IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU2022 CV 00346

BETWEEN **JULIE ANNE THOMPSON-JAMES** **CLAIMANT**

AND **MARCUS HASTINGS JAMES** **DEFENDANT**

IN CHAMBERS – VIA VIDEO CONFERENCE

Mr. B. St. Michael Hylton Q.C. and Daynia Allen instructed by Hylton Powell for the Claimant

Messrs. Hugh Small Q.C. and Chadwyck Goldsmith instructed by Legis Attorneys-at-Law the Defendant

Heard: February 24, April 29 and June 1, 2022

Mareva Injunction – Freezing Order – Risk of Dissipation – Non-disclosure – Undue Hardship

C. STAMP J.

[1] The parties were married in 2001 and have three children aged sixteen to eleven years. They separated in October 2021 and apparently the marriage has now broken down irretrievably. On 3 February 2022 Mrs. Thompson-James filed a Fixed Date Claim Form seeking a declaration under the Property Rights of Spouses Act ("PROSA") that she is entitled to a 50% interest in all assets

acquired by the parties or either of them in the course of their marriage. On 7 February 2022 by way of a without notice application she was granted a freezing order restraining the defendant from dealing with diverse assets, among other orders. On the 29th of April 2022, I conducted the *inter partes* hearing of the application for the freezing order as well as the Defendant's application to discharge the freezing orders that were granted *ex parte*. I intended to give my decision on the matter at the close of the hearing, however I was unable to do so due to time constraints. I do so now and set out a summary of my reasons for the decision and the orders made.

[2] Rule 17.1(1) (f) (ii) of the Civil Procedure Rules makes provision for the court's jurisdiction to grant a freezing order restraining a party from dealing with any assets whether they are located within the jurisdiction or not. To succeed, an applicant for a freezing order must satisfy the court firstly, that he has a good arguable case and secondly, that there is a risk or danger the assets sought to be frozen by the injunction will be dissipated outside the reach of the court by the defendant thus depriving the claimant of the fruits of his judgment.[1] "It is sufficient if there is a real risk that the judgment in favour of the plaintiff would remain unsatisfied if injunctive relief is refused…"[2]

[3] Having regard to the law and the evidence before me I hold that the claimant has cleared these two hurdles. The claimant has made a sufficient showing that she has a good arguable case. She detailed in her affidavits monetary and non-monetary contributions that she made to the home, the family and the acquisition of the assets during the marriage. She has also given evidence of facts from which it may be concluded that there is a real risk or danger, and I do not say likelihood, that the defendant could dispose of the assets or otherwise deal with them in a manner that could frustrate any judgment which may be obtained.

[1] See Jamaica Citizens Bank v Dalton Yap SCCA 58 of 1998.
[2] Ketchum International Plc. v Group Public Relations Holdings Limited [1996] 4 All ER 374 at page 383.

[4] It is to be noted that, up to the time of the *inter partes* hearing, the defendant did not challenge any of the key factual assertions made by the claimant. So the evidence before me, insofar as relevant to the crucial legal requirements for the grant of a freezing order, was essentially the same as the evidence at the without notice hearing.

[5] The freezing order sought and granted was quite comprehensive. Its effect was to freeze 100% of the assets held in the joint names of the parties or held solely in the defendant's name including funds held in accounts at financial institutions including his salary accounts.

[6] The defendant applied to discharge the freezing order on grounds that:

1. *there was no evidence of a risk of dissipation of assets;*
2. *there was material non-disclosure by the claimant in her ex parte application;*
3. *if they defendant had been heard there is a high probability that the freezing order would not have been granted or would not have been granted in the terms sought;*
4. *the freezing order is unjustly disproportionate to the orders sought by the claimant in her fixed date claim form and imposes undue hardship on the defendant.*

[7] Apart from some assets declared by the claimant to be held solely in her name and which do not appear to be the subject of dispute in this case, the assets in contention that were captured by the freezing order include:

a. *three houses held in the joint names of the parties,*
b. *four motor vehicles, three in the defendant's name and one in their joint names,*

c. bank and investment accounts,

d. shares in Access Financial Services Limited held in the name of Springhill Holdings Limited which is beneficially owned by a Trust, Springhill Trust, created by the defendant under the laws of St. Lucia,

e. *three properties registered in the name of Aeric Investments Limited which is beneficially owned by said Springhill Trust.*

[8] By far the most valuable and important asset in the case is the shares in Access valued, according to the evidence, at 3.25 billion dollars. By my rough calculation the combined net value of the remaining assets disclosed by the evidence amount just a small fraction of the value of the Access shares.

[9] I find that there is no real risk of dissipation of the real estate held in the joint names of the parties. As regards the bank and investment accounts and the motor vehicles, their value is so negligible compared to the value of the shares that any dissipation of their value between now and the trial could be adjusted and set off against the value of the shares on disposition of the matter. After all, the defendant would in any event be entitled to fifty percent, at least, of the assets. There is no real risk that any judgment in favour of the claimant would remain unsatisfied if the injunctions restraining dealing with these assets were discharged and I so hold. I also hold that the freezing order is disproportionate to what is necessary to protect the interest of the claimant and imposes undue hardship on the defendant.

[10] The critical assets are the shares in Access and, to a lesser extent, in Aeric which are beneficially owned by Springhill Trust. Mr. Hylton QC after an extensive and interesting review of several authorities on the law relevant to trusts incorporated overseas in general, and to the terms of the relevant trust deed in this case in particular, submitted that the defendant is still the beneficial owner of the shares notwithstanding the Trust. The defendant's counsel did not advance arguments in opposition. I am satisfied that the Trust in this case does

not adequately alienate the shares from the defendant and it is still possible for him to dispose of them. Therefore, as regards the shares I hold that there is a risk of dissipation that may deprive the claimant of the fruits of a judgment in her favour.

[11] In written submissions counsel for the defendant argued that there was material non-disclosure by the claimant in her *ex parte* application and had these facts been disclosed there was a high probability that the freezing order would not have been granted at all or would not have been granted in the terms that it was granted. In particular, the claimant did not disclose the expenses that the defendant bears in relation to the parties' household where they reside including payments for the health and education of their minor children, the expenses in relation to their jointly held properties and expenses for the remuneration of the staff which they employ. Indeed, the restraints imposed by the freezing order had such an onerous effect on the ability of the defendant to maintain has family and pay these expenses that the claimant, who had sought the freezing order while neglecting to disclose these matters, was later compelled to apply to the court to vary the freezing order as she was not in a position to pay those expenses alone.

[12] The law imposes a high duty of candour on a party who seeks an order on an *ex parte* application. The applicant must make the fullest and frankest possible disclosure and may be deprived of any advantage he may have obtained by means of an order which was made on the basis of less than full disclosure.[3] It is clear that the claimant did not make full disclosure when she sought the freezing order. And the non-disclosure is not immaterial, in my view. Experience shows that on the breakdown of a marriage a party's ability to maintain his/her household and children at the standard to which they are accustomed can, in some circumstances, especially if prolonged, be gravely injurious to the party affected. From the fact that it was the claimant who was forced to apply to vary the freezing order it is plain that the order would not have been made in those

[3] North American Holding Company Limited v Androcles Limited 2015 JMSC Civ 151.

terms had there been full disclosure. On this basis the defendant submitted that the freezing order should be discharged entirely.

[13] Even where, as I find here, there is a material non-disclosure, the Court still has a discretion not to discharge or vary an injunction granted *ex parte*.[4] I do not think that it would be just in this case to wholly discharge the freezing order and expose the claimant to risk of dissipation. My view is that it would be more appropriate to vary the order to fit the justice of the case.

[14] Mr. Hugh Small QC for the defendant elected to forego oral submissions due to limited time and relied on his written submissions. He did however further submit that an order under sections 21 of PROSA would provide effective means of protecting the assets and preserve the disputed PROSA property. It would expose the defendant to criminal prosecution if he disobeyed. He stressed that it was most appropriate to manage the matter under the statutory provision specifically created to deal with the situation. This would be preferable to the existing freezing order which has imposed undue hardship on the defendant and already has had to be varied. While Mr Hylton QC did not object to this course he did however point out that there is some additional value to the freezing order as it can be served on and bind third parties. My view is that recourse to section 21 is neither required nor appropriate as there is no evidence or indication that the defendant is about to make any disposition of property in order to defeat the claim. Mr Small's concession is unnecessary as I do not intend to leave the existing freezing order entirely intact but will vary it as the interest of justice demands.

[4] Brink's Mat Ltd v Elcombe and Others [1988] 3 All ER 188.

ORDERS

[15] Having regard to the foregoing, I shall vary the freezing order to suit the circumstances of the case by restricting it to the shares in Access and Aeric. Accordingly, it is ordered:

A. The Interim Freezing Order made 7 February 2022 and varied on 24 February 2022 is discharged.

B. The defendant is restrained whether by himself or by his servants or agents or otherwise howsoever from disposing of or transferring, charging, diminishing or in any way howsoever dealing in assets held in the name of Spring Hill Holdings Limited or Aeric Investments Limited or to which they are beneficially entitled and any shares owned by him or to which he is beneficially entitled in Access Financial Services Limited until the final disposition of the matter.

C. Each party will bear his/her own costs of the application.

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Chester Stamp
Puisne Judge