IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

CIVIL ACTION NO. HBC 211 OF 2011

BETWEEN : **WARICK LEE McCALLION** of FASA Subdivision, Nadi, Director.

1ST PLAINTIFF

A N D : **PACIFIC VENDING LIMITED** a limited liability company having its registered office at Lautoka.

2ND PLAINTIFF

A N D : **GLENN CLIFFORD SMITH** of Waqavuka Road, Namaka, Nadi, Director.

1ST DEFENDANT

A N D : **BIMAL PRASAD** of Pacific Embroidery Limited, Martintar, Nadi, Accountant.

2ND DEFENDANT

A N D : **PACIFIC EMBROIDERY (Fiji) LIMITED** a limited liability Company having its registered office at Namaka, Nadi.

3RD DEFENDANT

A N D : **LOUISE JOSEPH** (other particulars not known to the plaintiff)

4TH DEFENDANT

A N D : **RASER CHARTERS (FIJI) LIMITED** a limited liability company having its registered office at Jay Lal & Co. 21 Tui St. Marine Drive, Lautoka

5TH DEFENDANT

A N D : **FINEST LIQUOR (FIJI) LIMITED** a limited liability company having its registered office at Jay Lal & Co. 21 Tui St. Marine Drive, Lautoka.

6TH DEFENDANT

A N D : **PLAY PACIFIC (FIJI) LIMITED** a limited liability company having its registered office at Jay Lal & Co. 21 Tui St. Marine Drive, Lautoka.

7TH DEFENDANT

A N D : **WESTPAC BANKING CORPORATION LIMITED** a Financial institution having its headquarters in Suva.

8TH DEFENDANT

RULING

INTRODUCTION

1. The question before me now is whether or not to dissolve or extend the mareva injunction orders granted by Mr. Justice Inoke on 31st December 2010.

2. The onus is still on the plaintiff to convince me that the orders should be extended. To succeed in doing so, the plaintiff must show the following:

   (i) that they have a good arguable case and that there is a real risk that the defendants may remove or conceal his assets or deal with them so as to defeat their claim.

   (ii) also, the plaintiff must make a full and frank disclosure of all material facts known to him (including those unfavourable to their case).

   (iii) furthermore, the plaintiff must give an undertaking in damages in case they fail on the merits of the action or the mareva injunction turns out to be unjustified.

A GOOD ARGUABLE CASE

3. "A good arguable case" is a higher threshold (of evidence) than that of "a mere arguable case" or that of the case of an interlocutory injunction under the American Cyanamid test. However, a "good arguable case" is still a notch below the standard required in to succeed in a summary judgment application under Order 14 of the High Court Rules 1988. This must mean that to succeed in an application for a mareva injunction, it is not necessary for the plaintiff to prove their claim clearly.

4. The facts from which the plaintiff's cause of action arise are as follows. The plaintiff, Warick Lee McCallion (**"McCallion"**) and the defendant, Glenn Clifford Smith (**"Smith"**), were business partners.

5. Their business relationship began in 2004 when they set up a company called Pacific Vending Limited (**"PVL"**) to be the vehicle of the following business undertaking:

(i) sell, buy, install and deal in all kinds of vending machines.
(ii) import, produce and manufacture food products.
(iii) manufacture alcoholic and non-alcoholic daiquiris for wholesale distribution.

6. Both McCallion and Smith were directors/shareholders of PVL. Smith held 38% of the shares and McCallion held 37%. It is not clear to me who held the 25% balance of the shares. In 2004, PVL commenced operation in Namaka in Nadi in some premises which it shared with a company called Pacific Embroidery Limited (**"PEL"**). PEL also ran a factory in the same premises. In fact, PEL owned the premises. As a matter of fact, Smith had a substantial interest in PEL. PVL appeared to flourish in its business and all was well between the business partners. However, for one reason or another, McCallion and Smith's relationship began to sour at some point thereafter. The affidavits filed by both parties are rife with allegations and counter-allegations of dubious dealings and accusations of how little the other had really put into the business.

7. The amended statement of claim filed by McCallion on 04 January 2013 sets out his grievances. He alleges that Smith had orchestrated various underhanded dealings and transactions in PVL without his knowledge. These alleged devious dealings are the foundation of his claim against Smith and the other defendants.

The Allegations

8. McCallion alleges that in March 2009, whilst he was away abroad, Smith took it upon himself to appoint one Bimal Prasad as a director of PVL without his (McCallion's) knowledge or consent and then got Prasad involved in preparing and signing PVL financial statements/reports for the years 2009 and 2010.

9. It is common ground between the parties that Prasad was the Accountant for several other companies with which PVL had dealings. Those other companies were PEL, Raser Charters (Fiji) Ltd, Finest Liquor (Fiji) Ltd and Play Pacific (Fiji) Ltd. Smith, in fact, has controlling interest in all these other companies. Prasad and Joseph also, allegedly, have some interest in these companies.

10. McCallion alleges that the reports prepared by Prasad were not accurate in their record and account of PVL's dealings with the defendants.

11. McCallion also alleges that, whilst he was away abroad in March 2009, Smith underhandedly (without his knowledge or consent), arranged for a Louise Joseph to be a co-signatory on PVL's cheque books.

Abuse

12. McCallion alleges that, Joseph and Prasad, orchestrated by Smith, would sign away PVL's funds (Westpac Bank cheque books) for theirs and Smith's personal benefits, once they were appointed as cheque signatories. It is alleged that cheques were also signed for the benefit of the other companies in which they (Smith, Prasad and Joseph) all had an interest. McCallion also alleges that Smith, Prasad and Joseph colluded in transferring PVL stock to PEL and Finest Liquor.

13. McCallion alleges that the transfers all took place whilst he was away overseas. He alleges both negligence and fraud on the part of Smith, Prasad and Joseph in these dealings.

14. McCallion alleges that there was no meeting of directors, let alone any resolution, to authorise the appointment of Prasad and Joseph in these capacities.

15. Notably, Smith does not deny that he did appoint Prasad to be director of PVL, or, that immediately prior to making these appointments, Smith and McCallion were the only two directors of PVL, or, that there was no meeting of the directors, let alone any resolution passed, to appoint Prasad as director. Smith says however that he was managing director and chairman of PVL at the time and that it was within his powers to take these actions which

he did so in order to reduce the debt owed by PVL to PEL and other companies.

16. Smith appears to argue that McCallion had acquiesced to Prasad's appointment when, on 09 February 2010 and 31 August 2011, McCallion accepted salary payments co-signed by Prasad and Joseph as well as other cheques for payment of McCallion's personal matters such as FEA bills, tax payments, travel costs to Fiji and New Zealand. He further says that PVL's debt to PEL and other companies was reduced considerably to $91,905 at 31 August 2011 as a result of Prasad's and Joseph's appointment.

17. The particulars of negligence and/or fraud he alleges are set out in paragraph 14 (a) to (i) and 17(i) to (x) of McCallion's amended writ of summons and statement of claim as follows:

(i) there was no formal approval of the transfers by the board of directors.
(ii) McCallion was not informed of the transfers.
(iii) collusion to operate the PVL account.
(iv) Smith, Prasad and Joseph paying themselves out of PVL funds without directors' approval.
(v) Smith, Prasad and Joseph failing to disclose information and transactions to McCallion.
(vi) Smith, Prasad and Joseph signing financial reports that did not reflect a true and fair account of PVL.
(vii) Smith, Prasad and Joseph dealing with PVL stock/assets in conflict of interest as all were shareholders also of PEL, Finest Liquor, Raser Charters and Play Pacific.
(viii) Smith, Prasad and Joseph collusion to exclude McCallion from being signatory of PVL cheque books.
(ix) Smith appointment of Prasad without approval of McCallion as director.
(x) Smith, Prasad and Joseph cashing PVL cheques for personal use and to pay themselves and staff of other companies.
(xi) Smith, Prasad and Joseph using PVL funds for PEL, Raser Charters, Finest Liquor and Play Pacific purposes.
(xii) Smith, Prasad and Joseph transfer of stock without McCallion's knowledge.
(xiii) Smith, Prasad and Joseph using PVL cheque books without resolution, authority, approval of McCallion as director of PVL.

(xiv) Smith, Prasad and Joseph transfer of PVL funds out of PVL to Smith's account overseas.

(xv) signing a debenture to secure a loan in the sum of $420,000 for PEL without the knowledge of McCallion, let alone any directors' resolution.

COUNTER-CLAIM

Financial Assistance

18. The defendants have filed a counter-claim. In it, they plead how Smith had purposefully purchased various items for his other companies using PVL funds. The idea was that the purchase would be offset against PVL's debt to the other companies which did happen and which is properly accounted for.

19. According to Smith, PEL and his other companies had all assisted PVL financially in its establishment in 2004 and in its operation thereafter.

20. Smith also alleges that, on one occasion on 21 June 2010, he personally lent McCallion NZD$11,000 (eleven thousand dollars) which McCallion had required to attend to the death of his wife and sister. Of that amount, McCallion only managed to repay Smith the sum of NZD$2,000 on 21 March 2011. The remaining balance has remained outstanding to this day.

Inter-Company Debt?

21. As stated, Smith's various purchases for his other companies using PVL funds were offset against PVL's debt to these other companies. Smith argues the debt-reduction is properly accounted for. As pleaded in the counter-claim, PVL's total debt to PEL and the other companies stood at $218,963 as at 31 March 2010. Of this sum, a total of $212,939 was owed to PEL alone. Between 31 March 2010 and 31 August 2011, PVL's total debt was reduced to $91,905. Of this amount, $84,711 was owed to PEL alone.

22. The counterclaim sets out how, pursuant to the Mareva injunction and other ancillary orders granted *ex-parte* by Mr. Justice Inoke on 31 December 2010, McCallion and some bailiffs entered PEL premises on 11 January 2011 and seized the above-mentioned items in total ignorance of the fact that they were

purchased on PVL funds but had been accounted for by the reduction in the PVL debts.

23. In an affidavit of Smith sworn on 02 April 2013 in support of his application to set aside default judgement, Smith outlines how since the incorporation of PVL, the defendants have assisted in the establishment of the company and in its continued operations. This assistance was given in the form of the provision of security for loans, purchasing of equipment and stock, cash advances, directors advances, purchase of fixed assets operational costs and how these all accumulated to an ever accumulating "inter-company debt" which McCallion has acknowledged in the financial statements for various years. This intercompany debt began to be reduced at the point when Prasad and Joseph were appointed.

24. I observe from a supplementary affidavit filed by McCallion sworn on 21 September 2012 which was McCallion's affidavit of merits in the application to set aside the default judgement on the defendants' counter-claim, that the monies that Smith counter-claims on is the same monies that he defrauded or deposited by Smith into his personal accounts between 2008 and 2010 using PVL cheque accounts (leave alone the amounts he defrauded in 2011).

Misappropriation Of Funds Or Payment Of Inter-Company Debts?

25. Evidence was presented that monies were transferred out of PVL account into several accounts belonging to various other companies, both in Fiji and in Vanuatu and New Zealand, in which Smith, Prasad and Joseph have an interest. McCallion has absolutely no interest in these other companies.

26. That these monies were transferred out of PVL's account to the account of other companies is not in dispute between the parties. What the defendants refute is that these transfers were carried out unlawfully. The argument that emerges from the defendants' camp is that these transfers were made because of some intercompany debt i.e. debt that PVL owed to all those other companies. To establish this, the defendants point to the tax documents filed for and on behalf of PVL to the Fiji Islands Revenue & Customs Authority

which reflect these transfers as loan repayment. The defendants point to the fact that these tax documents were signed by MaCallion which is evident that he was aware of the existence of the inter company debts. What exactly was he aware of and when?

27. To counter this point, the plaintiffs highlight that the so called tax documents were prepared by Prasad. They maintain that they were not aware of the so-called inter company debts.

28. The flow of funds from PVL to the other companies is accounted for as an inter company loan in the tax documents. However, there were other payments made personally to Smith, Prasad and Joseph.

29. Ideally, an intercompany loan would generally be documented with a loan agreement which, usually, will document who advanced the money (of course), who borrowed the money (of course) the security (if any) and an interest rate at which the loan would be serviced. There was no loan agreement in this case placed before me.

30. From the submissions of both counsel, one asks: were the transfer of funds and stock, a case of misappropriation, or, were they a case of payment of inter-company loans?

31. Even if there was a valid inter-company loan, there are accounting issues involved. Was all the monies transferred applied towards the reduction of the inter-company debt or was part of it siphoned off for improper purposes unrelated to the debt?

32. In **Paragon Development Corporation v. Sonka Properties Inc.**, 2009 CanLII 13627 (ON SC), Wilton-Siegel J of the Ontario Superior Court of Justice, in dealing with a similar question as to whether certain disbursements out of a particular company account were acts of misappropriations or were a case of intercompany loan (my emphasis):

> *[112] I find that the Disbursements totalling $626,148 should be characterized as loans rather than as a misappropriation of assets based on four principal considerations.*
> *[113] First, and most significantly, the Krall Report indicates that the **accounting records** of both Paragon and Roselee (in respect of Disbursements made to or involving distributions from Roselee) **recorded all the Disbursements and treated them as obligations of the Kaiser-related companies in favour of Paragon**.*

*[114] Second, and consistent with this accounting activity, Allan saw **no evidence of any effort to conceal these transactions or of any effort to appropriate the assets in some manner**. There is no evidence that Kaiser's intention in using the particular corporations selected as the borrowers was to prevent or obstruct repayment of the loans.*
*[115] Third, there is evidence that **repayments were made** in respect of a number of the Disbursements and that **interest was paid** on such Disbursements at the time of repayment. In addition, [page604] the Kroll Report identified a number of credit balances in favour of Kaiser-related companies that also remain outstanding.*
[116] Fourth, the documentation of the Corporations and the correspondence of the parties adverse in interest to the Kaiser respondents since the dispute arose in or about 1990, while not dispositive, are also consistent with this characterization. For example, the Guarantee proceeds on the basis that the Kaiser-related companies owed moneys by way of loans to Paragon. In addition, in his letter of July 1992, Kahan refers to "withdrawals and loans" but not to misappropriations. Similarly, the Rutman and Grubner memoranda of the 1993 meeting describe the outstanding balances as shareholder loans.

APPLICANT'S BELIEF THAT DEFENDANTS ARE DISPOSING OFF THEIR ASSETS

33. To determine "real risk of dissipation of assets", the Fiji Court of Appeal in **Silver Beach Properties Ltd v Jawan** [2011] FJCA 48; ABU0042.2009 (29 September 2011) underscores the need to examine the facts carefully:

> 24. ....Such an examination of the facts is necessary in order to ensure the satisfaction of a decree in the event the Court holds with the applicant in the main action. This requirement too, depends mainly on the facts placed before court by the respective parties.

34. As Lord Denning said in **Third Chandris Shipping v Unimarine** [1979] 2 All ER 972 at paragraph at page 985:

> The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgement or award is satisfied. The mere fact that the defendant is abroad is not by itself sufficient.

35. There is some case authority that a "serious risk of dissipation" may be inferred from the facts raised at the "good arguable case" stage of the inquiry. The type of evidence from which the court can make that inference was addressed in **Third Chandris** (supra).

36. As Mustill J said at page 977 paras f to h:

> But what standard of proof is required? Counsel for the charterers argues that the plaintiff must show likelihood that his claim will prove fruitless if an injunction is refused. If likelihood involves the idea of "more likely than not", I consider that the level is pitched too high. **In most cases the plaintiff cannot produce affirmative proof to this effect. All he can show is that a danger exists, and this is all that it seems to me the reported cases require.** How does he prove such a danger? Prima facie by demonstrating that the asset is present, that it is moveable and that the defendant is abroad. Of course this always leaves the possibility that the defendant can point to facts which demonstrate he is someone who can be relied on to meet his obligations. Conversely, the plaintiff may be able to give concrete instances of events which put the defendant's reliability specifically in doubt.

37. In a case where fraud or dishonesty is alleged, once a good arguable case is established that the defendant has acted fraudulently or dishonestly, it is hardly necessary to require specific evidence of risk of dissipation. The same applies where an applicant has established a good arguable case of an unacceptably low standard of commercial morality if it gives rise to a feeling of uneasiness about the defendant.

38. In **Patterson v. BTR Engineering (Aust) Ltd & Ors** (1989) 18 NSWLR 319 at 325 paras E to G, Gleeson CJ of the New South Wales Supreme Court commented obiter as follows:

> ....I consider that Giles J was correct in taking the view that the evidence as to the nature of the scheme in which the appellant was allegedly involved, which established a prima facie case against him, was such as to justify the conclusion that there was a danger that the appellant would dispose of assets in order to defeat any judgement that might be obtained against him and that such danger was sufficiently substantial to warrant the injunction . There is no reason in principle why the evidence which is relevant to the first of the issues earlier referred to might not have a bearing on the second, and this will especially be so where the prima facie case is made out against a defendant is one of serious dishonesty involving diversion of money from its proper channels. The present is not a case in which a plaintiff who claims simply to be an unsecured creditor seeks to prevent a dissipation of assets which have no particular connection with the claim in question. This is a case in which the plaintiff claims that the defendant, making use of a corporation controlled by him, fraudulently misappropriated a large sum of money which, if it is still under the control of the appellant, would be quite likely to constitute, directly or indirectly, the bulk of his assets. As Giles J held, the nature of the scheme in which, on the evidence to date, the appellant appears to have engaged, is such that it is reasonable to infer that he is the sort of person who would, unless retrained, preserve his assets intact so that they might be available to his judgement creditor.

39. In **Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft mbH & Co**, the judge said that:

> "It is not enough for the plaintiff to assert that the assets will be dissipated. He must demonstrate this by solid evidence... 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... Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there..."

40. In **Ang Chee Huat v. Thomas Joseph Engelbach** [1995] 2 MLJ 83,the Malaysian Court of Appeal took the view that the conduct of the appellant lacked probity and honesty. This, the Court held, supported a finding that there was a real risk of dissipation.

41. Similarly, in **Amixco Asia Pte Ltd v Bank Negara Indonesia** [1992] 120 SLR 703, the Singaporean Court of Appeal accepted that there is a co-relation between objective evidence of prima facie dishonest conduct and the real risk of asset dissipation.

42. In the case before me, I take into account that Smith has business interests in Fiji as well as around the Pacific. I take also into account the strong unrefuted allegations that Smith has disposed of certain assets of PVL to his other offshore companies. I accept that there may yet be a valid explanation for this, but which can only emerge clearly at the trial proper. I also take into account Smith's attitude that as he did have a right to change the signatories to the PVL accounts at his whims without the need to inform McCallion beforehand and that he did orchestrate the transfer of funds. All these give an impression of an unacceptably low standard of commercial morality and gives rise me a feeling of uneasiness about the defendants. I think there is a real risk of dissipation in the circumstances of this case.

UNDERTAKING AS TO DAMAGES

43. I am satisfied with the plaintiffs undertaking as to damages.

CONCLUSION

44. It is hard for me at this time to make a determinative conclusion as to whether how much of the monies taken out of PVL account was applied

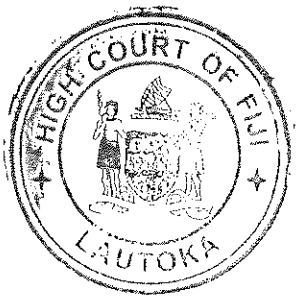
towards the reduction of the alleged intercompany loan and how much of it was applied towards "other" purposes.

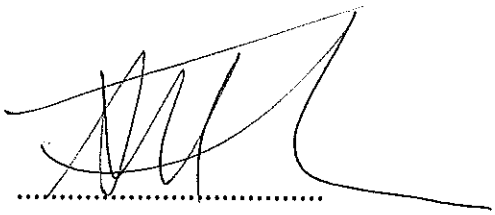
45. In the absence of formal documentation confirming an intercompany loan agreement, the circumstances concerning the appointment of Prasad and Joseph, and the subsequent transfer of funds, as well as the fact that Smith, Prasad and Joseph all appear to have a vested interest of one sort or another in the other companies, all combine to give me an impression that there was a lack of transparency in the way PVL accounts were being managed, to say the least. This is how things appear to me at this interlocutory stage.

46. Having said that, I keep an open mind and I accept that, at trial, all this may be refuted in evidence.

47. In the final, I am of the view that it would serve the interest of justice well to maintain the mareva injunctive orders in the interim and to set the earliest trial date possible today.

48. Parties to bear their own costs.





Anare Tuilevuka
JUDGE
07 April 2017.