IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 000312 OF 2004

BETWEEN	**ROBERT APGAR**	**CLAIMANT**
AND	**SHARON HOWELL – DAVIS**	**FIRST DEFENDANT**
AND	**RODNEY DAVIS**	**SECOND DEFENDANT**
AND	**COOL AQUA SUN SPORT LTD.**	**THIRD DEFENDANT**
AND	**COOL AQUA DIVERS COMPANY LIMITED**	**FOURTH DEFENDANT**

IN CHAMBERS

Miss Daniella Gentles instructed by Mr. Shawn Henriques for the claimant

Miss Dorothy Lightbourne instructed by Clayton Morgan & Co for all the defendants

June 2, 3, 4, 8, 9 and 28, 2004

Sykes J (Ag)

APPLICATION FOR FREEZING ORDER

The defence and counter claim

The defendants have filed a defence and counter claim. It is the counter claim that forms the foundation of their application for a freezing order against

Mr. Apgar (the claimant). I dismissed the application on June 9, 2004 on the basis that the defendants have not cleared the first threshold required for this order. I now state my reasons. I will only set out such facts as are necessary to explain my decision.

In the counter claim the defendants are seeking compensation for

(a) breach of contract;
(b) loss flowing from the initial freezing order that was granted ex parte;
(c) damage to a number of vehicles and water crafts;
(d) loss of business;
(e) loss of income.

Context

Mr. Apgar is an adventurer – not in the pejorative sense of the word. He is a sailor and travels the high seas. Not much is known about him other than that he is a United States citizen and he lives on a boat moored in the tourist mecca of Montego Bay where the sun drenched beaches are lapped by the revitalizing waters of the Caribbean Sea. He met Mr. Davis (the first defendant), who is a medical doctor and husband of Mrs. Sharon Howell-Davis (the second defendant), on the South American continent. Apparently, Mr. Davis is a persuasive speaker. Mr. Davis convinced Mr. Apgar to embark on a new odyssey. Mr. Apgar set sail from Belize to Jamaica in order to charter his boat to the Davis'. This was to assist the Davis' to improve the service delivered to their clients. In the minds of both parties, what could be better than the combination of seafarer in search of another quest and a businessman of great eloquence, coupled with the lure of el dorado?

The climate and business opportunity proved irresistible. Shortly after Mr. Apgar's arrival, he and the Davis' agreed that Mr. Apgar would purchase the

assets and business of the first two defendants, that were operated through the third and fourth defendants. The third and fourth defendants are wholly owned by the Davis'. Let me also say here that the contract was mainly oral. There is not much evidence in writing of the terms of the contract. Much, at trial, should there be one, will depend upon the accuracy of the recollection of each party rather than on a interpretation of a written agreement.

As the parties have now found out – a convincing tale and a free spirit are not necessarily ideal for matters of contractual detail. Mr. Apgar and the defendants are now in the midst of a contractual dispute. Mr. Apgar has sued the defendants for breach of contract. He applied for a freezing order against all the defendants. His initial application was granted ex parte but the defendants, when they appeared at an inter partes hearing, consented to an order that was drafted in very wide and possibly draconian terms.

The law

There is no doubt about the applicable law. It has been stated by the Jamaican Court of Appeal in ***Jamaica Citizens Bank Limited v Dalton Yap*** (1994) 31 J.L.R.42. The law is that a freezing order ought not to be granted unless per Rattray P at page 48 D-F:

(a) on a preliminary appraisal [the applicant][has established] a "good arguable case, in the sense of a case which is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50% chance of success." [Mustill J in Ninemia]..This is the minimum which the plaintiff must show in order to "cross the threshold", in other words, as I understand it, to get a foot in at the door, so as to access the entrance chamber of further consideration.

(b) Having got to first base...he must establish the risk or danger that the assets...will be dissipated...

At the ex parte stage of the application before the judge the benefit of hearing both sides is naturally absent (sic). To this extent facts presented are assessed on face value, but the plaintiff still has two tests. At the inter partes stage when there is opportunity for the filing of rebutting affidavits and the exposure of the fuller picture, at the end of the day the evidence as a whole has to be considered in determining whether or not to exercise the jurisdiction.

I approach this case bearing in mind the advice of Rattray P and the warning of Staughton LJ. The Lord Justice said in ***Sions v Ruscoe-Price*** (Court of Appeal – Civil Division) delivered November 30, 1988 slip op at page 2.

A Mareva injunction is an exceptional measure, and not a routine one. That is because it freezes a defendant's assets before it has been established that he owes anything at all. It also very often compels him to disclose where his assets are before it has been established that he owed anything at all.

The counter claim

I will now examine the various items in the counter claim as listed above to see if a good arguable case has been established at this stage. To my mind a good arguable means more than assertions. It must include an assessment of the material deployed in support of the application as well as the rebuttal evidence, if there is any. The process also involves taking into account matters in the evidence that defies good sense.

The claim for breach of contract and loss of business are best dealt with together because they are closely connected, based on the allegation of the defendants.

(a) breach of contract and loss of business

The defendants allege that Mr. Apgar wrote a letter dated February 10, 2004 to Mr. Martin Nicholson of the Ritz Carlton which stated that a new company, operated by him (Apgar), would be taking over the business run by the Davis'. The defendants say that the contents of the letter were false. They also claim that this letter precipitated, on February 23, 2004, the termination of the agreement between Cool Aqua Sun Sports Limited (the third defendant) and Rose Hall Developments Ltd, the operators of the Ritz Carlton.

According to the defendants they were no longer able to operate their business and so they should be compensated for this loss.

It should be noted that the agreement referred to by the defendants was between Cool Aqua Sun Sports Limited, a company registered under the Companies Act of Jamaica, and Rose Hall Developments Ltd. The Davis' were not privy to the contract. They signed in the capacity as directors of the company and not in their personal capacity. This is important because the affidavits show that the Davis' had executed share transfer certificates in favour of the claimant on January 27, 2004 – fourteen days before Mr. Apgar wrote to the Ritz Carlton. These documents show that the Davis' were transferring their shares in the third and fourth defendants to the claimant. Admittedly, the defendants say that this was done to assist the claimant to obtain a work permit. However, signing a transfer of shares is not something done lightly. Mr. Apgar says that this act by the Davis' was in accordance with the contract he had with them to buy the assets and the business of the third and fourth defendants. In light of the objective fact, namely, the signing of the transfer certificates, can it really be said, as the defendants are trying to make out, that the claimant was disseminating falsely infomation when he wrote the letter to the Ritz Carlton?

The defendants further allege that the claimant had breached his contract by either not meeting his monthly installment or not paying his monthly

installment as agreed between the parties. Both parties agree that the purchase price was to be paid in monthly installments. They also agree that the agreed schedule of payments to be met by Mr. Apgar was as follows: US$10,000 per month for the first two months and thereafter US$10,750 per month with the first payment due in January 2004. However the allegation of either non-payment or late payment is not supported by the affidavit of Detective Corporal Ellis.

The Detective Corporal swore in his affidavit that on February 14, 2004 he was present when the claimant showed Mrs. Howell-Davis a document in which the claimant alleged that he paid either to or on behalf of the Davis' a sum of US$38,772.09. The detective said that Mrs. Howell-Davis accepted the document as substantially true and accurate. She queried at most US$5,000.

If this is true then Mr. Apgar by February 14, 2004 had exceeded the agreed payment schedule. Of course this is disputed by the Davis'. The document referred to by the police officer has been produced as an exhibit by the claimant. This same exhibit has been identified by Brando Clarke and Jerome Chin as the document they knew to be a reconciliation statement between the Davis' and Mr. Apgar. These two latter deponents worked with the Davis' in the business. They also say that the business operated since January 1, 2004 under the direction of the claimant.

The point of all this is that the preponderance of evidence at this stage, on this issue, is more consistent with the claimant's account than with the defendants'.

(b) loss flowing from the initial freezing order that was granted ex parte

On this point Miss Gentles submitted that there can be no claim for this because the freezing order was a judicial act and that the time for enquiring whether the order was properly granted has not yet arrived. Miss Gentles stated

that that kind of enquiry can only be properly done at the end of the matter if it turns out that the order was not properly granted. She relied on ***Ushers Brewery Ltd v P.S. King & Co. (Finance) Ltd.*** [1972] Ch.148. In that case Plowman J cited a number of passages going back 100 years to illustrate that an enquiry as to damages resulting from the grant of an injunction is usually done when the merits of the case have been decided at trial. I agree with Miss Gentles.

(c) damaging of a number of vehicles and water crafts

The defendants alleged that the claimant damaged their vehicles and water crafts so badly that they required extensive repairs. In the particulars of claim the defendants stated that the cost of the repairs was or will be JA$914,557. The main evidence in support of this claim was the defendants' assertion. One would have expected otherwise. This is a large figure. Mr. and Mrs. Davis are both very literate persons. He is a medical doctor and she is a business woman. It does seem remarkable that the defendants have not been able to produce any written estimate of repairs or even documentary evidence of items purchased or to be purchased that would be consistent with this figure. I am not saying that their claim is untrue but at this stage I would have expected it to be substantiated with documentation or other evidence consistent with the assertion.

(d) loss of income

The particulars of claim alleged that this loss is US$169,822.56 and continuing. This figure was calculated for the period February 27, 2004 to April 14, 2004 at a rate of US$3,537.97 per day. The evidence in support of this was extremely thin. There was no reliable basis upon which this figure rested. The defendants said that they gleaned these figures from a document allegedly

produced by the claimant. However having regard to the alleged loss of data that was stored on the computers of the business I do not see how this figure could be put forward with any degree of cogency. In fact such exhibits as the defendants were able to find and produce showed the figure to be approximately US$45,000 for the same period.

I observe that if this rate of earning per day (US$3,537.97) continued for one year the income generated would be US$1,291,359.05. If this is so, then it defies good sense to accept, without some good explanation, that the defendants agreed to sell the claimant the assets and the business itself for what would now be the pauperly sum of US$146,850. This sum would have been payable over twelve months beginning January 2004. In other words one month's revenue, using a thirty day month, would yield US$106,139.10 but the sale price payable over one year would be US$146,850.

Conclusion

The defendants' case, at this point, consists primarily of unsubstantiated assertions. There is not much documentary support for the allegations. Such documents as are in existence are more consistent with the claimant's case. Where other deponents testify they do not support defendants' version of events. Looking at all the evidence the defendants do not have "*a foot in at the door, so as to access the entrance chamber of further consideration.*" They have not met the first criterion. The application is dismissed.