[2012] JMCC Comm. No.10

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2010 CD 00086

BETWEEN	FIRST FINANCIAL CARIBBEAN TRUST COMPANY LIMITED	CLAIMANT
AND	DELROY HOWELL	1ST DEFENDANT
AND	KENARTHUR MITCHELL	2ND DEFENDANT
AND	FIRST FINANCIAL CARIBBEAN (JAMAICA) LTD	3RD DEFENDANT
AND	FIRST FINANCIAL INTERNATIONAL GROUP LTD.	4TH DEFENDANT
AND	FIRST FINANCIAL CARIBBEAN LTD	5TH DEFENDANT
AND	FIRST FINANCIAL CARIBBEAN (HOLDINGS) LTD.	6TH DEFENDANT

Mr. Michael Hylton, Q.C. and Mr. Sundiata Gibbs instructed by Michael Hylton & Associates, Attorneys-at-law for the Claimant

Mr. Conrad George, instructed by Hart, Muirhead Fatta, representative for the 2nd, 3rd and 5th Defendants present

Mr. Roderick Gordon instructed by G. Anthony Levy & Co. for the 1st Defendant

Mr. Miguel Palmer instructed by Livingston, Alexander and Levy for the 4th and 6th Defendants

Heard: 3rd and 16th July, 2012

Applications For Variation Of Freezing Order

Mangatal, J.

[1] By Amended Notice of Application dated June 28th 2012 as further amended at the hearing the 1st Defendant "Mr. Howell" applied for among others, the following orders:-

a. That the Applicant be permitted to access the sum of US$198,528.00 owed to him by the 3rd and 5th Defendants from the 3rd and 5th Defendants' funds, held in escrow by its Attorneys-at-law as per the Court's Freezing Order, to meet urgent personal debts, medical expenses and living expenses.

b. That his reasonable living expenses be increased to US$3,000.00 per week, from US$1,000.00 per week.

c. That the US$37,000.00 due as per the Freezing Order be paid from the said escrow funds, on the same basis as paragraph 1(a) herein.

…

[2] The grounds on which Mr. Howell is seeking these Orders are as follows:-

1. These Orders are being sought pursuant to Parts 1.1 and 11 of the Supreme Court of Jamaica. C.P.R. 2002, and the said Freezing Order currently in place;

2. The injunction has been too onerous on the Applicant … and caused him quantifiable damage and he has no further asset with which he can satisfy his reasonable living and business expenses;

3. The Applicant's houses in the Cayman Islands, United States and in Jamaica are up for foreclosure and sale by private treaty respectively, and losses would put him in serious financial straits as well as put his family out of their shelter;

4. The Claimant has not provided a written undertaking in damages requested by the Applicant/First Defendant;

5. The Claimant/Respondent First Financial Caribbean Trust Company Limited (in Liquidation) has not notified the Court as to its ability to satisfy the undertaking in damages, nor confirmation that the TCJ Court has approved such an undertaking;

6. Significant assets remain frozen to satisfy the balance of convenience.

[3] The application is supported by the Affidavit of Delroy Howell filed June 25, 2012. In that Affidavit, Mr. Howell indicates that on the 19th August 2010, the freezing order was made, restraining the Defendants in their dealings with their assets up to a sum of US$13,911,092.15, allowing the Defendants to make payments as necessary in respect of their reasonable legal costs in defending the claim, from a current account or other source with the consent of the Claimant's attorneys. Further the 1st and 2nd Defendants were allowed an amount of US$1,000.00 per week on other ordinary and living expenses from a current account to be identified. There have been some extensions and variations during the period since August 2010.

[4] On the 3rd of September 2010, the Freezing Order was varied to permit the 3rd and 5th Applicants to take steps necessary to complete the Asset Sale and Purchase Agreement dated August 20, 2010 between themselves as sellers and Jamaica National Money Services Ltd. and National Building Society of Cayman as purchasers on condition:-

(1) that the sum of US$750,000.00 representing proceeds of sale of the Dumfries Road property less transfer tax and vendor's share of stamp duty and registered fees should be paid to the Claimant's Attorneys-at-law to hold in an interest bearing fixed deposit account pending further order of the Court and

(2) the balance of proceeds of sale payable pursuant to the Asset Purchase Agreement to be paid to Hart, Muirlead Fatta, Attorneys-at-Law, to be held in an interest bearing fixed deposit account pending further order of the Court or by written agreement of the parties.

[5] Mr. Howell claims that prior to the granting of the freezing order he had no difficulty paying all his bills and all of his financial obligations were met in a timely manner He states that he would have put his own equity in these assets, and covered the balance with loans from financial institutions.

[6] Mr. Howell in his Affidavit refers to a number of properties and assets that he states have monthly payments that are now in significant arrears. He claims that there are a number of properties owned by him in respect of which there are

mortgages upon which the mortgagees wish to foreclose, or exercise the power of sale under certain mortgages. Mr. Howell feels that he is in danger of losing his assets and property, and of his wife and 4 year old daughter being put on the streets.

[7] Mr. Howell has also indicated that he has a significant medical issue concerning an unverified mass in his chest. He had a previous operation in his chest to remove lumps, which were cancerous. He states that he needs to do extensive tests and to be in a position to pay for these tests and for possible surgery. Although no estimate from any medical practitioner or hospital was provided to the Court, a copy of an ultrasound report dated 16 March 2012 from the Radiology Department of the University Hospital of the West Indies was provided to confirm the new mass and the need for more tests. Mr. Howell has also stated that "surgery and tests cost me in excess of US$15,000.00. It is likely that it will cost more, and the need for funds is urgent".

[8] In his application filed on June 25 2012, Mr. Howell's 2nd application, he seeks to vary the freezing order to allow payments of US$185,076.00 and US$60,210.00 as legal fees. The grounds stated are set out in the application.

[9] Mr. Howell claims that the Attorneys-at-Law for the Claimant have been dilatory in approving legal fees for Counsel already on the record for him. He notes that he also wishes to retain Queen's Counsel Mr. R.N.A. Henriques. However, the retainer to secure Mr. Henriques' services has not been approved because the firm representing the Claimant Michael Hylton and Associates, have posed the question whether it is "reasonable to retain another counsel at

this stage of the proceedings where he is already represented by separate attorneys."

[10] The 4th and 6th Defendants have also applied by way of application filed June 28 2012, to vary the freezing order restraining them from disposing or dealing with their assets, applying for the Mareva Injunction to be varied to enable the 5th Defendant to disburse funds sufficient to pay the legal fees of the 4th and 6th Defendants in the sum of J$5,344,821.45.

[11] The ground on which the 4th and 6th Defendants seek the order is stated to be as follows:-

> That the 4th and 6th Defendants do not have the resources to pay legal fees incurred and will be unable to afford further legal representation.

[12] The background to the claim is summarized in the judgment of Brooks J, (as he then was), delivered May 5, 2011. I must say, I tried to follow the chronology of the orders set out in the Written Submissions provided on behalf of Mr. Howell, but I found it somewhat confusing. On the other hand, having looked through the files myself, I accept the background to the application to be as set out in paragraphs 6 -12 of the Claimant's written submissions.

[13] The Claimant's attorneys submit that the applications are misconceived and must fail for "the simple reason that (with respect) the Court cannot authorize one party to spend another party's funds". It is further submitted that Mr. Howell is not seeking a variation of the freezing order to allow him to expend his funds; he wants the court to authorize him to spend funds belonging to the 3rd and 5th

Defendants. The Claimant's attorneys submit that similar observations apply to the application of the 4th and 6th Defendants.

[14] As to Mr. Howell's second application it is submitted that it "is even more bizarre". This application, it was submitted, does not mention variation of the freezing order at all, and does not seek permission to do anything. Instead, it seeks an order that certain sums be paid. The Claimant's attorneys-at-law say that, presumably, it would be an order directing Messrs Hart, Muirhead Fatta to pay these sums from sums they hold for the 3rd and 5th Defendants in relation to debts allegedly owed by those Defendants. The submission continues that if the court were to so order, it would effectively be enforcing a non-existent judgment when no claim has even been made. It was further argued that this application also overlooks the fact that there is a freezing order against those Defendants, which restrains them from expending their funds, and there has been no variation of that order.

[15] It is my view that the arguments being raised by the Claimant are sound and are sufficient to dispose of all three applications. It is clear, particularly looking at the background, and the judgment of Brooks, J. delivered May 5, 2011 (which is under appeal), that different considerations apply to the different Defendants. Indeed, the 3rd and 5th Defendants are parties to the proceedings and are separately represented. Those Defendants have made no applications to vary the freezing order against them in relation to, or to encompass the 1st, 4th and 6th Defendants' applications. Mr. Gordon submitted that separate and apart from Mr. Howell being the majority shareholder, the Board of Directors have

identified payments due in the ordinary course of the 3rd and 5th Defendants' business. Mr. George, who is on the record for the 2nd, 3rd and 5th Defendants, also sought to argue that the authorities in general all point to the Court not tending to interfere with a company's method of doing business. He submitted that companies often provide indemnities to directors and enter into all types of agreements and arrangements in the midst of commercial life. However, it is difficult to sustain those arguments in the face of the sphere of entitlement which Mr. Howell himself circumscribed i.e. at paragraph 48 of his affidavit, Mr. Howell's evidence is that he is claiming salary payments. Mr. Howell has not in his evidence said anything about any indemnity being in place between him and the directors or any other special commercial arrangement. He says it is salary due him which he has not been paid. This must be looked at in combination with the fairly clear terms of the Asset Sale and Purchase Agreement. Further, this is no ordinary case of Directors of a company simply passing resolutions as to what a Defendant in a matter is entitled to. These are Directors of companies that are also themselves Defendants in the matter, in respect of which aspects of the claims by the Claimant were concisely summarized in the 15 October 2010 judgment of Brooks J.,(as he then was), as follows:

" …the claimant seeks, amongst other things, to recover from the first and second defendants, Messrs. Delroy Howell and Kenarthur Mitchell, the recovery of monies which had been held by the claimant on trust. The claimant has provided *prima facie* evidence that many millions of the trust money, which is in the currency of the United States of America, were transferred from the

claimant's accounts to Mr. Howell, to some corporations for which Mr. Howell is a director and a substantial shareholder, to other corporate entities and to certain individuals.

Three of the former set of corporations have been named as defendants to the claim. A fourth member of that group of companies (the fifth defendant) has also been so named, although no evidence has been produced, thus far, that it was in receipt of any of the trust funds.

The claimant has also identified real estate which was purchased with trust funds. These transfers and purchases were on the direction, or with the authority of either or both, Mr. Howell and Mr. Mitchell. It is not without significance that when these transactions were carried out, both men were directors of the claimant and Mr. Howell was its majority shareholder."

[16] Further, one of these Defendants, the 3rd Defendant, passing the resolutions is a Defendant in respect of which there was a partially satisfied judgment entered on admissions for the not inconsiderable sum of J$146,361,580.00. At page 32 of his judgment awarding summary judgment against the 1st and 2nd Defendants for equitable compensation to be assessed for breach of fiduciary duties, Brooks J. stated: " For those reasons also (The 3rd Defendant) must account for any trust monies transferred to it by the claimant. It has admitted owing J$146,361,580.00 to the claimant as a result of those transactions. Judgment on admission may be given in respect of those sums, but a full accounting must be given and any amount found due thereafter paid to the claimant." Equitable compensation still remains to be assessed, and the

Defendants' appeal against Brooks J. 's judgment has not yet been determined, it is still pending. The 1st and 2nd Defendant are still to carry out a full accounting for, amongst other matters, all trust monies expended by the Claimant between 15 March 2002, and 12 April 2010, if and when the assessment does take place.

[17] Paragraph 20.044 of the well-known work **Gee, on Commercial Injunctions**, 5th Edition, is instructive. The learned author states:

….

Where a party seeks a variation to the injunction to enable a payment to be made, he has the burden of persuading the court that the proposed source would not be in conflict with the principle underlying the Mareva jurisdiction. ***This is because the claimant by obtaining the injunction has already shown a risk of dissipation of assets and therefore the burden passes to the defendant to show that what he proposes would be just***. (My emphasis)

[18] In all the circumstances, I therefore agree with the Claimant's attorneys-at-law that the 3rd and 5th Defendants' consent to the variation of the freezing order against Mr. Howell (see copies of Resolutions of the respective companies of May 17, 2012), does not assist since the more relevant order against Mr. Howell is the one relating to the 3rd and 5th Defendants' assets.

[19] In stark contrast, there has been an application, albeit filed the very day on which these applications were considered by the Court, by the 3rd and 5th Defendants, seeking the Court's permission that they be permitted to pay from the funds held by Messrs Hart, Muirhead, Fatta, the sum of US$38,461,53 to Mr.

Kenarthur Mitchell, the 2nd Defendant, by way of redundancy payment arising from the termination of his employment with the 3rd Defendant in September 2010. This was by reason of redundancy occasioned by the sale of the business of that company. The 2nd Defendant Mitchell made a corresponding application that he be permitted to use any monies disbursed by the 3rd and 5th Defendants to him as redundancy payment to pay the amount outstanding on his mortgage on a property. Both orders were granted by me on July 3, 2012 without opposition from the Claimant's Attorneys. It does appear to me to be quite plain that the applications of the 1st, 4th and 6th Defendants cannot get off the ground because of this deficiency/omission.

[20] Further, it is relevant that the freezing order permits the 3rd and 5th Defendants to make payments "as may be necessary in the ordinary course of their business with the consent of the Claimant's attorneys …" The 3rd and 5th Defendants have not made this application. Reference was made by Counsel for the Claimant to the provisions of the Asset Sale and Purchase Agreement signed with Jamaica National August 20, 2010, exhibited to the 20th Affidavit of Sundiata Gibbs, Attorney-at-Law, an attorney employed to Michael Hylton & Associates and one of the Attorneys having conduct of the matter, filed June 29 2012. I agree that these provisions appear to contradict the assertions that Mr. Howell is owed by the 3rd and 5th Defendants the monies which he asserts in this application. The agreement provides at Clause 5.3 that on its completion the 3rd and 5th Defendants shall terminate all their employees and duly pay to them all sums due. The Agreement further contemplates that if any employee of the 3rd

and 5th Defendants are to be retained it would be as employees of the purchasers of the business. Clause 9(d) did, as argued by Mr. Hylton, Q.C., appear to limit any alleged duties of Mr. Howell to a period of three months in order to assist the purchasers with any reasonable inquiries that they may have.

[21] The Agreement does not provide for the 3rd and 5th Defendants to carry on any business beyond the completion date of September 15, 2010. In any event, the evidence is that the 3rd and 5th Defendants have ceased carrying on their business and the payments being sought could not be considered to be made in the ordinary course of their business.

[22] As stated before, the above bases are sufficient to call for a dismissal of all three of the applications. However, in the event that I am wrong, I will discuss the respective grounds of the three applications.

MR. HOWELL'S FIRST APPLICATION

[23] It is convenient to consider the grounds under the following heads:-

a. Mr. Howell has no other asset with which he can satisfy his reasonable living and business expenses and the freezing order has been too onerous (grounds 2 and 3).

b. The Claimant has not given an undertaking as to damages as requested by Mr. Howell – (grounds 4 and 5).

c. Significant assets remain frozen sufficient to satisfy the "balance of convenience" (ground 6).

a. Mr. Howell has no other assets with which he can satisfy reasonable living and business expenses

[24] It is difficult to accept that Mr. Howell has demonstrated on a balance of probabilities that he has no assets from which to satisfy his reasonable living expenses. This is because of a number of factors. Firstly, in his Affidavit filed in compliance with paragraph 2 of the freezing order, as pointed out in paragraph 28 of the Claimant's written submissions, Mr. Howell identified amongst his assets, six real estate properties, seven what some may call "top-end" or luxury motor cars, including the Lamborghini mentioned in his Affidavit in respect of which he says that there are outstanding payments, the others being a Range Rover, a Denali, Lexus, Mercedez Benz, Hummer, and a Jaguar. He also referred to five bank accounts with sums totalling CI$19,000.00 and in excess of US$497,000.00. At paragraph 5 of his 20th Affidavit, Mr. Gibbs states that since May 27, 2011, (the date when the Court of Appeal dismissed the Defendants' application to set aside the freezing order and strike out the claim against them), Mr. Howell has never requested his firm's consent for any payment out of his personal funds, for anything, including his living expenses. He states that all of Mr. Howell's requests have been in respect of assets owned by other entities. Mr. Howell does not appear to be contesting that this is indeed the case. Further, the Claimants aver that since the grant of the freezing order in August 2010, Mr. Howell's Attorneys have never notified the Claimant's Attorneys of any account from which the US$1,000.00 allowed under the freezing order for Mr. Howell's ordinary living expenses would be expended. I agree that in all the circumstances it is difficult to understand the basis upon which the Court should vary the provisions of the freezing order to permit a greater sum to be expended by Mr. Howell. I am also of the view that the Court cannot simply grant Mr. Howell permission to use assets of the 3rd and 5th Defendants when he has not previously or first applied to be enabled to use his own assets to satisfy his personal obligations.

[25] Further, I accept that the case cited by Queen's Counsel Mr. Hylton, **Cantor Index Ltd. V Lister** [2002] C.P. Rep. 25, suggests that Mr. Howell would not be able in any event to come to the Court to recover as of right US$37,000 as living expenses representing the weekly US$1,000.00 sum permitted to be paid to Mr. Howell for his ordinary living expenses for the thirty-seven weeks past prior to the application and in respect of which Mr. Howell did not request any payment previously. In dismissing the defendant's claim for retrospective payment of his ordinary living expenses, Neuberger J. stated, at page 10.

……I do not think a defendant is entitled, as of right, to come before the court 20 weeks after the freezing order is made and say that he should be paid £10,000, whether from his bank account or by selling assets, if that would otherwise be a breach of paragraph 1(1) or 1(2) of the Freezing Order, if he has been able, over those 20 weeks, to live his life without needing to invoke paragraph 3(1) of the order. It seems to me that that point is reinforced by my conclusion on issue (d). If the defendant, as he has chosen to do in this case, is entitled and able to borrow from third parties for the purpose of living, and he chooses to take that course, then that is his lawful choice. If he takes that course, he simply does not need to invoke the indulgence, if that is not too unfair a word, contained in paragraph 3(1) of the order. There is therefore no reason which, as it were, justifies permitting him to receive £10,000 for those ten weeks of living when he did not need it.

Mr. Gordon, in responding to **Cantor** on behalf of Mr. Howell sought to distinguish the case on the basis that it involved a sum paid into court. Mr. Gordon also submitted that whether retrospective or not, the present application is being made to deal with urgent matters. I do not think that the case is distinguishable from the instant case on those bases.

b. The Claimant has not provided a written undertaking in damages as requested by Mr. Howell

[26] Again, this ground does not find fertile terrain. The question of an undertaking as to damages being required of the Claimant has already been explored at first instance and at the Court of Appeal and it was held that in the circumstances of this case none was required. As to the undertaking as to damages pursuant to the order of Phillips J.A. that was in respect of an injunction pending appeal, which appeal has already been decided in the Claimant's favour, and can in any event have no relevance here. Thus it does not appear to me that Mr. Howell's request for this written undertaking can hold any sway.

c. Whether significant assets remain frozen which exceed the value in the freezing order

[27] It would appear that this is a ground that Mr. Howell is also unable to make out. This is a ground upon which the Defendants have already unsuccessfully sought to rely in their application to have the freezing order set aside. It cannot avail them at this point in the proceedings either.

Mr. Howell's Second Application and that of the 4th and 6th Defendants Regarding Payment of Legal Fees

[28] As regards these applications, there is also an additional obstacle, other than the fact that there is no application by the 3rd and 5th Defendants for a variation.

Paragraph 4 of the Freezing Order provides that:

" The Defendants may make such payments as may be necessary in respect of their reasonable legal costs in defending the claim with the consent of the Claimant's attorneys from a current account or other source the identity of which has first been notified by them in writing to the Claimant's attorneys."

The Defendants have had separate representation and have filed their own Defences. I agree with the Claimants' Attorneys that a freezing order, without more, permits a Defendant to use his or its funds to pay his or its own reasonable legal costs, and not that of another Defendant.

[29] I find support for my view in the **Gee**, at paragraph 20.050, under the heading

"(iii) *Mareva Relief and legal costs* ", where it is stated:

The court is in principle anxious to ensure that a defendant is not deprived of professional legal representation by reason of a freezing injunction and where there is no proprietary claim this is an important factor to take into account in favour of permitting the expenditure, because ***the defendant ought to be able to use his own assets to defend himself****.*

The example order provides:

"EXCEPTIONS TO THIS ORDER

11. (1) This order does not prohibit the Respondent from spending £…. a week towards his ordinary living expenses and also £……[or a reasonable sum] on legal advice and representation. [But before spending any money the Respondent must tell the Applicant's legal representatives where the money is to come from.] "

This wording enables money to be spent on legal advice and representation for the person restrained by the injunction but not for someone else, even a relative in related proceedings*.*

(My emphasis)

The unreported decision of Lawrence Collins J. in **Perroti v. Watson**, January

12, 2001, Ch D., is cited for this last proposition.

[30] The 1st Defendant's amended application filed June 28 2012, and his application filed June 25, 2012 are therefore dismissed.

[31] The 4th and 6th Defendants' application for court orders filed June 28, 2012 is also dismissed.