FIJI ISLANDS REVENUE AND CUSTOMS AUTHORITY v INTERVAL HOLIDAYS (FIJI) LTD and 3 Ors (HBC0075 of 2004)

HIGH COURT — CIVIL JURISDICTION

WINTER J

17 September 2004

Practice and procedure — injunctions — Mareva injunction — whether or not Mareva injunction be granted — legal test in granting Mareva injunction.

The background to this application was detailed in a judgment of Tompkins JA on 28 November 2003 and the reasons of Scott J contained in a judgment dated 4 December 2003 contained in Civil Action No HBC0442 of 2003S and Court of Appeal Civil File ABU0062 of 2003S respectively.

An original motion was filed ex parte and an inter-partes hearing was directed on 9 September 2004. Subsequently, the matter was redirected holding that the motion be considered ex parte upon the need to grant urgent interim relief. The parties attempted to settle the dispute.

On 17 September, the matter came back to court with the Plaintiff asking for an application seeking orders detailed in the motion. As a consequence, the Defendant was denied an opportunity to respond as he needs time to prepare to have the matters fairly argued.

Counsel's argument was understood to be in the context of the legal test in granting Mareva injunctions.

The issue was whether or not the Mareva injunction should be granted.

Held — (1) The legal tests for the grant of Mareva injunctions were set out in the case of *Bank of New Zealand v Hawkins* which were as follows: (a) it has a good arguable case on its substantive claim; (b) there are assets of the Defendant within the jurisdiction to which orders can apply; and (c) there is a real risk that the Defendant will dissipate or dispose of assets so as to render himself "judgment proof".

(2) Accordingly, (a) there was an arguable case as the Plaintiff issued the fourth Defendant with an assessment for final and binding tax and a subsequent deed of settlement entered into by each of the Defendants and other parties that would give rise to an arguable object of avoiding tax payments; (b) there were assets within the jurisdiction to which orders can apply because the Plaintiff had evidence of assets under the control of the Defendant by virtue of a deed of settlement; (c) there was a real risk that the Defendant will dissipate or dispose of assets so as to render himself judgment-proof as Mr Frank Allan Yeates, a director of the company, was a person with a proven criminal record including a record of business fraud, was currently barred from entering into Fiji and from carrying on company business in New Zealand. Moreover, Mr Yeates was a party to the deed of settlement. Thus, the third Defendant was in a fiduciary position to receive instructions and comply with client demand. There was a real risk that the third Defendant will be left with no choice but to dispose of this pool of money in which those directions may come directly or indirectly from Mr Yeates.

Application granted.

Cases referred to

Bank of New Zealand (BNZ) v Hawkins (1989) 1 PRNZ 451, applied.

Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd [1972] 1 WLR 1213; [1972] 3 All ER 384; *Shaw v Narain* [1992] 2 NZLR 544; *Ninemia Maritime Corp v Trave GmbH & Co KG (The Niedersachsen)* [1983] 1 WLR 1412; [1984] 1 All ER 398, cited.

Third Chandris Shipping Corporation v Unimarine SA [1979] 1 QB 645; [1979] 2 All ER 972, considered.

M. Scott for the Plaintiff

R. Naidu and *Ms R. Lal* for the Defendants

Winter J. The background to this application is detailed in a judgment of Tompkins JA (28 November 2003) and the reasons of his Honour Justice Scott contained in a judgment dated 4 December 2003 contained in Civil Action No HBC0442 of 2003S and Court of Appeal Civil File ABU0062 of 2003S.

The original motion was filed ex parte. I directed that it be heard inter-parties on the 9 of September. The parties attempted certain settlement discussions. The matter came back before me on the 17 of September with the Plaintiff wanting to immediately press the application seeking the orders detailed in the motion.

Counsel's argument had not been refined and as a result took much longer than anticipated to reach a point where it could be understood in context of the legal test for the granting of Mareva injunctions.

As a result the third Defendant was effectively denied the opportunity for response. It became clear that the third Defendant would require time to prepare a sufficient response to have these matters fairly argued.

Accordingly although at my original direction the matter was bought inter-parties I redirected that the motion be considered ex parte upon the need to grant urgent interim relief. I therefore treated the third Respondent's appearance on a "pickwick" basis. All of their rights are reserved: compare *Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd* [1972] 1 WLR 1213; [1972] 3 All ER 384.

I granted the injunction in terms set out later in this judgment but indicated to counsel that I would immediately dictate my reasons for so doing.

The legal test

The legal test for the grant of Mareva injunctions is conveniently set out in the head note to *Bank of New Zealand (BNZ) v Hawkins* [1989] 1 PR NZ 451, a decision of Justice Gault:

> 1. An applicant for a mareva injunction must show that:
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> (a) It has a good arguable case on its substantive claim. This threshold requirement is more onerous than that normally applied in the case of interlocutory injunctions of a serious question to be determined. (b) There are assets of the defendant within the jurisdiction to which orders can apply. Providing the plaintiff produces evidence of some assets, if the defendant is not forthcoming by way of disclosure of his assets in … (Fiji) … the court may infer that this requirement is met.
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> (c) There is a real risk that the defendant will dissipate or dispose of assets so as to render himself "judgment proof". Mere assertion of belief that the defendant might dissipate his assets unsupported by solid ground justifying that belief is insufficient. On the other hand, affirmative proof of likelihood of dissipation or of an nefarious attempt is not necessary.

In addition, Gault J noted (at 452):

> Finally, against the need to protect the plaintiff so as to ensure any judgment is not rendered barren there must be balanced any prejudice or hardship to the defendant and to third parties. Generally this is a requirement that consideration must be given to the requirement for overall justice in the circumstances.

It is important to bear in mind Gault J's observation that the flexibility of the remedy must be preserved (at 454) where justice in a particular case so requires slavish adherence to these criteria is not necessary. The New Zealand Court of Appeal in *Shaw v Narain* [1992] 2 NZLR 544 confirmed this reasoning. Each element will be considered in turn.

Good arguable case

The test is more onerous than with other types of interlocutory injunctions. It follows that the affidavit in support must advance sufficient evidence from which the court can glean the existence of a "good arguable case" that is 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: compare *Ninemia Maritime Corp v Trave GmbH & Co KG (The Niedersachsen)* [1983] 1 WLR 1412; [1984] 1 All ER 398 at 415 per Kerr LJ.

The Plaintiff argues that the statement of claim sets out the background to its good arguable case. The fourth Defendant carried on taxable activity; claimed substantial vat relief and incurred considerable vat liabilities. This caused the Plaintiff to conduct a series of tax audits that resulted ultimately in a "tax assessment" dated 6 November 2003. The fourth Defendant did not object to that assessment formally although it may have raised some informal argument with the taxation authorities over "discrepancies". For present purposes I don't need to make a decision or ruling on the importance of those discussions. I merely record as a finding that a formal assessment was issued on or about 6 November 2003 indicating a vat debt by the fourth Defendant in excess of $2 million and no objection has been lodged.

The Plaintiff argues that a subsequent arrangement (the deed of Settlement) entered into by each of the Defendants and the NLTB together with a company known as Touchdown Productions Ltd (a New Zealand Company) had the purpose or effect of relieving the fourth Defendant and perhaps others from liability to pay tax. They argue by reference to statute the arrangement is void.

The Plaintiff issued the fourth Defendant with an assessment for final and binding tax. The subsequent scheme of arrangement entered into by the fourth Defendant and other parties may have had the arguable object of avoiding tax payments to the fiscal authority. I am satisfied there is a good arguable case.

Assets within the jurisdiction

The Plaintiff has some evidence of assets under the third Defendant's control. The third Defendants are solicitors and are also a party to the deed of settlement. That deed created a fund of approximately 1.9 million hich was to stand in the third Defendant's trust account and be available for the payment of Defendant's debt. In an affidavit filed by a principal of the third Defendant law firm yesterday 16 of September (para 25) there is acknowledgement of that process together with the concession that there has been some dissipation and dispossession of that fund already. The third Defendant will not say anymore about the fund.

I am accordingly satisfied that there are assets within the jurisdiction to which orders can apply and that those assets are in the control of the Defendants. I find those assets to be a sum of money lodged in the Defendant's trust account under a certain deed of settlement between the Defendants and others.

Risk of dissipation or disposal

This requirement may seem well nigh an impossible to meet. It almost requires a Plaintiff to be able to produce evidence as to the state of mind of the Defendant, or proof that an attempt will be made to move assets or money. The courts have

traditionally recognised the difficulty of this aspect. Some comfort can be obtained from *Third Chandris Shipping Corporation v Unimarine SA* [1979] 1 QB 645 at 671 (*Third Chandris*) where Lord Justice Lawton said:

> The mere fact that a defendant having assets within the jurisdiction of the … court is a foreigner or a foreign corporation cannot in my judgment by itself justify the granting of a mareva injunction. There must be facts from which the commercial court, like a prudent sensible commercial man, can properly infer a danger of default …..For a commercial man, when assessing risks, there is no commercial equivalent of the criminal records office or Ruff's guide to the turf.

The latter reference for those unaccustomed to Ruff's guide is a gentleman's manual to horse and dog racing.

In circumstances where a Plaintiff's claim results from alleged dishonest activity committed by a Defendant or a related party such as a director then the threshold for establishing a Defendant's likely disposition or disposal of assets is never too high.

Much comment was made in the affidavits of the character of one Mr Yeates, a director of the Defendant companies.

Mr Frank Allan Yeates is a person with a proven criminal record including a record of business fraud. He is currently barred from entry into Fiji because of that record and banned from carrying on company business in New Zealand. The decision of Justice Scott which I have earlier referenced summarises those matters. As an ex parte threshold test I am prepared to accept the earlier judgments made about Mr Yeates character. As Lord Justice Lawton said in *Third Chandris* judges with experience in commercial cases can be expected to identify likely debt dodgers and make assessments of the risk of default based on usual commercial acumen.

Mr Yeates is a party to the deed of settlement to which I have earlier referred. He is a director of one or more of the Defendant companies. The third Defendant is in a fiduciary position of having to receive instructions and comply with client demand. It must do what the client directs regarding the dispossession of moneys held in trust for the benefit of those clients.

Mr Yeates banned from being a director in New Zealand, banned from coming into Fiji and the subject of a bad character judgment by his Honour Justice Scott is exactly the sort of individual to which Lawton J referred. My concern is that he might attempt to instruct the lawyers to "judgment proof" this fund.

In addition, a partner of the third Defendant deposed in his affidavit of yesterday that the firm has already paid out some of the money held in trust. By inference this must have been at the direction of one or more of the parties to the deed of settlement. The statement heightens the principle that a lawyer must do what she is directed to do with moneys held in a trust account.

I am satisfied that there is a real risk that the third Defendant will be left with no choice but to dispose off this pool of money as directed. Those directions might come directly or indirectly from Mr Yeates that is a risk the Plaintiff should be protected from.

Overall justice

Ultimately the court has a discretion and it must weigh the rights and interests of the parties. I am satisfied that there is evidence to support an allegation that the Defendant is likely to dispose of or dissipate assets so as to protect its Defendant clients, non-parties, or its own self interests. Accordingly the interests of justice lie in favour of granting the relief requested.

I do however expressly leave open the right of the Defendant to apply to rescind or vary the Mareva injunction. I expressly note that this is an ex parte finding after some 3 hours of hearing the matter over the course of the 17 September. The matter may receive a full hearing before me on the resumed date of 6 October 2004 at 11 am.

Conclusion and orders

I make the following ex parte order:

"Upon reading the Plaintiff's notice of interlocutory application ex-parte dated the 9th of September 2004 for restraining orders under Order 29 Rule 2 of the High Court Rules and the General Equitable Jurisdiction and the affidavits in support and upon hearing counsel for the plaintiff, and the plaintiff having filed an undertaking as to damages" I order that:

Pending further order of the Court the third defendant by itself or in any other way, including through others acting on its behalf or on its instructions or with its permission tacit or express or with its encouragement — must not:

I. Remove from Fiji or cause or permit the removal from Fiji of the whole or any part of any money held by it in trust for the credit of the first and second defendants or any party to a certain deed of settlement annexed hereto marked 'A'.

II. Dispose of deal with or diminish the value of or cause or permit any disposition dealing or diminution in value of any money held by it in trust for the credit of the first and second defendants or any party to a certain deed of settlement annexed hereto marked 'A'.

III. This Order is temporary and is made until midnight on the 6th of October 2004.

IV. The Order is effective immediately.

V. The costs of this application to be costs in the cause.

Application granted.