiff is no longer simply a claimant but now has an order for judgment.

Another case in the review was **Capital Cameras Ltd v. Harold Lines Ltd and others (National Westminster Bank plc intervening) [1991] All E. R. 389,** which reaffirmed the principle that the court will be minded to vary a Mareva injunction to satisfy the obligation owed to a third party especially where that third party has acquired some kind of property interest over the assets frozen.

Mr. Morrison also referred to the caution issued in **SCF Finance Company Ltd v. Masri and another [1985] 2 All E. R. 747** in respect of tying up the assets of third parties. In that case, Lloyd, L J was at pains to point out that where a plaintiff invites the court to include within the scope of a Mareva injunction assets which appear on their face to belong to a third party, e.g. a bank account in the name of a third party, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the defendant. On the other hand, the court made it equally clear that it would not be prepared to vary an order just on the bare say so of a defendant or a third party that assets subjected to the injunction belonged to the said third party. There must be evidence before the court to substantiate the say so.

In Mr. Morrison's view the evidence before this court which includes affidavits sworn to by Margie Geddes and by Malcolm McDonald, together with the sales agreement and proof of

payment of a J$20,000,000 deposit, clearly substantiate the defendant's "say so" and provided ample evidence to suggest that the second defendant had acquired at least a beneficial estate in the shares which are the subject of the Sales Agreement. On the facts provided by the first defendant company, he contends that a prima facie case of ownership of the shares by the second defendant has been established. Therefore, the first defendant should be allowed to meet its obligation to the second defendant.

Further, acknowledging that the authorities make it clear that a variation of a Mareva order will only be granted where the business commitment which the defendant seeks to honour is a bona fide and ordinary business commitment, Mr. Morrison next sought to show that the first defendant had clearly established that its Sale Agreement with the second defendant is a bona fide commitment.

He referred to the text by Steven Gee Q.C. which he said sheds some light on the type of evidence a defendant who seeks a variation must produce to resist a claim of mala fides. At page 318 it is stated that:

> "Where the defendant is seeking the variation, it is usual for him to satisfy this requirement by swearing an affidavit deposing to the amount of the proposed payment, and his reason for making it... If the payment concerns a particular transaction between the defendant and the third party, then ordinarily the defendant will give some details of that transaction and exhibit any appropriate documents to negative any suggestion that the transaction is other than bona fide".

It is to be noted that Mr. Gee speaks of what is usual and ordinarily done. This therefore suggests that in some instances more may be required. In this case there was more as, in addition to their affidavit evidence and documents exhibited thereto, viva voce evidence was also given by Mrs. Geddes, Mr. Malcolm McDonald and Mr. Christopher Berry.

Mr. Morrison contends that the first defendant must be given the benefit of any doubt as to the bona fides of the Agreement, being the party who has produced documents which are prima facie valid.

In his view it is no part of the business of the court at this interlocutory stage of the proceedings to pronounce upon the validity of the agreement. The court should only be concerned with the question of whether in all the circumstances it would be a proper exercise of its discretion to vary the injunction.

The plaintiff strongly resists the first defendant's application for variation and seeks an order for the continuation of the injunction until execution of the judgments which the plaintiff sought to secure. The plaintiff's attorney-at-law Mr. Allen Wood identified five issues which in his view should be determined by the court. They are as follows:

> 1. Whether the agreement for the sale of the Desnoes & Geddes stocks dated 1st October 1999 can properly be described as an arms length bona fide sale agreement made by the first defendant in the ordinary course of business;
> He added that if he Court is satisfied that it is not bona fide then on the first issue no variation of the Mareva injunction ought to be permitted.
>
> 2. Whether the injunction ought to be varied or modified to permit the transfer of the stocks to the second defendant having regard to the fact that Mrs. Margie Geddes as the principal director and shareholder who negotiated and made that agreement knew or ought to have known that the plaintiff was a trustee and that the assets or the proceeds were intended to pass to the trust created by her late husband for the purpose of benefiting his children and grandchildren;
> This he said arose from the cross-examination of Mrs. Geddes. She knew Jorril was a trust and was created to benefit her late husband's children and grandchildren.
>
> 3. Whether the agreement dated 1st October 1999 is a fraud or sham made for the purpose of placing the first defendant's assets, namely, the Desnoes & Geddes stocks, out of the reach of the plaintiff's claim, as a creditor of the first defendant, pursuant to the promissory notes which are the subject of this action;

4. whether the injunction ought to be varied to permit completion of the agreement dated 1st October 1999 if same was made in contravention of the Securities Act;

5. whether the injunction dated 8th November 1999 was breached by the making of payments to the second defendant of US$1.5 million from the first defendant's bank account on 30th May 2001 and 22nd January 2002.

It is Mr. Wood's submission that the court may embark upon an inquiry into the beneficial ownership of the Desnoes & Geddes shares and is not obliged to accept the defendant's assertion as to ownership of the assets (see **SCF Finance Co. Ltd. v Masri and another [1985] 2 All E.R. 748** (supra))

Per Lloyd LJ:

> "If a court were not permitted to inquire into a third party's claim but were bound to accept it at its face value, how could the court be satisfied that any transfer of assets to the third party had occurred before rather than after the injunction?"

So it was that the court embarked upon an inquiry as to the beneficial ownership of the Desnoes & Geddes shares which was claimed by the second defendant, in his affidavit evidence.

Mr. Wood submitted that it is incumbent on the defendants to establish that the agreement for sale was a bona fide arms length transaction made in the ordinary course of business and the court should not simply accept the defendant's assertions, but ought to make careful inquiry and to exercise its discretion taking all the factors into consideration (see **SCF Finance Co. Ltd. v. Masri and another [1985] 2 All E.R. 748** (supra).

If it appears on the evidential material presented to the court that the purported agreement to sell the Desnoes & Geddes stocks to the second defendant was not a bona fide arms length transaction made in the ordinary course of business then the Mareva injunction ought to be continued and the first defendant ought properly to be regarded as being in breach of that order by paying out US$1.5 million to the second defendant and the appropriate order should be made for the restoration of that sum by paying it into court.

He attaches great significance to answers given by Mrs. Geddes in cross-examination relating to her admitted knowledge that her late husband had created or made trust agreements via Jorril Financial Inc and that it related to assets he had placed in some Jamaican Companies; that she knew that the trust would come into being on his death and knew that the vehicle for calling in these assets would be via promissory notes that he had issued.

Mrs. Geddes also said she knew that in making the demand on the notes Jorril was not a normal trade debtor.

Mr. Wood further submitted that the evidence of Mrs. Geddes reveals that the agreement to sell the Desnoes & Geddes stocks was not an arms length bona fide transaction made in the ordinary course of the business of the first defendant but rather an agreement negotiated and concluded without testing the open market and in direct response to the plaintiff's letter of demand.

In addition Mrs. Geddes admits that the principal shareholder of the purchasing company namely Albun Whittaker was a friend and she made no attempt to ascertain if his company even had the financial ability to pay. He contends that from documents disclosed by Mr Whittaker he was no more than a mere man of straw and it was at least misleading to portray him as having the financial ability to complete the transaction. Further, the sale could not be said to be in the ordinary course of the first defendant's business as the company was not pursuing any business at all when it entered into the agreement but rather was attempting to liquidate it's principal assets in response to the plaintiff's demand.

Further still, the purported agreement was over a deferred period of 5 years and the promissory note which was to secure the balance of $56,646,122, was, on a recent valuation (21/8/2000) by Price Waterhouse Coopers estimated to value $34 to $36.4 million which means the shares would have been sold for $56 instead of $76 million. According to Mr. Wood,

Mrs. Geddes having full knowledge of the trust and the promissory notes and being sole director of the first defendant company, on the death of Paul Geddes was in the nature of a constructive trustee who was proceeding to realise assets for the purpose of funding the trust created by her late husband. Her cavalier manner in proceeding to sell the assets without taking prudent steps, such as securing a valuation and, agreeing to a deferral of the payment for five years, is an indication of lack of good faith and these are factors which the court ought to take into account as good bases for refusing to vary the injunction.

The court ought not to close its eyes to the surrounding circumstances, which suggest that this agreement was a sham and was an attempt by the first defendant to place its assets outside of the reach of the plaintiff.

Mr. Wood made further submissions on the inadequacy of the sale price for the shares and raised questions about the nature of the contract and the consideration allegedly given by the second defendant. He went on to submit that it is a fundamental mistake, which is not consistent with the legal principles, to believe that a court, on an inquiry such as in this case, is limited to accepting the document made by the parties and represented to be a genuine agreement. To the contrary, he continued, the court is entitled to go behind the form of the agreement dated 1st October, 1999 and to scrutinize the substance of the transaction made between the defendants for the purpose of determining whether the agreement was merely a facade made with no common intention to create the legal rights and obligations which the document gives the appearance of creating.

For this submission he finds support in the Australian case of **Scott v. Commissioner of Taxation (1966) 40 ALJR 265**. Here Windeyer J stated:

> "A disguise is a real thing: it may be an elaborate and carefully prepared thing; but it is nevertheless a disguise".

The question he said is whether the parties who entered into the ostensible transaction mean it to be in truth their transaction or did they mean it to be and in fact use it as merely a disguise, a facade, a sham, a false front ... concealing their real transaction.

Mr. Wood contends that on the evidence in the present case the agreement of 1st October, 1999 falls squarely within the category where, despite what is stated in the agreement as to the provision of consideration, what has been disclosed during cross-examination of Mr. Malcolm McDonald is that in actual fact no consideration at all has been provided by the second defendant and that, despite what is stated in the agreement, the consideration is illusory for it has been disclosed by Mr. McDonald that what occurred was that the second defendant sent him a cheque for US$500,000 dated 1/10/99 and that cheque was never encashed. Mr. McDonald simply cancelled the cheque by writing void across its face while $20 million was paid by Mrs. Geddes from her bank account to enable the stamping of the agreement so that it would be represented that the deposit had been paid.

Mr. McDonald sought to explain that the cheque was cancelled because Mrs. Geddes had bought the US currency from the 2nd Defendant but there was no supporting evidence that US$500,000 was ever sold to Mrs. Geddes or that the 2nd Defendant ever had any funds anywhere near $500,000 to pay because the only bank account exhibited was in continuous debit from September 1 to the end of November 1999 which was the period during which the deposit was allegedly paid. If Mrs. Geddes had indeed bought the U.S. dollars, asked Mr. Wood, why wasn't the cheque endorsed to her as opposed to being cancelled and the cancelled cheque held in Mr. McDonald's files.

Mr. Wood submits that this is cogent evidence that the agreement is but a colourable transaction designed to hinder, delay and/or defeat the Plaintiff 's claim and these are the

circumstances, where it appears that the 2nd Defendant has given no consideration, that J$1.5 million in dividends have been paid out to the company.

It was also revealed in cross-examination that Mr. McDonald holds a blank transfer in respect of the shareholdings of the 2nd Defendant and Mrs. Geddes holds the share certificate. It is therefore open to the Court to infer that in reality it is Mrs. Geddes who is the beneficial shareholder of the 2nd Defendant especially when it is considered that she paid the only sum under this transaction - that is, the J$20 million.

Mrs. Geddes is the sole beneficiary under the Will of her late husband so in effect this would be a circuitous transaction leading right back to Mrs. Geddes and she would then take the shares free and clear of the Plaintiff's claim.

A further submission made by Mr. Wood related to Mr. Whittaker's status as Director of the 2nd Defendant company as a document exhibited reveals that he was not a director of the 2nd Defendant company on October 1, 1999 – he only became a director on November 8, 1999. He therefore could not have signed the agreement on October 1, 1999 as a director.

He referred to numerous instances of inconsistencies and untruths in the evidence of both Mrs. Geddes and Mr. McDonald and the lack of support for their evidence as it relates to Mr. Berry's affidavit. Mrs. Geddes for instance could not provide details of the agreement such as when and where it was signed and whether or not she had taken it to Mr. McDonald.

As authority for the Plaintiff's application for the continuation of the Injunction Mr. Wood relied on the case of Stewart Chartering Ltd. v. C & O Managements SA and others The Venus Destiny (1980) 1 ALL ER 718. In this case Robert Goff J said:-

> "If the Plaintiffs were unable to obtain a Judgment in the present case without abandoning their Mareva Injunction it would be open to a Defendant to defeat the very purpose of the proceedings simply be declining to enter an appearance.....The appropriate action to be taken by the Court in such circumstances is in my

> judgment to grant leave to the Plaintiff, in an appropriate case, to enter judgment in default of Appearance, notwithstanding that the writ is endorsed with a claim for an injunction. If the court so acts it can also order the Mareva Injunction to continue in force after the judgment in aid of execution .... the policy underlying the Mareva Injunction can only be given effect to if the court has power to continue the Mareva Injunction after judgment, in aid of execution"

Conclusion

It clearly is agreed by the parties that in exercising its discretion in this matter the court must have regard to all the circumstances in order to arrive at what is just and convenient.

That, in my view, demands that the court should not only take the affidavits and supporting documents into account but also the demeanour of the witnesses who gave viva voce evidence assessing how each stood up to the test of cross-examination.

I agree with Mr. Wood's submission that the court is not obliged to take the Sales Agreement at face value but should carefully scrutinize all the surrounding circumstances in order to determine its bona fides – in order to determine whether this was an agreement made in good faith. This must be one of the factors, which the court should take into account in the exercise of its discretion.

It is my view that the material before me gives rise to some very serious concerns particularly about the genuineness of the Sales Agreement. To list but a few of those concerns there is:

(i) Mrs. Geddes' assertions that the arrangement for the sale of the principal assets of the 1st Defendant company was to quickly raise funds to meet the Plaintiff's demand on the promissory notes. She mentions the four week time frame which she was given as an indication of the need to

act quickly yet she proceeds to enter into an agreement with a 5 year deferred payment plan.

(ii) The fact that on receiving the deposit of J$20,000,000 no attempt is made to communicate with the Plaintiff and commence payment on the debt.

(iii) That no approach was made to the Plaintiff when a decision was made to sell the principal assets of the company. The decision was not even disclosed to the Plaintiff. Instead the Plaintiff was told about a Suit in the Privy Council which on the face of it, bore no relation to the Plaintiff's claim.

(iv) The fact that the offer for the sale of the shares was made only to her friend Mr. Albun Whittaker.

(v) The payment of that deposit by Mrs. Geddes herself, a factor which only came to light in cross-examination.

(vi) The holding of the stock transfer by her attorney Malcolm McDonald and the stock certificate by Mrs. Geddes herself which effectively give rise to circumstances with the potential of leading the stocks back to her, free of the Plaintiff's claim.

(vii) The apparent financial inability of the 2nd Defendant to enter into this agreement coupled with the status of the signatory to the agreement vis-avis the 2nd Defendant company, at the relevant time.

(viii) The fact that the Order for the Mareva Injunction was served on the 1st Defendant from November 10, 1999 yet it was two years later, after the Plaintiff's application for Summary Judgment, that the 1st Defendant

sought to apply for a variation of the order, to facilitate an agreement allegedly entered into in October 1999.

(ix) The admission of Mrs. Geddes of her knowledge of the trust and of the promissory notes but on receipt of the demand having the need to seek legal advice, as to payment on the notes and the attempt to challenge the validity of the notes.

(x) The fact that notwithstanding knowledge of the Mareva Injunction payments were made to the 2nd Defendant even after the 1st Defendant made an application to the court for variation of the Order, thereby acknowledging the need for a directive from the Court in this matter.

These factors are to be viewed in the light of the lack of candor and the evasiveness which were all too clearly exhibited by Mrs. Geddes in cross-examination, particularly when asked about her knowledge of dividends declared by D & G and of certain Board decisions. The evidence is replete with instances where she did not immediately give a direct answer to questions put and generally her demeanour was not that of a witness of truth. I recall here her attempt to explain her reason for not approaching the Plaintiff company concerning the proposed sale. She recalled an instance during her husband's lifetime when his children had expressed a preference for cash instead of shares. I found this unconvincing.

Similarly, Mr. McDonald's viva voce evidence about the purchase of the US$500,000 by Mrs. Geddes to explain the cancelled cheque in his records lacked sincerity.

It seems to me that these factors, without even going into other areas raised by Mr. Wood in his submissions, provide more than sufficient basis for the Court to refuse to exercise its discretion in favour of the first Defendant's application to vary the terms of the Mareva Injunction, as prayed. In all the circumstances, I am of the view that it is just and convenient to

allow the Mareva Injunction which was granted on November 8, 1999 to continue until the judgment ordered in each Suit is executed.

Further, I am of the view, on the evidence presented to me in this hearing, that there was not such an agreement on November 8, 1999 as would pass the beneficial ownership in the shares, to the second defendant and no payment of dividends ought to have been made to the 2nd Defendant after that date.

Accordingly, the Order of this Court is as follows:

On the 1st Defendant's Summons to vary the Mareva Injunction granted on November 8, 1999 Summons dismissed with costs to the Plaintiff against the first Defendant, to be agreed or taxed.

On the Plaintiff's Application for Summary Judgment in relation to Suit No. C.L. 1999/J104 it is ordered that:

1. Final Judgment be entered in favour of the Plaintiff against the 1st Defendant pursuant to Section 79 of the Judicature (Civil Procedure Code Law) for the sum of United States One Hundred and Ninety Seven Thousand Seven Hundred and Sixty Dollars and Eighty Six Cents (US$197,766.86) together with interest on the sum of United States One Hundred and Twenty Thousand Dollars (US$120,000.00) at a rate of 12% per annum from the 2nd November 1999 to the date of payment as claimed in the Statement of Claim on the ground that there is no Defence to the Claim;

2. As against the 1st and 2nd Defendants and each of them, it be ordered directed and declared that:-

   i) the Mareva Injunction granted on the 8th day of November, 1999 is to remain in place and is to continue until the execution of the Judgment

and payment to the Plaintiff in full of the judgment debt, interest and costs;

ii) the Mareva Injunction granted in this action on 8th November 1999 is not varied or modified and continues to apply to all stocks in Desnoes & Geddes Limited owned or held in the name of the 1st Defendant and to all bonus shares and dividends which have been paid or accrued in respect of such stocks since the grant of the aforesaid injunction

4. Liberty to apply;

5. Costs of this application to the Plaintiff as against the 1st and 2nd Defendants to be agreed or taxed.

It is further ordered that the first and second Defendants and each of them do pay into Court the sum of One Million Five Hundred and Three Thousand Five Hundred and Forty-Six United States Dollars and Ninety Cents (US$1,503,546.90), which was paid out from the 1st Defendant's bank account in Jamaica at Citibank, N.A. to the 2nd Defendant on May 30, 2001 and January 22, 2002, within 42 days of this Order together with interest at the rate of 12% per annum from the 22nd of January 2002 to the date of payment and the sum so paid into Court shall abide any further Order of the Court.