IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007 HCV 02993

BETWEEN RBTT BANK JAMAICA LIMITED CLAIMANT

AND LAKELAND FARMS LIMITED DEFENDANT

Jermaine Spence Esq. and Ms. Coleen Weise instructed by Dunn Cox for the Claimant/Applicant; Ian G. Wilkinson instructed by Ian G. Wilkinson & Co for the Defendant/Respondent

Inter Partes hearing of Application for Freezing Order: Need for evidence of a "real risk of dissipation; what amounts to such evidence; whether refraining from doing something which the defendant is not obliged to do can amount to provision of such evidence.

Heard: June 29 and July 1, 2009.

Anderson J.

This is the *inter partes* hearing of an application for a Freezing Order in relation to assets owned by the defendant. The Claimant had previously secured a default judgment against the defendant and had also secured an *ex parte* Freezing Order. These had arisen in circumstances where the Claimant is alleging that it provided money to the defendant through the defendant's agent by agreeing to encash a cheque, drawn on an account held with another bank. It is the Claimant's position that the cheque was returned "Refer to Drawer". The cheque was purportedly replaced by another cheque which was similarly dishonoured. The Claimant claimed against the defendant who has failed to repay the monies in question and denies that it is liable to do so. The default judgment was subsequently set aside as was the Freezing Order which had been obtained *ex parte*.

Freezing Orders (formerly known as a "Mareva" injunctions), represent a fundamentally draconian procedure, which restrains a party from dealing with his assets as he would wish. They are frequently used in cases to safeguard the assets which may be needed to satisfy a judgment from being dissipated before the successful claimant is able to get his

hands on them to satisfy a judgment. In **Jamaica Citizens Bank Limited v Dalton Yap, (1994) 31 J.L.R. 42** the Jamaican Court of Appeal affirmed its previous decision of **Watkis v Simmons and others, (1988) 25 J.L.R. 282** where it was held that the Supreme Court had the power to grant Mareva Injunctions. That conclusion is now reflected and codified in Part 17 of the Civil Procedure Rules 2002 dealing with Interim Remedies.

In the **Dalton Yap** case (supra) Forte JA (as then was then) articulated the two part test as to whether a Mareva injunction should lie, in the following terms:

> Before a Mareva Injunction can be granted therefore, two things must be established:
> (1) that the plaintiff has a good arguable case the standard of which is evidence which is more than barely capable of serious argument, but not necessarily having a 50% chance of success, and
>
> (2) 'Solid evidence' that there is a real risk that the assets will be dissipated, either by removal or in some other way and that consequently a judgment or award is favour of the plaintiff would remain unsatisfied.

The first part is a "minimum requirement" which must be satisfied before any consideration need be made of the former. Downer JA, in the same case, also stated the two preconditions that must be met before a Mareva Injunction is granted. He said that the authorities suggest that there must be (a) a good arguable case and (b) the risk of removal of property *so as to avoid payment*. Based upon a reading of all the authorities, this is not to be taken to reflect any need for intention. As noted by Sykes J. (Ag. as he then was) in the unreported case of **Shoucair v Tucker-Brown & Tucker Brown, HCV 1032 of 2004**, the remedy is not intended to is not to provide security against insolvency (per Goff J in **Iraqi Min. of Defence v Arcepey Shipping [1980] 1 All ER 480, 486d**). Indeed, as Lord Donaldson said in **Derby & Co. Ltd. v Weldon (Nos. 3 & 4) (C.A.) 1990 1 Ch. 65 at p 76:**

> .....whilst one of the hazards facing a plaintiff in litigation is that, come the day of judgment, it may not be possible for him to obtain satisfaction of that judgment fully or at all, the Court should not permit the defendant artificially to create such a situation.

Nor does a claimant acquire any proprietary rights in the defendant's property. Still further, it is not designed to elevate the claimant above any other set of persons who may also be claiming part or whole of the defendant's property.

How do these principles apply to the present case?

In my view, the Claimant has demonstrated that it can easily meet the first of the two (2) tests which have been laid down. It may be that the submissions with respect to the Bills of Exchange Act would be sufficient to satisfy this. Without seeking to pass any judgment on the relative merits of each party's case at this stage, I would say that, based upon the affidavit evidence adduced so far, there is at least, an arguable case on the part of the Claimant. The only question, therefore, is whether the second test, the real risk of dissipation, has been satisfied. It is common ground that there is no need to show that it is the *intention* of the person against whom the Order is sought, to defeat any judgment that may be awarded against him.

The issue to be determined therefore is: "What is the nature of the evidence which is being put forward by the Claimant as giving rise to a conclusion that there is a "real risk of dissipation"? I agree with Claimant's counsel's citation of the judgment in **Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG, (The Niedersachsen) [1984] 1 All ER 398** to the following effect:

> It is not enough for the plaintiff to assert a risk that the assets will be dissipated. *He must demonstrate this by solid evidence*. The evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led o a blank wall."

As my learned brother, Rattray J. said in **Kingston Telecom Ltd. v Zion Dahari, Rahul Singh and Commonwealth Communications LLC (Claim No HCV 2433 of 2003)**: "The obligation of the court is to consider all the evidence before it in order to determine

whether there is a real risk of dissipation or removal of assets from the jurisdiction, thereby leaving any judgment in the applicant's favour, unsatisfied".

In his submissions for the Claimant in support of the application, counsel points firstly to what he describes as the "spurious nature of the defence filed" by the defendant as evidence of the risk of dissipation. Accepting this at face value, the submission is that the defendant, not only has no case but probably also knows it, and therefore has a vested interest in dissipating the assets before having a judgment against it. Counsel also says that the defendant has demonstrated a lack of probity and is able to move money very quickly "being a cambio operation, a money changer". I am unclear where the evidence for this is to be found. Is it that any defendant who has access to convertible currency is to be seen as a risk with respect to dissipation? I should think not.

Counsel also relies heavily upon the fact that the cambio operation which, lay at the heart of this claim, has ceased trading. There is evidence to the effect that visits to the location where it formerly operated have revealed that it no longer operates there. This is put forward as evidence of "risk of dissipation", and indeed, evidence that dissipation has already taken place. It is difficult to reconcile that proposition with the evidence, and counsel for the defendant makes the point that, at least since about April 2008 the licence for the cambio had expired and had not been renewed. It is clear that the cambio would have no legal basis of operation if it had no licence. Nor is there any basis for asserting the proposition that the defendant would have had any duty to renew its licence even it had subsequently expired, as a basis for opposing the submission that there was risk of dissipation.

Claimant's counsel also submits that among the matters to be considered in deciding whether there is a real risk are, the nature of the assets, e.g. a bank account because money is fungible, may be more susceptible to dissipation; the nature and standing of the defendant's business and the length of time it has been in operation. The past credit history of the defendant, the defendant's response to the Claimant's claim and the dishonesty of the defendant are relevant factors to be taken into account.

Claimant's counsel points to a number of averments in the affidavits of the Claimant's witnesses as well as in those of the defendant's affiants which, he suggests, puts the defendant in a poor light. For example, he points to what appear to be instances of mismanagement in the operation of the cambio, allegations by the managing director of the defendant company, of fraud committed by employees; evasiveness and an unwillingness to pursue the litigation or arbitration with alacrity.

Counsel for the defendant simply rests on a submission that the second limb of the test has not been made out, given the nature of the evidence before the court. He says there is no evidence of a real risk of dissipation. I understand him to say that there is no direct evidence of the risk. Certainly there is no direct evidence of the previous dishonesty or lack of credit worthiness on the part of the defendant. I should point out the obvious here. The defendant is Lakeland Farms Limited and there is evidence that the defendant was engaged in other businesses than merely the operation of a cambio, however the licensing and operational arrangements between the defendant and Best Rate Cambio (Ltd) were organized. There is no evidence that the defendant is not a profitable enterprise apart from its cambio operations and that any judgment against it could not be enforced against other assets. It ought not to be necessary to point out that allegations of mismanagement, without more, could hardly be enough to give rise to a real risk of dissipation.

In **Kingston Telecom** (supra), the evidence showed that the defendants were foreigners, had a "paucity of financial ties to Jamaica" and operated their company in a manner which led to the view that they could move money to their advantage and Rattray found that "a sufficient foundation had been laid to show a real risk of dissipation of assets by the defendants".

It should be borne in mind that the defendant here is Lakeland Farms, and not Best Rate Cambio. It is not clear to me how the termination of the operations of the cambio is to be interpreted as an attempt to "dissipate" assets of the defendant, especially when, as noted above, its licence to trade had already expired and had not been renewed. *Au contrere*, it

may be that if the business was losing money, and there is no evidence that it was or was not, closing its operations may serve to shore up the creditworthiness of the defendant. I am of the view that the evidence cited by the Claimant as supportive of the conclusion of a risk of dissipation could equally be indicative of some other possible inference or conclusion. The draconian interim remedy of the Freezing Order ought not, in my view, to be visited upon a defendant merely because it may have a case which is less than stellar in its prospects, or even if its handling of the litigation is less than punctilious. Again I make no judgment and merely say this for the purposes of argument. The duty of the applicant for a Freezing Order is to provide evidence of **real risk of dissipation**.

I regret that in the instant case, the claimant has failed to show such, and I deny the application for a Freezing Order.

The costs of this application are to be the defendant's to be taxed if not agreed. I also make an Order that this matter is to be tried at the earliest possible date on which it can be accommodated on the court's list and certainly, not later than December 2009.

Roy K. Anderson
Puisne Judge
July 1, 2009