IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

BETWEEN	CENTURY NATIONAL BANK LIMITED	PLAINTIFF
A N D	CNB HOLDINGS LIMITED	1ST DEFENDANT
A N D	CENTURY NATIONAL DEVELOPMENT LIMITED	2ND DEFENDANT
A N D	DONOVAN CRAWFORD	3RD DEFENDANT
A N D	VALTON CAPLE WILLIAMS	4TH DEFENDANT
A N D	BALMAIN BROWN	5TH DEFENDANT
A N D	REGARDLESS LIMITED	6TH DEFENDANT
A N D	FORDIX LIMITED	7TH DEFENDANT
A N D	SPRING PARK FARMS	8TH DEFENDANT
A N D	ALMA CRAWFORD	9TH DEFENDANT

Michael Hylton Q.C. and Miss Michelle Henry instructed by Miss Monica Ladd of Myers Fletcher and Gordon for the Plaintiff.

Lord Gifford Q.C., Leon Green and Audley Foster instructed by Miss Marjorie Brown for the first, second, third and sixth defendants.

Anthony Pearson instructed by Playfair, Junor, Pearson and Company for the fourth defendant.

January 13, 14, 16, 21, and 24, 1997 and March 21, 1997.

WALKER, J.

This matter came before me on applications made by the first, second, third, fourth and sixth defendants to discharge a mareva injunction obtained on October 2, 1996 by the plaintiff. On January 24, 1997 in refusing these applications I gave a judgment in the following terms:

> "Applications of the first, second, third, fourth and sixth defendants refused. Costs to be costs in the cause. Mareva Injunction granted by Panton, J. on October 2, 1996 as subsequently varied maintained in all respects save and except that within seven (7) days of the date hereof, and in substitution for the present undertaking in damages, there shall be given on behalf of the plaintiff an undertaking by another commercial bank in the sum of $5 Million. Leave to appeal granted to the defendants."

At that time I promised to put my reasons in writing at a later date. I now fulfil that promise.

The history of the matter reveals that on July 10, 1996 pursuant to powers conferred on him by the Banking Act, 1992, the Financial Institutions

Act, 1992 and the Bank of Jamaica Building Societies Regulations 1995 the Minister of Finance assumed temporary management of the plaintiff. For this purpose the Minister appointed as his agent Mr. Richard Downer, a chartered accountant and senior partner in the accounting firm of Price Waterhouse. Having, himself, taken over control of the plaintiff and examined the plaintiff's records Mr. Downer caused legal proceedings to be instituted against these applicants and the other defendants.

This matter first came before the court on October 2, 1996. Then it was heard ex-parte by Panton J. who granted this injunction.

No doubt the test to be applied in determining a matter of this nature is that which was enunciated in the judgment of **Lord Denning MR** in **Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) (1977) 3 ALL ER 342** and approved in the later case of **Nenemia Maritime Corp. v. Trave Schiffahrts (1984) 1 ALL ER 398.** It is the same test that was followed in the local case of **Jamaica Citizens Bank Limited v Yap (unreported) SCCA NO. 82/93** That test involved two questions in the context of which I propose to address the issues which are now before me. These questions are:-

1. Has the plaintiff shown that it has a good arguable case against the applicants?

2. Would the variation or discharge of the mareva injunction involve a real risk that a judgment or award in the plaintiff's favour would remain unsatisfied because of the applicants' removal of assets from the jurisdiction or dissipation of assets within the jurisdiction?

The first question

It was not in dispute that the plaintiff has shown that it has a good arguable case against the first, second, and sixth defendants. Lord Gifford Q.C. did not argue to the contrary, and from all appearances could hardly have successfully done so. Indeed, it was the submission of Mr. Hylton Q.C. for the plainfiff that the plaintiff has shown "unanswerable" cases against these defendants.

The evidence against the third and fourth defendants on the first question

This evidence showed that:-

(1) the third defendant was at the material time Chairman of the plaintiff and a major share-holder of the second defendant.

(2) the fourth defendant was at the material time Group President or Executive Vice President of the first and second defendants.

(3) the third defendant, his wife, Claudine, and his children Donovan and Sian own between themselves all the shares in the sixth defendant.

(4) the third defendant, the sixth defendant and the ninth defendant (who is the mother of the third defendant) between themselves own 54% of the shares in the first defendant.

(5) Transnational Group Limited (hereinafter referred to as "Transnational") was a company incorporated in the Bahamas, and the third and fourth defendants were at the material time a director and alternate director, respectively, of Transnational.

(6) the third and fourth defendants were at the material time a director and alternate director, respectively, of First Trade International Bank and Trust (hereinafter referred to as "First Trade") a company incorporated in the Bahamas and a subsidiary of Transnational.

(7) First trade commenced doing business on October 3, 1993. It was floated with a share capital of US$5,000,000.00 and at all material times had a share capital of less than US$6,000,000.00.

(8) Towerbank Limited (hereinafter referred to as "Towerbank") was a company incorporated in Panama and was at the material time a shareholder in Transnational.

(9) In or about December, 1993, the plaintiff entered into two agreements with First Trade "in reciprocity" for First Trade extending credit to the first

and second defendants.

(10) Pursuant to these agreements the plaintiff deposited US$22,000,000.00 with First Trade and First Trade lent US$16,000,000.00 to the first defendant and US$6,000,000.00 to the second defendant. First Trade held the said deposits as security for these loans, and interest earned on the deposits between December, 1993 and May 1995 was not paid to the plaintiff but was, instead, apparently applied against interest payable by the first and second defendants in respect of the aforesaid loans. Between December, 1994 and May 1995 First Trade set off the plaintiff's deposits against the debts due from the first and second defendants.

(11) On or about 28th June, 1995 a series of transactions was affected whereby Towerbank purported to lend US$19,500,000,00 to the first defendant and US$6,000,000.00 to the second defendant. Thereafter the first and second defendants authorised Towerbank to credit the proceeds of the loans to a deposit account in the name of the plaintiff, and the plaintiff agreed that Towerbank should hold those deposits as security for the said loans and authorised Towerbank to cancel the deposits and to set them off against the said loans to the first and second defendants.

(12) On November 15, 1995 First Trade resolved to go into voluntary liquidation.

(13) By letter dated March 26, 1996 the plaintiff authorised Towerbank to apply the interest earned on the deposit with Towerbank against the interest payable by the first and second defendants to Towerbank.

(14) Subsequently, Towerbank advised the plaintiff that interest of US$2,295,000.00 earned on the plaintiff's deposits had been so applied, and further that with effect from July 9, 1996 Towerbank cancelled the plaintiff's deposits and applied the proceeds in settlement of the loans to the first and second defendants.

(15) In 1995 a similar transaction took place in which the plaintiff entered into an agreement with First Trade whereby it agreed to maintain deposits with First Trade "in reciprocity" for First Trade extending credit to a Bahamian company known as Shelltox Investments Limited. Pursuant to this agreement on or about March 30, 1995 the plaintiff deposited US$3,500,000.00 with First Trade and First Trade lent an equivalent sum of money in U.S currency to Shelltox Investments Limited.

Mr. Hylton Q.C submitted that the net result of these transactions is that the plaintiff has suffered a permanent loss of US$25,500,000.00 or J$1 billion, money which has effectively gone into the coffers of the first and second defendants and Shelltox Investments Limited. This evidence, he submitted, was sufficient to establish as against the third and fourth defendants a case of negligence and/or breach of trust.

In his submissions Lord Gifford Q.C. contended that the evidence of the First Trade transaction could not be said to be abnormal banking practice and did not substantiate a claim of negligence or breach of trust against the third defendant. As regards the Shelltox transaction there was no evidence of negligence. In the circumstances, it was submitted that the plaintiff had failed to "cross the threshold" of showing a good arguable case against the third defendant.

For his part Mr. Pearson was content to adopt the submissions of Lord Gifford Q.C. insofar as those submissions were applicable to the case for the fourth defendant.

In the present case I find that there has been evidence adduced by means of the affidavit of Mr. Downer which, if believed, is capable of

rendering the third and fourth defendants personally liable to the plaintiff in negligence and/or breach of trust. This evidence consists in the way in which the plaintiff was managed by these two defendants, particularly, as to the transactions which they negotiated, the unsecured loans which were granted and the use of the plaintiff's assets for the benefit of companies in which they both had vested interests.

For these reasons I conclude that the plaintiff has, indeed, shown a good arguable case against all the defendants whose applications are now before me.

The second question

The main evidence for the plaintiff was contained in paragraphs 24 - 30 of Mr. Downer's affidavit. There Mr. Downer deponed as follows:-

> " 24 - The 3rd and 4th Defendants have both purchased and maintained homes in Atlanta, Georgia in the United States. I exhibit hereto marked **"RD 41"** and **"RD 42"** respectively, copies of Instrument of Conveyance dated March 5, 1992, in respect of premises known as Lot 9, Clipper Bay II, Phase 1, Fulton County, Georgia, from Bernard and Michele Kenner to the 3rd Defendant and his wife and Instrument of Conveyance dated November 15, 1991, in respect of premises known as Lot 2, Block B, Clipper Bay V, Phase 1, Fulton County, Georgia, from Jim Hogan Homes Inc., to the 4th Defendant and his wife.
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> 25 - The 3rd Defendant and the 4th Defendants both also maintained accounts of the Wachovia Bank of Georgia N.A. in Atlanta, Georgia, in the United States of America, ("the Atlanta accounts") and a number of questionable payments by the Plaintiff to these Defendants and others have been deposited in those accounts. By way of example, four days before Christmas in 1993, three cheques were drawn on the Plaintiff's funds and deposited into those accounts. I exhibit hereto the following:-
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> a. Marked **"RD 43"** a copy of cheque dated 21st December, 1993, payable to Claudette Williams in the sum of US$6,104.83. The supporting voucher (exhibit **"RD 44"**) describes this as a reimbursement of expenses. In the year 1994 alone, there are five other payments to Mrs. Williams, totaling approximately US$70,000.00 as follows:-
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> |---|---|
> | April 21, 1994 | $10,000.00 |
> | June 23, 1994 | $10,000.00 |
> | August 15, 1994 | $25,000.00 |
> | October 28, 1994 | $ 4,927.00 |
> | December 30, 1994 | $20,000.00 |
> | | US$69,927.00 |

b. Marked "RD 45" a copy of cheque dated 21st December, 1993, payable to Corbed Inc. in the sum of US86,339.00. The supporting voucher (exhibit "RD 45") describes this as being a payment for "Management Consul Fees." Also exhibited hereto and marked "RD 47" are the results of a company search in Atlanta, Georgia, in relation to Corbed Inc. It shows that that company has two officers, the 4th Defendant and his wife, Claudette, who are President and Vice President, respectively; that it has two employees, (who are the same two officers) and that it carries on the business of wholesaling and retailing "non-durable goods, specializing in general Merchandise."

c. Marked "RD 48" cheque dated 21st December, 1993, payable to the 3rd Defendant in the sum of US$118,982.00. I have not been able to find supporting vouchers explaining the purpose for this payment.

26 - In addition to the above payments, there were numerous other payments, to the 3rd Defendants and Corbed Inc. which were deposited to the Atlanta accounts. These include:-

a. Cheque dated June 22, 1994 in the sum of US$19,618.50 payable to Corbed Inc. (exhibit "RD 49"). I have not been able to find any supporting voucher. I have however, seen a ledger (hereinafter referred to as "the cheque ledger") in which the Plaintiff listed the cheques drawn on this account. Although the number of this cheque is listed on the relevant page - (exhibit "RD 50"), there is no other information;

b. Cheque dated April 14, 1994 in the sum of US$19,618.50 payable to Corbed Inc. (exhibit "RD 51"). I have not been able to find any supporting voucher, and exhibit a copy of the relevant page from the cheque ledger;

c. Cheque dated April 18, 1995 in the sum of US$117,300.00 payable to the 3rd Defendant (exhibit "RD 52"). I have not been able to find any supporting voucher, and exhibit marked "RD 53" a copy of the relevant page from the cheque ledger which incorrectly describes the payee as "CNB."

27 - I am advised that the 1st, 2nd, 3rd, 4th and/or 6th Defendants own substantial real estate in Jamaica, but in view of the fact that over 1.4 Billion is claimed against these Defendants in this action, I verily believe that they do not have suffcient assets in this jurisdiction to cover the claim.

28 - I have seen nothing in the files of records of the Plaintiff to indicate that as at December 1993 or at any time there was a contractual or any relationship between the Plaintiff and Corbed Inc., or between the Plaintiff and Claudette Williams.

> 29. - The 1st Defendant has substantial funds in the United States of America. Exhibited hereto and marked **"RD 54"** and **"RD 55"** are copies of fax transmissions which were addressed to the 3rd Defendant, but apparently inadvertently sent to the Plaintiff's office on September 13 and September 25, 1996. They indicate that on the 9th September, 1996 after the Plaintiff had made formal demand on the 1st Defendant, and after the 1st Defendant had made set out in exhibit **"RD 5"**, the 1st Defendant wired US$517,298.80 from Bankamerica International to its attorneys in Coral Gables, Florida, with instructions that its attorneys hold the funds "for further credit to CNB Holdings Ltd." These documents indicate further, that the said attorneys-at-law then sent those funds and a furhter sum of US$218,620.85 which was also wired to them, to Citibank in Dania Florida for the credit of the 1st Defendant. It appears that these funds were sent in this way in order to prevent them being traced.
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> 30 - The 3rd Defendant and the 4th Defendant are both very experienced bankers, and as the transactions set out above and in the Statement of Claim indicate, they are well experienced in moving funds out of the jurisdiction and from one jurisdiction to another, and doing so in a manner that will not be easily detected."

It is of no little significance that neither the third nor fourth defendant made any specific response to this evidence of the transfer of funds. However, it was submitted on their behalf that this evidence was not enough to justify the "draconian imposition" of a mareva injunction. In particular it was submitted that the movement of funds from one bank to another within the United States of America did not establish evidence of an intention to dissipate or conceal assets. The authorities, it was said, showed that nothing short of solid evidence of the likelihood of dissipation of assets (as opposed to a base assertion of fact) would suffice to justify the grant of such an injunction. It was pointed out that the money referred to in paragraph 29 of Mr. Downer's affidavit has since been returned to Jamaica and deposited in a Jamaican bank. It is a matter of fact that these defendants are both experienced bankers, and in his own words the third defendant is "used to the international transfer of funds."

Concerning this transfer of funds I feel constrained to make the comment that from the point of view of the plaintiff it must be regarded as a stroke of good fortune that the matter came to the attention of Mr. Downer. Obviously the relevant correspondence had been sent for the attention of the third defendant, and one can do no more than speculate as to whether or not this sum of money would have been disclosed by the third defendant, let alone repatriated by him, had the correspondence in fact reached its intended

destination without Mr. Downer's knowledge. Here the question may be asked: was the action of the third defendant in directing the transfer of these funds within the United States of America at the particular time prompted by honourable motives vis-a-vis the plaintiff? It seems to me to be entirely conceivable that the argument could justifiably be maintained that it was not.

On behalf of the fourth defendant Mr. Pearson submitted that his client's assets were pledged to the Century National Building Society, as the plaintiff well knew, and that there was no evidence of any asset of the fourth defendant which was in the actual process of dissipation.

Again, the evidence shows that the third and fourth defendants both own homes in the United States of America and commute between that country and Jamaica. Their ties to the United States of America are, therefore, real and I think give rise to a likelihood that, faced with a suit in which in excess of J$1-4 billion is being claimed against them, they may liquidate their assets (as to which there is no evidence of a value exceeding the amount of the claim against them) and seek safe haven in the United States of America. I use the phrase "safe haven" inasmuch as the United States of America is not a country to which our Judgments and Awards (Reciprocal Enforcement) Act or our Judgments and Awards (Foreign) (Reciprocal Enforcement) Act apply. That this is a relevant consideration in a matter of this nature is clear from the dicta of Carey P. (Ag.) in Wheelabrator Act Pollution Control v. FC Reynolds (unreported) SCCA No. 91/94

There was another submission upon which the defendants relied. It was to the effect that on the application before Panton J., It was incumbent on the plaintiff to make a full and frank disclosure of all material facts, including the circumstances in which the Minister of Finance assumed temporary management of the plaintiff. This was not done, so it was argued, the result being that such non-disclosure of facts must necessarily prove fatal to the injunction granted by the court. I found no merit whatsoever in this submission.

In the ultimate analysis I must determine whether the injunction granted by Panton J. should be discharged as the defendants ask. Having found that the plaintiff has shown a minimum of a good arguable case against the defendants, and having considered the whole of the evidence as it now

stands, I have concluded that a refusal to maintain this injunction would involve a real risk that a judgment or award in favour of the plaintiff would remain unsatisfied. In the circumstances these applications were refused.

Finally, I dealt with the original undertaking given by the plaintiff in this matter. I am of the opinion that it was inadequate and had to be varied In my judgment an undertaking as to damages is imposed in the discretion of the court and any inadequacy therein does not render the injunction to which it attaches invalid on that account. Therefore, I ordered that the undertaking should be varied in the terms of this judgment.