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Judgment Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 82/93

BEFORE: THE HON. MR. JUSTICE RATTRAY - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	JAMAICA CITIZENS BANK LIMITED	PLAINTIFF/APPELLANT
A N D	DALTON YAP	DEFENDANT/RESPONDENT

Michael Hylton and Patrick McDonald for Appellant

Norman Wright and Christopher Dunkley for Respondent

January 10, 11, 12, 13 and February 7 & 14, 1994

Rattray P:

On the 8th day of October 1993 the plaintiff/appellant Jamaica Citizens Bank Limited filed a writ of summons in the Supreme Court against the defendant/respondent Dalton Yap. The endorsement on the writ claimed against the defendant for:

1. Damages for breach of contract of employment.
2. Further and/or in the alternative, damages for conspiracy.
3. Further and/or in the alternative, damages for deceit.
4. Further and/or in the alternative, damages for negligence.
5. Costs.
6. Interest.
7. An Injunction to restrain the defendant from disposing of and/or dealing with his assets wheresoever situate in so far as the same do not exceed the sum of US$400,000.00 until judgment.

On that same date on an application by the plaintiff/appellant, Reid J. granted ex parte a Mareva Injunction against the defendant/respondent in the following terms:

"**IT IS HEREBY ORDERED THAT:**

(a) The Defendant be restrained, whether by himself, his servant or agents, or howsoever otherwise from disposing of and/or dealing with his assets wheresoever situate in so far as the same do not exceed the sum of US$400,000.00 and in particular from withdrawing or transferring the funds in his accounts at Jamaica Citizens Bank, until judgment or further order herein.

(b) Liberty to the Defendant and any Third Party affected by the Order to apply on notice to the Plaintiff's Attorneys-at-law to set aside or vary this Order.

(c) Costs Reserved.

PROVIDED THAT:

This Order is declared to be of no effect against, and is not intended to bind any Third Party outside of the jurisdiction of this Court, directly or indirectly affected by the terms of this Order, unless and until this Order shall be declared enforceable or recognized or is enforced by any Court of the jurisdiction in which the Defendant's assets are situated and in particular, the Courts of the State of Florida in the United States of America."

The application was supported by an affidavit sworn to by one Ewart Scott, the Acting Managing Director of the plaintiff Bank who deponed the following material facts:

(a) That the defendant a Jamaican resident **in Jamaica** had been up to 1st October, 1993 employed to the plaintiff as General Manager with responsibility for Technology and Operations, and whose duties involved the processing of Credit Cards transactions involving Credit Cards issued on the authority of Visa International and Master Card International.

(b) That the Bank had put in place policy guidelines and security checks for the processing of these transactions which are required to be followed by all Bank personnel;

and continued as follows:

"
...

5. As a result of queries raised by Visa International and Master Card International, the Bank conducted a thorough internal investigation and this investigation has so far revealed, among other things, that:

(a) The Defendant completely disregarded several bank guidelines in setting up and managing the credit card operations;

(b) The Defendant circumvented instructions from the Bank to terminate the processing of such transactions;

(c) The Defendant withheld information pertaining to the operation of this service from the executive management personnel of the Bank.

6. More specifically, the Defendant between April and August 1993:

(a) Established credit card relationships with certain Telemarketers in the United States and Antigua, without the authority or knowledge of the Bank, without carrying out the appropriate credit checks and procedures and in contravention of the conditions of the Visa International license, which prohibits licensee Banks from entering into credit card relationships with Merchants carrying on business outside the licensee Bank's region;

(b) Delayed complying with instructions from Visa International and Master Card International for dealing with such relationship;

(c) Delayed communication to executive management of the Plaintiff Bank of problems which arose pertaining to the said operations;

(d) Circumvented executive management's instructions to terminate such arrangements by assisting in the setting up of a ficitious office in Kingston for one of the said Telemarketers;

"(e) Authorised payments to the said Telemarketers totalling over US$400,000.00 which authorisation was either fraudulent or grossly negligent;

(f) Improperly caused or allowed a portion of the reserves held by the Plaintiff bank to meet potential liability arising from disputed charges to be paid out of the Bank".

Consequent on these discoveries the defendant was dismissed with immediate effect from his employment with the Bank by a letter dated 1st October 1993, exhibited with the affidavit which stated as follows:

"October 1, 1993

Mr. Dalton Yap
General Manager
Technology/Operations
Jamaica Citizens Bank Ltd
4 King Street
Kingston

Dear Mr. Yap,

Recent investigations concluded by our Group Audit Department on September 29, 1993 have revealed that you have been involved in and facilitated major breaches of the Bank's policy and have exposed the Bank to serious legal and financial risks. These Audit investigations have identified and revealed:

1. Gross negligence in the establishment by you of Visa/Mastercard transaction processing relationships without any credit checks as well as at least 'wilful blindness' in respect of the relationships;

2. Non-compliance with Visa International and Mastercard By-laws for establishment of Merchant relationships;

3. Non-compliance and/or delays in compliance with instructions from Visa/Mastercard;

4. Circumvention of Executive Management's instructions to terminate processing arrangements by facilitating 'A Ghost' office in Kingston for Travel connection;

5. The withholding of information from Executive Management;

6. Unauthorized release by you of agreed reserves;

" 7. Attendance by you at an Audio Text convention on June 9 & 10 in California which could cause Visa International to sever its relationship with the Bank;

8. Your involvement in transactions which could give rise to grounds for Visa International to terminate our licensing arrangement.

You have exposed the Bank to:

a) Possible legal action by Telemarketers.

b) Possible fines from VISA/MASTERCARD.

c) Potential suits against our Miami Agency.

d) Potential irrecoverable charge backs which could lead to financial losses of up to US$695,710.89.

In light of the above you are hereby dismissed with immediate effect. You will be held accountable for all losses sustained by us as a result of your negligence and or unauthorized actions.

Until the Bank has satisfied itself that no loss has been suffered, any sum which may be due to you will be withheld.

All indebtedness to the Bank must be settled immediately. Kindly immediately return to me your Staff Identification and Health Cards, your JCB Cards and Cheque Books and any other property of the Bank which may be in your possession.

Yours faithfully,

/s/ **EWART SCOTT**
Actg. Managing Director

c: Emmanuel Obasare
Chief Internal Auditor"

The appellant further alleged that the defendant was owner of two accounts at the branch of the plaintiff's Bank in Miami, Florida into which he had deposited between April and August 1993 sums totalling US$412,137.00 but from which during the same period there had been withdrawn sums by cheque and by wire transfer to Hong Kong, among other places in foreign territories amounting to

US$356,478.00. There was therefore left in these accounts a balance of US$84,536.63 plus two Certificate of Deposit Accounts containing US$4,761.01 and US$5,229.38, respectively.

At the plaintiff's King Street Branch the defendant held three accounts with balances of US$5,136.80, J$411,608.00 and J$60,397.00, respectively.

The defendant on the 4th, 5th and 8th October:

(i) instructed the Miami Branch to transfer out some of the funds to another Bank;

(ii) attempted to withdraw some funds from the account;

(iii) instructed the immediate closure of all his accounts both at the King Street and the Miami Branch.

The plaintiff asserted a belief that the defendant does not have sufficient assets in the jurisdiction to cover the claim in the action filed. Furthermore, the plaintiff was of the belief "that the defendant is likely to remove or otherwise deal with those assets in such a manner as to frustrate any judgment which may be awarded against him, unless restrained by the Court".

It is to be noted that the letter of dismissal stated damages arising from the defendant's default of up to US$695,710.89. The affidavit alleged the wrongful authorization of payments to Tele-marketers amounting to over US$400,000.00 which were either fraudulent or grossly negligent.

On the 15th of October 1993, the defendant applied by summons to discharge and/or set aside the Mareva Injunction. He filed an affidavit which inter alia stated that apart from being an employee of the plaintiff Bank he was also a customer of the Bank. He related his being summoned on October 1, to a meeting with Mr. Scott, being shown a document purported to be an Audit Report which document "made a number of very serious and defamatory allegations" against him and he confirmed the fact of his dismissal. He gave instructions to his attorneys-at-law who wrote the plaintiff on his behalf denying the allegations. He attempted to withdraw funds from his personal account

at the Bank's King Street Branch but was advised that the account was frozen. Further enquiries disclosed that a Mareva Injunction had been obtained against him by the Bank on the 8th of October 1993. He denied vigorously the allegations made against him and deponed that he had given instructions to his attorneys-at-law to sue the Bank for wrongful dismissal and defamation. He stated that the figures given in respect to the lodgments and withdrawals in the U.S. account in Miami were "grossly incorrect".

In respect of his Jamaica Citizens Bank King Street accounts he places the balances at October 12 to be a sum total of J$116,182.23 and Can.$8,190.63.

He alleges that he has substantial assets in Jamaica which he has no intention of removing from the jurisdiction except in the ordinary course of his business.

His attempts to remove his money from the plaintiff Bank "were taken as a direct result of my loss of confidence in the Jamaica Citizens Bank and in accordance with my desire to immediately terminate my Customer Relationship with the Bank, having been terminated as an Employee of the said Institution". He notified his intention to resist all claims by the Bank disclosed in the endorsement on the writ of summons. Finally he alleges "that my personal and professional life has been severely disrupted as a result of the actions of the plaintiff Bank, and since the imposition of this Mareva Injunction, I have had to seek the assistance of relatives and friends to support myself and my family as I am unable to access any funds whatsoever from my accounts".

In a supplemental affidavit the defendant exhibited photocopy correspondence from the Bank's Miami Agency informing him of the freezing of the accounts pursuant to the terms of the Mareva Injunction.

This then is the evidence which Theobalds J. had to assess in order to make a determination as to whether or not he should order the discharge of the Mareva Injunction. After hearing submissions from the attorneys-at-law representing the parties Theobalds J. on the

26th of November 1993 made an order discharging the Mareva Injunction. It is this order which is before us on appeal.

Basically the rationale of Theobalds J. in discharging the Mareva Injunction rests upon his assessment of the affidavit evidence before him and his conclusion "that there was no justification or further justification for the Mareva Injunction to continue". While we will not substitute our own discretion for that of Theobalds J. in the determination of the issue unless of course he acted on principles that were clearly wrong we nevertheless are in as good a position as the Learned Judge to assess the evidence in this matter.

At the inter partes hearing "the Judge must consider the whole of the evidence as it then stands in deciding whether to maintain or continue, or to discharge or vary the order previously made" [Kerr L.J. - Ninemia Corp. v. Trave Schiffahrts (1984) 1 All E.R. 398 at p. 422]. From the many authorities to which we have been referred by Counsel for the appellant, Mr. Hylton, and Counsel for the respondent, Mr. Wright, to whom I am indebted for their in-depth exploration of the issue, I cull the following principles:

1. The Mareva Injunction is an appropriate and useful instrument to be utilised when there is a danger that the debtor may dispose of his assets so as to defeat the debt before payment. [Denning L.J. in Mareva International Bulkcarriers (1980) 1 All E.R. 213].

2. The applicant for the Mareva has to meet two tests to the satisfaction of the Judge:

   (a) on a preliminary appraisal he must establish a "good arguable case, in the sense of 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". [Mustill J. in Ninemia (supra) p. 404]. This is a minimum which the plaintiff must show in order to "cross the threshold", in other words, as I understand it, to get a foot in at the door, so as to access the entrance chamber of further consideration.
>
> (b) having got to first base, so to speak on (a), he must establish the risk or danger that the assets sought to be frozen by the Injunction and in respect of which the restraining jurisdiction of the Court is being prayed against the defendant will be dissipated outside the reach of the Court by the defendant thus depriving the plaintiff of the fruits of his judgment.

At the ex parte stage of the application before the Judge the benefit of hearing both sides is naturally absent. To this extent facts presented are assessed on face value, but the plaintiff still has to meet these two tests. At the inter partes stage when there is opportunity for the filing of rebutting affidavits and the exposure of the fuller picture, at the end of the day the evidence as a whole has to be considered in determining whether or not to exercise the jurisdiction.

Our task therefore is to examine the affidavits to determine whether Theobalds J. properly discharged the Injunction or whether he erred in removing the injunctive protection to the plaintiff which Reid J. found to be necessary on the ex parte hearing.

The action brought by the plaintiff is based upon breach of contract of employment, conspiracy, deceit and negligence. The defendant held a high position of trust in the plaintiff's Bank. The evidence identified in paragraphs 1 - 7 of the affidavit of Ewart Scott, the Acting Managing Director of the plaintff Bank meets the threshold requirement and merits consideration as to whether a good arguable case exists on the plaintiff's behalf. The plaintiff has stated the unauthorised actions of the defendant

which were either fraudulent or grossly negligent and from which the plaintiff maintains it has suffered the damage referred to in the endorsement to the writ of summons filed in the suit on which the application for the interlocutory relief has been made. The letter of termination of employment of the defendant exhibited as "ES 1" states potential financial losses by the Bank attributable to the acts or defaults of the defendant of up to US$695,710.89.

Paragraphs 8 - 11 are matters which have come to the knowledge of the defendant by virtue of his capacity as Acting Managing Director of the Bank. He therefore speaks of the Bank's knowledge since the Bank cannot speak for itself. Who better to depone on its behalf than the Acting Managing Director?

A scrutiny of the defendant's activities, if accepted at the hearing will:

> (i) establish a strong inference which can legitimately ground the belief of the plaintiff as stated in paragraph 14 "that the Defendant is likely to remove or otherwise deal with those assets in such a manner as to frustrate any judgment which may be awarded against him, unless restrained by the Court".
>
> (ii) taken with the other allegations and for the purpose of meeting the "risk" criteria, provide "direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on". [Ninemia (supra) p. 406].

These are the factors which the plaintiff relies upon to discharge the burden placed upon it to satisfy the Judge of the existence of "a good arguable case" as well as the probability of risk.

It must be kept in mind that this action is based upon allegations of fraud and the question of probity of the defendant is therefore very material.

Furthermore Mr. Scott's affidavit discloses the facility with which the defendant moves funds from one country to another and

his experience in so doing. This highlights an additional dimension to the risk element upon which the plaintiff can legitimately rely to underpin his belief that if the Injunction is not granted the consequences which are feared by the plaintiff are likely to materialise.

Paragraphs 12 - 13 state, as they can only do, the limited knowledge of the plaintiff as to the available assets of the defendant. The plaintiff has already identified those assets of the defendant of which it is aware and so has directly informed the Court.

We need therefore to examine carefully the defendant's responses in his affidavits in reply, since all the evidence had to be assessed and weighed by the Judge to determine whether the facts alleged and the inferences arising out of these facts are sufficient so as to permit the Injunction to stand.

The defendant's first affidavit, paragraphs 1 - 8, merely gives a narrative of the events up to the grant of the Mareva Injunction by Reid J. Thereafter he gives a blanket denial of the allegations made against him by Mr. Scott in the affidavit and states his intention to sue for wrongful dismissal and defamation against the plaintiff. He disputes the figures stated by Mr. Scott in paragraph 8 as to lodgments and withdrawals for the period April - August 1993 in the Miami account but does not state what the correct figures are or what the balance is at the time of making his affidavit. He states the balances in his King Street account. He states his loss of confidence in the Bank since his dismissal as the reason for wanting to terminate his banking relationship with the plaintiff by moving his accounts from that Bank. He refers to the financial disruption to him caused by the grant of the Mareva Injunction by virtue of his being prevented from having access to the funds in the Bank. He depones that he is a Jamaican Citizen with substantial assets in Jamaica and with no intention of removing these assets from the jurisdiction except in the ordinary course of business.

He does not state what is the nature of the business which he conducts. He is silent as to the identity of "the substantial assets" which he claims to have in Jamaica. He denies having any intention of attempting to evade or frustrating any judgment or decision lawfully obtained against him.

His further affidavit ten days later really adds nothing and only exhibits correspondence between himself and the Bank concerning the freezing of the Miami account under the terms of the Mareva Injunction. This then is a totality of the evidence which was available in the inter partes hearing before Theobalds J.

The purpose of the Mareva Injunction is not to give a preferred position to any particular creditor of a defendant. It is not meant in any way to affect the law of insolvency as regards the priority of creditors. The remedy is "in personam" and is available to a plaintiff if the evidence satisfies the necessary pre-conditions and the justice of the situation requires it.

If the grant of the Injunction inflicts hardship on the defendant his legitimate interests must prevail over the interest of the plaintiff. However those legitimate interests must be established by the defendant not just as an allegation but by an identification of these interests and the hardship which he is suffering or is likely to suffer since these are most likely within the peculiar knowledge of the defendant himself.

In his reasons for judgment, Theobalds J. enunciated his view "that the Injunction seeks to give the plaintiff a position in relation to Mr. Yap that is over and above that of any other creditor". This may be a theoretical conclusion arrived at in the grant of any Mareva Injunction, and any other creditor so affected may apply to vary the Injunction with regard to his own claim. The fact is that the affidavits of the defendant provide no evidence as to who these other creditors are and the nature of the defendant's obligation to these creditors. The absence of the necessary substance from the defendant's affidavit is recognised by Theobalds J. who describes the

defendant's affidavit as "a pathetic attempt to provide reasons why the Injunction should not have been granted in the first place".

The prior consideration however is, as Theobalds J. recognises, whether the plaintiff's evidence discloses material upon which the Mareva Injunction should have properly been granted by Reid J. in the first place. In the view of Theobalds J. it should not have been and this led him into making the order for the discharge of the Injunction. He bases his conclusion on the fact that:

(a) the plaintiff has not filed his statement of claim;

(b) on his assessment that if the evidence in the plaintiff's affidavit based on information and belief are excised, since no sources are referred to, there is no evidence affording "a proper basis upon which the Mareva Injunction was granted in the first place".

With regard to (a) the grant of the Mareva Injunction need not await the filing of a statement of claim. Indeed sometimes this protection is afforded by a Court even before the filing of the writ of summons if the affidavit before the Court discloses the urgency. The writ of summons in this case has an endorsement which sufficiently discloses the nature of the claim. The affidavit of the plaintiff sets out the facts upon which the plaintiff relies to support the claim at the trial, and at this stage puts forward for the consideration of the Court in determining the grant of the Injunction.

With regard to (b) the first ten paragraphs of the plaintiff's affidavit defy the Judge's conclusion of an absence of material for consideration as to whether or not to grant the Injunction. Paragraphs 12 - 13 depone only as to the state of the plaintiff's lack of knowledge of the existence of other assets available to meet its claim if the action succeeds. It baffles me as to how this can be grounded in the way the Judge requires - that is the "stating of the sources of his knowledge, information and belief". The

defendant , placed in a position of heightening the awareness of the plaintiff and calming its fears by disclosing some of his other assets is merely content to rely on a statement that he has "substantial assets in Jamacia". This in my view is very unsatisfactory, particularly within the forum of a jurisdiction in equity and an allegation by the plaintiff of fraud. Paragraph 14 which states the belief of the plaintiff that the defendant is likely to "remove or otherwise deal with those assets in such a manner as to frustrate any judgment which may be awarded against him, unless restrained by the Court" must be examined in the light of other allegations in the preceding paragraphs of the affidavit to see if there is sufficiently disclosed behaviour on the part of the defendant which would reasonably lead the plaintiff to have this belief. Is there a risk that the defendant will act in the way the plaintiff believes with the result that a judgment in his favour would remain unsatisfied? In this latter regard the nature of the cause of action and the facility of the defendant based upon his employment experience and former conduct in relation to his Bank accounts to move funds swiftly to different parts of the world is not to be ignored.

The approach of Theobalds J. should have been to examine the evidence as a whole to determine whether in his view:

(i) the plaintiff had at least shown "a good arguable case";

(ii) the discharge of the Mareva Injunction would create a real risk that a judgment or award in favour of the plaintiff would remain unsatisfied.

The reasoning of Theobalds J. follows a completely different route. Furthermore his evaluation of the evidence indicates a misunderstanding of its purport which led to obvious errors in his assessment.

An appellate Court is always reluctant to interfere with the exercise of a trial Judge's discretion. The Court will however do so in certain limited circumstances which include "the ground that it

was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist ..." [See judgment of Lord Diplock in Hadmor Productions Ltd. v. Hamilton (1982) 1 All E.R. 1042 at p. 1046, cited in the judgment of Carey J.A. in Kingsley Cooper v. Fitzgerald Hope Howard, Lois Angela Howard and Management Communications System Limited, Supreme Court Criminal Appeals Nos. 29 and 31 of 1989 delivered on the 12th of June, 1989].

We were concerned with the question of whether the Mareva Injunction could properly be made in respect to assets of a defendant outside the jurisdiction of the Jamacian Court to wit the defendant's assets in Miami, Florida. The authorities satisfy me that the Injunction can be made in relation to assets of a defendant held worldwide, as the remedy is in personam and the defendant would be in contempt of the Court's order if he breaches the Injunction in relation to the assets wherever held. A sufficient sanction exists not only in the usual penalties for contempt but additionally in that the Court could bar the defendant's right to defend if he disobeyed the order. [See Darby & Co. v. Weldon (No. 2) (1989) 1 All E.R. 1002].

In the circumstances therefore I would allow the appeal and restore the order of Reid J. granting the Mareva Injunction in the following terms:

> "On an undertaking being given by the plaintiff or his attorney-at-law:
>
> (1) To abide by any Order of the Court as to damages should the Court hereafter be of the opinion that the Defendant or any third party given notice of this Order have suffered any damages that the Plaintiff ought to pay.
>
> (2) To pay reasonable costs and expenses incurred by any third party given notice of this Order in complying with the same.
>
> **IT IS HEREBY ORDERED THAT:**
>
> (a) The Defendant be restrained, whether by himself, his servants or agents, or howsoever otherwise from disposing of and/or dealing with his assets wheresoever situate in so far as the

" same do not exceed the sum of US$400,000.00 and in particular from withdrawing or transferring the funds in his accounts at Jamaica Citizens Bank, until judgment or further order herein.

(b) Liberty to the Defendant and any Third party affected by the Order to apply on notice to the Plaintiff's Attorneys-at-law to set aside or vary this Order.

PROVIDED THAT:

This Order is declared to be of no effect against, and is not intended to bind any Third Party outside of the jurisdiction of this Court, directly or indirectly affected by the terms of this Order, unless and until this Order shall be declared enforceable or recognized or is enforced by any Court of the jurisdiction in which the Defendant's assets are situated and in particular, the Courts of the State of Florida in the United States of America".

FORTE, J.A.

This is an appeal which challenges an Order by Theobalds J discharging a Mareva injunction granted by Reid J on an ex parte summons taken out by the appellant **and which ordered in part as follows:**

> "(a) The Defendant be restrained, whether by himself his servants or agents, or howsoever otherwise from disposing of and/or dealing with his assets wheresoever situate in so far as the same do not exceed the sum of U.S.$400,000 and in particular from withdrawing or transferring the funds in his accounts at Jamaica Citizens Bank until judgment or further order therein."

That the Courts in our jurisdiction have the jurisdiction to grant Mareva injunctions was established in the unreported case of **Bertram Watkis v. Anthony Simmons et al** S.C.C.A. 46/87 delivered on the 18th July, 1988 in which Kerr, J A in accepting the English procedure as applicable to our jurisdiction stated as follows:

> "The jurisdiction to grant a Mareva injunction is well established. In the Mareva case the English Court of Appeal considered the general principle of respectable antiquity expressed in **Lister v. Stubbs** [1890] 45 Ch. D. 1 (1886-90) All E R Rep. 797, to the effect that the Court has no jurisdiction to protect a creditor before he obtains judgment. Nevertheless, it was held that the jurisdiction conferred by Section 45 of the Supreme Court (Consolidation) Act. 1925 was sufficiently wide to confer jurisdiction to grant an interlocutory injunction: 'If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets. It seems to me that this is a proper case for the exercise of this jurisdiction.'

> "per Lord Denning at page 215. Section 45 of the English Act is similar in terms and purpose to section 49(h) of our Judicature (Supreme Court) Act, the relevant part of which reads:
>
> "A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just, ..."

Consequently, before dealing specifically with the facts and issues which arose for consideration in this appeal, it would be appropriate to examine what have become established guidelines in England for the granting of such injunctions. The matter was comprehensively dealt with in the case of **Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft mbH & Co KG The Niedersachsen** [1984] 1 All E R 398 (hereinafter called the Ninemia case). In delivering his judgment at the inter partes hearing Mustill J commented generally on the development of the Mareva injunction. He said:

> "Originally, the relief was reserved for cases where the creditor required protection until the hearing of an RSC Ord 14 summons, founded on a debt which was undisputed or indisputable. In **Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia** (as interveners) [1977] 3 All E R 324, [1978] Q B 644 the jurisdiction was enlarged, so as to enable security to be granted in respect of claims against foreign defendants which were not appropriate for summary judgment. Subsequently, the procedure has expanded into fields far removed from the commercial world in which it was first developed, and at the same time the principles have been refined, so as to provide certain safe-guards for a defendant or other person who might suffer hardship if subjected to an order in the unadorned form which was in use at the outset."

The principles to which Mustill J referred are adequately set out in the headnote to the report of the case. It states:

> "The test to be applied by the court when deciding to exercise its statutory discretion to grant a Mareva injunction to a plaintiff pursuant to s 37a of the Supreme Court Act 1981 whenever it appears to the court to be just and convenient to do so is whether after the plaintiff has shown that he has at least a good arguable case and after considering the whole of the evidence before the court, the refusal of a Mareva injunction would involve a real risk that a judgment or award in the plaintiff's favour would remain unsatisfied because of the defendants removal of assets from the jurisdiction or dissipation of assets within the jurisdiction."

In dealing with the first limb of the required considerations Mustill J (page 402), after making reference to the cases cited in argument concluded:

> "These cases are not easily reconciled, but to my mind they establish that the strength of the plaintiff's case is relevant in two distinct respects:
>
> (1) the plaintiff must have a case of a certain strength, before the question of granting Mareva relief can arise at all, I will call this the 'threshold';
>
> (2) even where the plaintiff shows that he has a case which reaches the threshold, the strength of his case is to be weighed in the balance with other factors relevant to the exercise of the discretion. It seems to me plain that the second proposition is justified by common sense and by the authorities."

In determining the "threshold" Mustill J at page 403 relied on what he described as the foundation authority i.e. the **Pertamina** case [1977] 3 All E R 324, and in particular dicta of Lord Denning M R at page 334:

> "So I would hold that an order restraining removal of assets can be made whenever the plaintiff can show that he has a 'good arguable case'. That is a test applied for service on a defendant out of the jurisdiction: see **Vitkovice Horni a Hutni Tezirstvo v. Korner;** and it is a good test in this procedure which is appropriate when defendants are out of the jurisdiction. It is also in conformity with the test as to the granting of injunctions whenever it is just and convenient as laid down by the House of Lords in **America Cyanamid Co v. Ethicon Ltd.**"

It is of relevance, however, as Mustill J stated, to note that at the time of the **Pertamina** decision, "it was not the law as it is now that the Mareva injunction applies to persons resident in the United Kingdom." See also the case of **Barclay-Johnson v. Yuill** [1980] 3 All E R 190 where it was held inter alia per Sir Robert Megarry V C that the grant of a Mareva injunction was not barred merely because the defendant was not a foreigner or a foreign-based person.

In asking the meaning of "a good arguable case" Mustill J concluded at page 404:

> "In these circumstances, I consider that the right course is to adopt the test of a good arguable case, in the sense of 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."

Turning to the second principle for consideration, i.e. the risk of removal or dissipation of assets, after examining several cases on the point, Mustill J concluded:

> "Nevertheless, certain themes can be seen to run through the cases. It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. 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. Or the plaintiff may

> "show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstances of the case."

The guidelines set out by Mustill J were approved in the Court of Appeal per Kerr L J (supra at page 419) who stated thus:

> "In our view the test is whether, on the assumption that the plaintiff has shown at least 'a good arguable case', the court concludes, on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiff would remain unsatisfied."

Before a Mareva injunction can be granted therefore, two things must be established:

> (1) that the plaintiff has a good arguable case the standard of which is evidence which is more than barely capable of serious argument, but not necessarily having a 50% chance of success, and
>
> (2) 'Solid evidence' that there is a real risk that the assets will be dissipated, either by removal or in some other way and that consequently a judgment or award in favour of the plaintiff would remain unsatisfied.

Before, however applying these principles to the instant case, two other matters arise for determination:

> (1) At the inter partes hearing, on whom lay the burden of proof, and
>
> (2) Can the Mareva injunction extend to assets outside of the jurisdiction.

1. Burden of Proof

The question arose, it appears, because of the history of the case.

Reid J in the ex parte summons granted the Mareva injunction "until trial or until further order." As a result the defendant/respondent had to apply to have the injunction discharged, and it is upon that latter summons that the matter was heard inter partes.

Before us, Mr. Norman Wright sought to argue that the injunction was irregular, in that it was not made for a limited period, which would have necessitated the plaintiff, applying for a continuance of the order, in which event the plaintiff would have had to establish a case for such an order. The argument that the order was irregular for the reasons advanced, is, in my view, unmeritorious. Mr. Hylton in replying to this contention referred the Court to several cases in which the orders for Mareva injunction were either exactly in the terms of the instant order, or were made 'until further order'. In the text entitled "injunctions" by David Bean (4th Edition) at page 85, the author states:

> "The present practice of the Queen's Bench Division, including the Commercial Court, on ex parte applications for Mareva injunctions is to grant an injunction until judgment or further order, that is to say without a return date being specified. This avoids the need for a second hearing in cases where the defendant does not seek to contest the order, but allows the defendant to apply in the usual way for the injunction to be discharged. In the majority of cases no such application is made and the injunction is allowed to continue until the dispute is resolved. In **Z Ltd v. A and others** [1982] Q B 558 Kerr LJ expressly approved the practice of not specifying a return date on the ex parte hearing."

I would therefore conclude that there was no irregularity in the order for Mareva injunction made by Reid J.

In these circumstances, where the defendant, given the indefinite period of the injunction, applies for its discharge, on whom lies the burden? This question is answered in the **Ninemia** case (supra) to some extent, in the following passage from the judgment of Mustill J (page 409) which was approved by this Court in the case of **Watkis v. Simmons** (supra at page 10):

> "... The judge who hears the proceedings inter partes must decide on all the evidence laid before him. The evidence adduced for the defendant will normally be looked at for the purposes of deciding whether it is enough to displace any inferences which might otherwise be drawn from the plaintiff's evidence. But I see no reason in principle why, if the defendant's evidence raises more questions than it answers, and does so in a manner which tends to enhance rather than allay any justifiable apprehension concerning dissipation of assets, the court should be obliged to leave this out of account. On the other hand, the plaintiff has no right to criticise the defendant's evidence, for omissions or obscurities. The defendant is entitled to choose for himself what evidence, if any, he adduces. The less impressive his evidence, the less effective it will be to displace any adverse inferences. But there must be an inference to be displaced, if the injunction is to stand, and comment on the defendant's evidence must not be taken so far that the burden of proof is unconsciously reversed."

And again in the same case on Appeal before the Court of Appeal where Kerr LJ stated at page 422:

> "..Whether the inter partes hearing takes the form of an application by the defendant to discharge the injunction, as is usual in the Commercial Court, or whether, as in the Chancery Division, the injunction is only granted for a limited time and there is then an inter partes hearing with regard to whether or not it should be continued,

> "the judge must consider the whole of the evidence as it then stands in deciding whether to maintain or continue, or to discharge or vary, the order previously made."

In these circumstances, on the inter partes hearing, the Court would be obliged to look at the evidence as a whole to determine, whether there is a good arguable case, and whether there is a risk that the defendant's assets may be dissipated thereby making futile a judgment in favour of the plaintiff at trial.

2. Can Mareva Injunction extend to Assets outside of Jurisdiction?

This question was dealt with in the case of **Derby & Co Ltd and others v. Weldon and others (No. 2)** [1989] 1 All E R 1002, where Lord Donaldson MR (PP. 1008-9) approved in substance the following dicta of Sir **Nicolas** Browne-Wilkinson VC in **MBPXL Corp v. Intercontinental Banking Corp Ltd** [1975] CA Transcript 411:

> "It has been said many times that Mareva relief is a developing field. There is no doubt that as a matter of English law this court has jurisdiction to grant relief against any party properly before it in relation to assets wherever situate. However, the circumstances under which such jurisdiction should be exercised must depend on and vary with the circumstances of every case. The rationale of the earlier decisions was plain: the court was seeking to freeze assets against which an eventual judgment in the English court could be enforced. In my judgment the earlier decisions merely show what was a settled practice in the ordinary case: that is to say in a case where there was no question of extending the order beyond local assets. For myself, I believe that the practice of requiring some grounds for believing there are local assets is still applicable in such case. But the three recent Court of Appeal cases were not the normal case [see Babanaft International Co SA v. Bassatne [1989] 1 All ER

> "433, [1989] 2 WLR 232, Republic of Haiti v. Duvalier [1989] 1 All ER 456, [1989] 2 WLR 261 and Derby & Co Ltd v. Weldon (No. 1) [1989] 1 All ER 469. [1989] 2 WLR 276]. In each judgment the Court of Appeal stressed they were very special cases. They involved a claim for Mareva relief over assets not situate here. If the case of Derby & Co Ltd v. Weldon (No. 1) before the Court of Appeal was a very special case, so is this application, which is intimately linked with exactly the same matter. In my judgment, I am free to exercise the undoubted jurisdiction to make the orders sought in the particular circumstances of this case. But, to my mind, three requirements ought to be satisfied before the court takes the extreme step that is asked for in this case. The first requirement is that the special circumstances of the case justify such an exceptional order. Second, that the order is in accordance with the rationale on which Mareva relief has been based in the past. Third, that the order does not conflict with the ordinary principles of international law."

Based on the rationale and the purpose for granting Mareva relief i.e. that no defendant should be permitted to take action which may frustrate subsequent orders of the Court Lord Donaldson MR (page 1009) opined that:

> "If for the achievement of this purpose it is necessary to make orders concerning foreign assets, such orders should be made, subject, of course, to ordinary principles of international law."

He however expressed the view that - (page 1009)

> "The existence of sufficient assets within the jurisdiction is an excellent reason for confining the jurisdiction to such assets, but, other considerations apart, the fewer the assets within the jurisdiction the greater the necessity for taking protective measures in relation to those outside it."

In accepting the above dicta as a correct statement of the law, I would conclude that the Court has jurisdiction to grant a Mareva injunction which extends to assets outside of its jurisdiction provided that (i) there are special circumstances for doing so, (ii) the order is in accordance with the rationale for granting such injunctions i.e. to prevent a defendant from taking action which may frustrate the plaintiff recovering the fruits of a subsequent judgment, and (iii) that it does not conflict with international law.

The proviso in (iii) on the face of it, presents some difficulty, firstly in relation to how such an order would be enforced, and secondly, whether it would in fact be in conflict with the laws of the country in which the assets reside.

Lord Donaldson disposed of these two 'difficulties' in this way:

(i) Page 90 -

> "... I think that a sufficient sanction exists in the fact that, in the event of disobedience, the court could bar the defendants' right to defend. This is not a consequence which they could contemplate lightly as they would become fugitives from a final judgment given against them without their explanations having been heard and which might well be enforced against them by other courts."

(ii) As to the impact of international law Lord Donaldson felt it had two aspects -

(a) the nature or content of the order itself and

(b) the effect on third parties

As to (a) he concluded that Mareva injunctions operate solely in personam and consequently do not normally offend the consideration of comity which require courts of one country to refrain from making orders which infringe the exclusive jurisdiction of the courts of other countries.

It follows that as the Mareva injunctions operate in personam, the sanction in (i) would be the effective measure to persuade the defendant into complying with the order.

(b) In order to protect the rights of third parties Lord Donaldson as did Nicolas Browne-Wilkinson V C in the Babanaft case [1989] 1 All E.R. 433 expressed the view that this difficulty could be solved by the addition of a proviso to the injunction. The following is the proviso suggested by Lord Donaldson. He introduced it thus:

> "What should be done? I should prefer a proviso on the following lines:
>
> 'PROVIDED THAT, in so far as this order purports to have any extra-territorial effect, no person shall be effected thereby or concerned with the terms thereof until it shall be declared enforceable or be enforced by a foreign court and then it shall only affect them to the extent of such declaration or enforcement UNLESS they are (a) a person to whom this order is addressed or an officer of or an agent appointed by a power of attorney of such a person or (b) persons who are subject to the jurisdiction of this court and (i) have been given written notice of this order at their residence or place of business within the jurisdiction, and (ii) are able to prevent acts o omissions outside the jurisdiction of this court which assist in the breach of the terms of this order."

How then do the above principles apply to the circumstances of this case?

In support of the ex parte summons for the Mareva injunction the plaintiff relied upon the affidavit of Mr. Ewart Scott, the Acting Managing Director of the plaintiff Bank. The affidavit states that the plaintiff offers to the public internationally honoured credit cards under licence for Visa International and Master Card International and that the defendant was employed to the plaintiff Bank up until 1st October, 1993 as General

Manager with responsibility for technology and operations and in particular for the processing of Credit Card Transactions involving credit cards issued on the authority of Visa and Master Cards International. The affidavit, after declaring that the plaintiff Bank, conducted a thorough internal investigation, sets out certain acts of the defendant, which resulted in his dismissal and in the plaintiff filing a writ of summons in which several claims are made against him.

For convenience, it would be appropriate to set out hereunder the indorsement of the writ of summons:

> "The Plaintiff's claim is against the Defendant for:
>
> 1. Damages for breach of contract of employment.
>
> 2. Further and/or in the alternative, damages for conspiracy.
>
> 3. Further and/or in the alternative, damages for deceit.
>
> 4. Further and/or in the alternative, damages for negligence.
>
> 5. Costs.
>
> 6. Interest.
>
> 7. An injunction to restrain the Defendant from disposing of and/or dealing with his assets wheresoever situated in so far as the same do not exceed the sum of US $400,000.00 until judgment.

Mr. Scott detailed the allegations against the defendant in paragraph 6 of his affidavit which reads:

> "6. More specifically, the Defendant between April and August 1993:
>
> (a) Established credit card relationships with certain telemarketers in the United States and Antigua, without the authority or knowledge of the Bank, without carrying out the appropriate credit checks and procedures and in contravention of the conditions of the Visa International

"License, which prohibits licensee Banks from entering into credit card relationships with Merchants carrying on business outside the licensee Bank's region;

(b) Delayed complying with instructions from Visa International and Master Card International for dealing with such relationships;

(c) Delayed communication to executive management of the Plaintiff Bank of problems which arose pertaining to the said operations;

(d) Circumvented executive management's instructions to terminate such arrangements by assisting in the setting up of a fictitious office in Kingston for one of the said Telemarketers;

(e) Authorised payments to the said Telemarketers totalling over US $400,000.00 which authorisation was either fraudulent or grossly negligent;

(f) Improperly caused or allowed a portion of the reserves held by the Plaintiff Bank to meet potential liability arising from disputed charges to be paid out of the Bank."

In paragraphs 8 and 9, the state of the defendant's accounts held in the plaintiff Bank is disclosed, and as it may be necessary to refer specifically to the allegations therein, the paragraphs are set out hereunder:

"8. The Defendant is the holder of two accounts (numbered 400000719 and 100001160) at the branch of the Plaintiff Bank in Miami, Florida, in the U.S.A. Between April and August of this year, various sums were deposited into those accounts, totalling US$412,137.00. The Defendant over the same period withdrew from those accounts US $356,478.00 some by cheque and some by wire transfer to Hong Kong, among other places. There is now a balance of US $84,536.63 in the said accounts. In addition, he has two Certificate of Deposit Accounts containing US $4,761.01 and US$5,229.88, respectively.

> "9. The Defendant also holds three accounts at the Plaintiff's King Street Branch, which as at today's date, have balances of US$5,136.80, J$411,608.00 and J$60,937.00 respectively.

There are thereafter, allegations of the defendant's unsuccessful attempts to transfer or withdraw funds held in the accounts but at times prior to his notification of the (ex parte) Mareva injunction against him. Then Mr. Scott swears that as far as he is aware the defendant does not have sufficient assets in this jurisdiction to cover the claim in the action and that the only liquid assets of the defendant against which any judgment could be executed are the funds held in the plaintiff Bank's Miami branch, and declares in paragraph 14 that he and the plaintiff are of the belief that the defendant is likely to remove or otherwise deal with those assets in such a manner as to frustrate any judgment which may be awarded against him, unless restrained by the Court.

On the other hand, in support of his summons to discharge the jurisdiction, the defendant filed an affidavit which was described by Theobalds J in his reasons for judgment at the inter partes hearing, as "a pathetic attempt to provide reasons why the injunction should not have been granted in the first place." Such a description, though giving the impression that the learned trial judge was incorrectly placing a burden of proof on the defendant, is in my view understandable in the circumstances where the affidavit consists of a mere general denial of the allegations of misconduct including what may well amount to fraudulent conduct on his (the defendant's) part.

The learned judge, however, in spite of his comments in respect of the quality of the defendant's affidavit, nevertheless went on to examine the content of the plaintiff's affidavit in order to determine whether on that evidence the injunction should be discharged. He said:

> "On the other hand, the plaintiff having filed the Writ of Summons herein has not followed it up with a Statement of Claim. The plaintiff has put forward, in my view, evidence based on information and belief without stating the sources of his knowledge, information and belief. If those paragraphs are deleted there is nothing on the face of the Affidavit which I could consider as a proper basis on which the Mareva Injunction was granted in the first place. There is a duty on the Plaintiff to have put machinery in place to avoid this and if that had been done this would not have happened. The Plaintiff's Affidavit bears out that there was no justification or further justification for the Mareva injunction to continue. The Plaintiff can seek his remedies without the injunction continuing any further."

With these words, the learned judge granted the application to discharge the injunction.

At the hearing of the appeal we were informed that the paragrapns to which the learned judge referred, in coming to his conclusion were paragraphs 8 - 14 of Mr. Scott's affidavit, because it followed upon submissions made by the respondent before Theobalds J. The basis of this submission was section 408 of the Civil Procedure Code which states as follows:

> "408. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except that on interlocutory proceedings or with leave under section 272A or section 367 of this Law, an affidavit may contain statements of information and belief, with the sources and grounds thereof."

Is the contention that the affidavit breached this section, valid?

Paragraphs 8 and 9 speak to facts which in my opinion, would be to the knowledge of the deponee, his being in the capacity of the Acting Managing Director of the plaintiff Bank. Paragraphs 10 and 11 speak to the source, and grounds of the information and for convenience are set out hereunder:

"Paragraph 10:

I have been informed by the General Manager of the Plaintiff Bank's Miami Branch, William Hinds, and do verily believe that on the 4th October, 1993, the Defendant instructed the Branch to transfer some of the funds currently standing to his credit in the said accounts to another Bank, and that on the 5th October, 1993 the Defendant attempted to withdraw some of the funds from these accounts.

Paragraph 11

I am advised by Mr. Loren Edwards, the Manager of J.C.B.'s King Street branch, and verily believe that at approximately 11:00 a.m. this morning, the Defendant called him and indicated that he wished to immediately close all his accounts, both at that branch and at the Miami branch."

Paragraphs 12 and 13, in my view speak merely to the limitation of Scott's knowledge as to the respondent's possession of other assets other than those set out in paragraphs 8 and 9. Then paragraph 14 of the affidavit speaks to the belief of Scott and the plaintiff, based on the allegations made in the foregoing paragraphs, that the respondent was likely to remove or otherwise deal with the assets "in such a manner as to frustrate any judgment which may be awarded against him, unless restrained by the Court."

In my view, none of these paragraphs are in breach of the Civil Procedure Code, and could have been considered in determining whether the Mareva injunction should be discharged. In any event, much of the contents complained of were admitted in the respondent's affidavit e.g. in relation to paragraphs 8 and 9 where the respondentthough not admitting the sum alleged to be held in the various accounts, did however admit to having the accounts alleged (see paragraph 10 of his affidavit).

In paragraph 11, the respondent states what amounts to an admission of the contents of paragraphs 10 and 11 of Mr. Scott's affidavit. He said:

> "... That my actions referred to in paragraphs 10 and 11 of Mr. Scott's Affidavit were taken as a direct result of my loss of confidence in the Jamaica Citizens Bank and in accordance with my desire to immediately terminate my Customer Relationship with the Bank, having been terminated as an Employee of the said Institution.
> That my record of employment up to the time of the purported dismissal will show that I have always conducted myself in respect of my obligations in a responsible manner, and I have absolutely no intention of acting otherwise, or of attempting to evade or frustrate any judgment or decision lawfully obtained against me."

The foregoing assessment of the affidavits demonstrates that the learned judge was in error, when he felt that he was unable to rely on certain of the paragraphs in Mr. Scott's affidavit, and in my view did not therefore exercise his discretion on the basis of all the evidence before him. Consequently, this Court is entitled to look at all the evidence and thereafter determine whether the order granting the injunction was correct in all the circumstances.

On the evidence, as a whole, can there be a conclusion that there was a good arguable case? The plaintiff alleges that the respondent, while an employee of its Bank, conducted himself in circumstances which amounted to either a fraudulent or negligent treatment of its funds, resulting in loss of an amount of about US $400,000. In my view the content of the respondent's affidavit and in particular his general denial in the face of an allegation of fraud made against him does not displace the inferences arising in the evidence of the appellant, which clearly discloses a good arguable case.

In relation to whether there was a risk that the respondent may remove the funds or otherwise deal with them in a manner such as may frustrate any judgment recovered, I would conclude that his obvious knowledge of international finance, viz undisputed practice in international financial dealings, and his own admission that he is desirous of removing the funds (though giving an explanation for same) amounts to sufficient evidence upon which it can be concluded that there would be such a risk.

As to whether the order can extend to foreign assets, in keeping with the decision in **Derby & Co Ltd v. Weldon (No.2)** (supra) I would so conclude. The order, as it refers to "assets wheresoever situate" and given the allegations of funds in the Miami branch of the Appellant's Bank, in my view correctly includes these assets.

In addition, the proviso, in my view is sufficient to protect third party rights, and is in keeping with the suggested wording in **Derby & Co Ltd v. Weldon (No. 2)** (supra). It states:

> "PROVIDED THAT:
>
> This Order is declared to be of no effect against, and is not intended to bind any Third Party outside of the jurisdiction of this Court, directly affected by the terms of this Order, unless and until this Order shall be declared enforceable or recognized or is enforced by any Court of the jurisdiction in which the Defendant's assets are situated and in particular, the Courts of the State of Florida in the United States of America."

For these reasons I would allow the appeal, set aside the order of Theobalds J and restore the Mareva injunction on the terms and conditions granted by Reid J. The respondent, should pay the costs both here and below.

DOWNER J A

Dalton Yap, the respondent was formerly employed to the appellant, Jamaica Citizens Bank Limited - The Bank - in a high managerial position. The Bank has stated that he was specifically responsible for the technological and operational aspects of the Master Card International and International Visa Credit Card operations of the Bank, and as such, was in a position to establish improper credit card relationship worldwide with Telemarketers to the prejudice of The Bank as regards its principals, as alleged. The other allegation was that, as a manager, he conspired with others to set up a fictitious office to defraud The Bank of its funds. These allegations also suggest that there may have been a "fraudulent breach of fiduciary duty." See **Reading v Attorney General** [1949] 2 K B 232 at 236 and [1951] A C 502.

The affidavit evidence discloses that he operated a number of accounts at an agency of The Bank in Miami Florida, which is outside the jurisdiction of this Court, but not beyond its reach. Additionally he operated some five accounts at the headquarters of The Bank in Kingston. These are choses in action and tracing is a remedy at common law, if it is proved that the proceeds of his illicit transactions were deposited in those accounts. See **Bank Belge v. Hambrouck** [1921] 1 K B 321.

The Bank dismissed Yap summarily on 1st October 1993, for fraud and misconduct and a crucial sentence in the letter of dismissal reads "Until the Bank has satisfied itself that no loss has been suffered any sum which may be due to you will be withheld." On 8th October, The Bank instituted proceedings with promptitude against Yap and in the endorsement on the writ, The Bank sued for damages for breach of contract of employment and in the alternative damages for conspiracy, deceit, and negligence. Also endorsed on the writ

is the claim for a Mareva injunction. It reads:

> "7. An injunction to restrain the Defendant from disposing of and/or dealing with his assets whereso-ever situate in so far as the same do not exceed the sum of US$400,000.00 until judgment."

Whether this endorsement was prudent or necessary is debatable. It adds nothing to the ex parte application for the injunction and if it had been served before the grant of the Mareva injunction was made, the funds it protected could have been spirited away.

An appearance was entered by Yap on 14th October 1993. On the same day the writ was filed, The Bank applied ex parte for the Mareva injunction. In evaluating The Bank's action, it must be emphasized that because of the rapidity of electronic transfer of funds coupled with the absence of exchange control, it is permissible in cases of urgency to apply for, and secure injunctive relief on the basis of a draft affidavit if there is an undertaking to file it afterwards. See **The Niedersachsen** [1984] 1 All E R 398 at 400 and **Z Ltd v A-Z and AA-LL** [1982] 1 Q B 558 at 589 per Kerr L J. Since the summons applying for the Mareva injunction, and the order made on it are at the heart of this dispute, it is pertinent to set out their relevant parts. So far as the ex parte summons is concerned, it reads:

> "... an application on behalf of the Plaintiff for an injunction restrain-ing the Defendant, whether by himself, his servants or agents, or howsoever otherwise from disposing of and/or dealing with his assets wheresoever situate in so far as the same do not exceed the sum of US$400,000.00 and in particular from withdrawing or transferring the funds in his accounts at Jamaica Citizens Bank, Miami, until judgment or further order herein."

As for the ex parte injunction, the coercive section ordered that:

> "(a) The Defendant be restrained, whether by himself, his servants or agents, or howsoever otherwise from disposing of and/or dealing with his assets wheresoever situate in so far as the same do not exceed the sum of US$400,000.00 and in particular from withdrawing or transferring the funds in his accounts at Jamaica Citizens Bank, until judgment or further order herein."

Then because the procedures of the court always provide that the defendant be notified at the earliest time of the prejudice to him, from an order made without his knowledge, paragraph 1 of the Mareva injunction reads:

> "1. Forthwith to serve a copy of this Order upon the Defendant."

Additionally, there is the provision which gives the defendant and any third party affected, liberty to apply. That sub-paragraph stipulates that:

> "(b) Liberty to the Defendant and any Third Party affected by the Order to apply on notice to the Plaintiff's Attorneys-at-law to set aside or vary this Order."

This right is enshrined in section 486 of the Civil Procedure Code.

What provisions governed the award of this ex parte Mareva Injunction?

The statutory foundation for the Supreme Court to award **injunctions** is to be found in section 49(h) the Judicature Supreme Court Act which is modelled on section 25(8) of the Supreme Court of Judicature Act [1873] (U.K.) now 37(1) of the Supreme Court Act of 1981 as well as section 686 of the Civil Procedure Code. Insofar as material section 49(h) reads:

> **"49(h)** With respect to the law to be administered by the Supreme Court, the following provisions shall apply that is to say—
>
> > ... an injunction may be granted ... by an interlocutory order by the Court, in all cases in which it appears

> to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just."...

Then in recognition that exceptional circumstances may warrant an ex parte application, section 486 of the Civil Procedure Code reads in part:

> "486 ...
>
> **'Ex parte' applications in special cases**
>
> But the Court or a Judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order 'ex parte' upon such terms as to costs or otherwise, and subject to such undertaking (if any), as the Court or Judge may think just; and any party affected by such order may move to set it aside."

In the interests of justice, as indicated, the mandatory order of the court also provides that The Bank serve the injunctive order on Yap. There can be no serious complaint in this regard as we were told that the Mareva injunction was served on the afternoon of Monday 11th October, while the injunction was awarded on the afternoon of Friday the 8th. Yet, there was some prejudice to Yap as paragraph 8 of his affidavit states:

> "8. That on Monday, October 11th, I attempted to withdraw funds from my personal account at the Jamaica Citizens Bank, King Street, but was advised that the account was frozen and that I must direct any queries to the Law firm of Myers, Fletcher & Gordon. Inquiries by my Attorneys-at-Law confirmed that a Mareva Injunction had been applied for and obtained in this Honourable Court, by the Plaintiff Bank, on October 8, 1993."

Of a more serious nature was the effect of the Mareva injunction on Yap's account in Miami. The correspondence speaks for itself. Yap wrote as follows:

"October 22, 1993

Mr Peter McWilliam
Vice President, Administration
Jamaica Citizens Bank Miami Agency
200 s. Biscayne Blvd, suite 3550
Miami, Florida, 33131-2332

Re: MAREVA INJUNCTION

Dear Peter,

I acknowledge with thanks your facsimile this morning with the mareva injunction.

Kindly confirm in writing that my accounts are frozen pursuant to the authority of the mareva injunction obtained in Jamaica.

Yours truly,

sgd/ Dalton Yap

c: William Hinds, SVP, Miami Agency Bank."

The Miami agency of The Bank responded as follows:

"Mr. Dalton Yap, 22nd October 1993
Lot # 6
Off Charlton Avenue
Mandeville,
JAMAICA

Dear Sir,

Your telefacsimile of today's date refers.

Please note that your accounts have been frozen based upon our lawyers' opinion that we are permitted to do so under the 'Mareva' injunction, a copy of which you have in your possession.

Yours faithfully,

sgd/ Peter McWilliam
Vice President Administration."

Since an ex parte order is by its nature provisional, the ordinary ex parte injunction is usually granted for a short period of five days: see Order 29/1/16 [1969] White Book. In **Z Ltd v A-Z & AA-LL** [1982] 1 Q B 558 at 587 - 588, Kerr L.J. gives excellent reasons why a fixed return date is undesirable for Mareva injunctions. He says:

> "... While subsequent hearings inter partes may be unavoidable in many cases, these involve additional time for the court and costs for the parties, and also for any possible interveners, such as banks. For this reason I feel doubtful whether it should become the practice in every case to fix a return date at once. It seems to me that such a practice would have two undesirable consequences. First, it would tend to lessen the degree of thought which should be given to ensuring, so far as is then foreseeably possible, that the appropriate order is made on the ex parte application. Secondly, return dates given as a matter of routine will clutter up the courts, and in particular the Commercial Court, with hearings on Mareva injunctions to an even greater extent than is already happening. Moreover, in most cases when return dates are given on the original application I think that it will be found that this will usually be followed by an application for an application for an adjournment, often by the consent of both parties, and it then takes further time on the part of the listing officer, and often of the court itself, to deal with such applications. In this connection it should also be borne in mind that in many cases of Mareva injunctions the defendant may be outside the jurisdiction or otherwise difficult to serve expeditiously and that thereafter further time will usually be needed by both parties to consider whether, and if so to what extent, the original order requires adjustment and whether or not any contested hearing inter partes is necessary for this purpose."

It must be recognized that the Mareva jurisdiction however, is exceptional. As the circumstances are usually urgent, the initial application is invariable ex parte. Mustill J, as he then was, sets out its unique features in **Niedersachsen** (supra). At p. 403 the learned judge said:

> "... In the ordinary way, a plaintiff seeks an interlocutory injunction for the purpose of holding until trial the substantive relief which he hopes to obtain on final judgment. The interlocutory injunction is a direct reflection of his cause of action. The relief granted on a Mareva application is of a quite different character. It bears no relation to the relief granted at

> the trial. The plaintiff, however successful at the trial, will not obtain a perpetual injunction in terms of the interlocutory Mareva injunction. The latter bears on assets which in the great majority of cases have no connection at all with the cause of action on which the injunction is founded."

It is also useful to add that in **Z Ltd v A-Z & AA-LL** (supra) at 488, Kerr L.J. made the following observation:

> "..The primary consideration should be at the stage of the ex parte application, and what then appears to be the appropriate order."

On this basis, the crucial issue in this case was whether the order made by Reid J, was correct and should have been maintained as The Bank contends or discharged as Theobalds J ordained.

The respondent Yap moved promptly on 15th October, to set aside the ex parte Mareva injunction which effectively froze his accounts with The Bank, both within and without the jurisdiction. Despite the appearance in the agreed note of the judgment by Theobalds J, that the issue was decided at a day's hearing, counsel on both sides told this Court that the hearings lasted several days over a period of six weeks. The judge's order in part, reads:

> "...IT IS HEREBY ORDERED AND ADJUDGED THAT:-
>
> 1. Application granted for Discharge of Mareva Injunction granted on the 8th October 1993;
>
> 2. Leave to Appeal granted;
>
> 3. Application for Stay of Execution refused;"

With respect to the refusal to stay execution, The Bank had the foresight to secure a stay successfully from Wright J A and Wolfe J A in this Court pending the outcome of the appeal.

It is now appropriate to examine the merits of the order appealed.

Did the circumstances in The Bank's affidavit justify Reid's J award of a Mareva injunction?

The affidavit before Reid J was crucial to determine if the learned judge was justified in granting the Mareva injunction. The deponent Ewart Scott was the acting managing director of The Bank. As such he had access to its records. In detailing the misconduct of Yap, he specified the reasons for suspecting Yap of impropriety. Here is how he outlined it:

> "5. As a result of queries raised by Visa International and Master Card International, the Bank conducted a thorough internal investigation and this investigation has so far revealed, among other things, that:-
>
> (a) The Defendant completely disregarded several bank guidelines in setting up and managing the credit card operations;
>
> (b) The Defendant circumvented instructions from the Bank to terminate the processing of such transactions;
>
> (c) The Defendant withheld information pertaining to the operation of this service from the Executive management personnel of the Bank."

Then in further particularising the misconduct of Yap, the deponent stated:

> "More specifically, the Defendant between April and August 1993:-
>
> (a) Established credit card relationships with certain Telemarketers in the United States and Antigua, without the authority or knowledge of the Bank, without carrying out the appropriate credit checks and procedures and in contravention of the conditions of the Visa International license, which prohibits licensee Banks from entering into credit card relationships with Merchants carrying on business outside the licensee Bank's region;

(b) Delayed complying with instructions from Visa International and Master Card International for dealing with such relationships;

(c) Delayed communication to executive management of the Plaintiff Bank of problems which arose pertaining to the said operations;

(d) Circumvented executive management's instructions to terminate such arrangements, by assisting in the setting up of a fictitious office in Kingston for one of the said Telemarketers."

Further the deponent stated that Yap:

" (e) Authorised payments to the said Telemarketers totalling over US$400,000.00 which authorisation was either fraudulent or grossly negligent."

Then in conclusion the deponent added that Yap:

" (f) Improperly caused or allowed a portion of the reserves held by the Plaintiff bank to meet potential liability arising from disputed charges to be paid out of the Bank."

As for the details of the Yap's Miami bank accounts, the deponent stated:

"8. The Defendant is the holder of two accounts (numbered 400000719 and 100001160) at the branch of the Plaintiff Bank in Miami, Florida, in the U.S.A. Between April and August of this year, various sums were deposited into those accounts, totalling US$412,137.00. The Defendant over the same period withdrew from those accounts US$350,478.00 some by cheque and some by wire transfer to Hong Kong, among other places. There is now a balance of US$84,536.63 in the said accounts. In addition, he has two Certificates of Deposit Accounts containing US$4,761.01 and US$5,229.88, respectively."

It should be noted that deposits were made during the specific period when the acts of fraud and misconduct were alleged. Further, the sums fraudulently deposited, bear a

resemblance to those involved in dealing with the Telemarketers without the authority to do so. Turning to Yap's accounts at The Bank in Jamaica, he stated that:

> "9. The Defendant also holds three accounts at the Plaintiff's King Street Branch, which as at today's date, have balances of US$5,136.80, J$411,608.00 and J$60,937.00 respectively."

The authorities suggest that Ewart Scott's affidavit ought to satisfy two tests at the ex parte stage. It must be a good arguable case, in that The Bank ought to have good prospect of succeeding at the trial. Secondly, there must be a risk that Yap would remove the funds from both the Kingston and Miami accounts so as to avoid payment. if judgment is given against him.

Kerr L J sums up the position thus in **Z Ltd v A-Z & AA-LL** (supra) at p. 585:

> " It follows that in my view Mareva injunctions should be granted, but granted only, when it appears to the court that there is a combination of two circumstances. First, when it appears likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum. Secondly, when there are also reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, in whole or in part, but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him."

If the defendant's assets are abroad, then consideration ought to be given for a worldwide Mareva injunction. This is precisely the order that Reid J made. Since his competence to do this was challenged in a forceful submission by Mr. Wright for Yap, the validity of that aspect of the order must now be examined. Equity acts in personam. Once the litigant was within the jurisdiction, even if the land was without, equity in its discretion, could provide a remedy.

Thus, in **Penn v Lord Baltimore** [1750] Ves Sen 44 or 27 E R 1132 - specific performance was granted as regards land in the American colonies. Lord Hardwicke L C, in compelling the defendant, Lord Baltimore to fix the boundaries between Pennsylvania and Maryland as had been agreed, stated that:

> "...The conscience of the party was bound by this agreement; and being within the jurisdiction of the court, which acts in personam, the court may properly decree it as an agreement, if a foundation for it."

A similar statement of principle was made by Lord Selbourne in **Ewing v Orr Ewing** (No.1) [1893] 9 App. Cas. 34 at 40.

Injunctive relief to restrain a defendant from proceeding in a foreign country, was given in **Re North Carolina Estate Co. Ltd.** [1889] 5 T L R 328. Where the courts of equity led in providing a remedy outside the jurisdiction, the commercial court followed in creating and expanding the jurisdiction of the Mareva injunction. The commercial court was also influenced by the "saise conservatoire" of continental jurisprudence: see **Z Ltd** (supra) at p. 573. Mr. Hylton for The Bank helpfully referred the court to **Derby & Co. Ltd. and others v Weldon and others (No. 2)** [1989] 1 All E R 1000. The following passage by Lord Donaldson M R at 1009 sets out the position with clarity:

> " In my judgment, the key requirement for any Mareva injunction, whether or not it extends to foreign assets, is that it shall accord with the rationale on which Mareva relief has been based in the past. That rationale, legitimate purpose and fundamental principle I have already stated, namely that no court should permit a defendant to take action designed to frustrate subsequent orders of the court. If for the achievement of this purpose it is necessary to make orders concerning foreign assets such orders should be made subject, of course, to ordinary principles of international law.

> When Sir Nicolas Browne-Wilkinson V C said that special circumstances had to be present to justify such an exceptional order, I do not understand him to have been saying more than that the court should not go further than necessity dictates that in the first instance it should look to assets within the jurisdiction and that in the majority of cases there will be no justification for looking to foreign assets."

Further on the same page Lord Donaldson cites the modern cases where worldwide order was granted. It runs thus:

> " The reality is, I think, that it is only recently that litigants have sought extra-territorial relief and that the courts have had to consider whether to grant it and on what conditions. During the last year it has been granted in the three cases to which Sir Nicolas Browne-Wilkinson V C referred, namely the **Babanaft** case [1989] 1 All E R 433, [1989] 2 W L R 232, **Republic of Haiti v Dubalier** [1989] 1 All E R 456, [1989] 2 W L R 261 and **Derby & Co Ltd v Weldon (No. 1)** [1989] 1 All E R 469, [1989] 2 W L R 276. Counsel for CMI seeks to distinguish the **Babanaft** case on the grounds that the injunction was granted in aid of execution of an existing judgment. This I accept as a distinction in that the court will have less hesitation in taking measures in support of a judgment creditor than it would in support of a potential judgment creditor. The decision in **Republic of Haiti v Duvalier** (supra) he seeks to distinguish on the grounds that it was a tracing case and that the funds were under the control of an agent resident within the jurisdiction. This is certainly a distinction in fact, although I am not sure that it is one of principle. In **Derby & Co Ltd v Weldon (No. 1)** (supra) he seeks to distinguish on the ground that the defendants had assets within the jurisdiction, but, for the reasons which I have already given, I do not consider this to be a distinction in principle."

If the assets are within the jurisdiction, then the Mareva injunction precludes Yap from dealing with it. The relevance of this in this case is that, the order made by Reid J, includes Yap's accounts at the Kingston branch of The Bank.

As for the assets abroad, to my mind it is clear that, from the wording of the order made by Reid J, it precluded dealing with assets:

> "wheresoever situate in so far as the same do not exceed the sum of US$400,000.00 and in particular from withdrawing or transferring the funds in his accounts at Jamaica Citizens Bank, until judgment or further order herein."

There is a proviso to the injunction which is important. It reads:

> **"PROVIDED THAT:**
>
> This Order is declared to be of no effect against, and is not intended to bind any Third Party outside of the jurisdiction of this Court, directly or indirectly affected by the terms of this Order, unless and until this Order shall be declared enforceable or recognized or is enforced by any Court of the jurisdiction in which the Defendant's assets are situated and in particular, the Courts of the State of Florida in the United States of America."

Lord Donaldson continues on page 1012 of **Derby** (supra), thus:

> " The express reason for including such a proviso was that Mareva injunctions 'have an in rem effect on third parties' and that 'Mareva injunctions have a direct effect on third parties who are notified of them and hold assets comprised in the order' (per Kerr L J in the **Babanaft** case [1989] 1 All E R 433 at 438, [1989] 2 W L R 232 at 240). I know what was meant, but I am not sure that it is possible to have an 'in rem effect' on persons whether natural or juridical and a Mareva injunction does not have any in rem effect on the assets themselves or the defendant's title to them. Nor does such an injunction have a direct effect on third parties. The injunction (a) restrains those to whom it is directed from exercising what would otherwise be their rights and (b) indirectly affects the rights of some, but not all, third parties to give effect to instructions from those directly bound by the order to do or concur

> in the doing of acts which are prohibited by the order. Whether any particular third party is indirectly affected, depends on whether that person is subject to the jurisdiction of the English courts."

At page 1013 His Lordship sets out a proviso which was no doubt, the model for the proviso in this injunction. Perhaps one should add that the effective sanctions against a defendant is imprisonment for contempt, or sequestration of assets. In fact, Lord Donaldson in **Derby** (supra) mentioned another effective sanction at p. 1010. He adapted the injunctive relief which restrained a litigant from pursuing his remedy in the common law courts. In refashioning this relief, His Lordship said:

> "...I think that a sufficient sanction exists in the fact that, in the event of disobedience, the court could bar the defendants' right to defend. This is not a consequence which they could contemplate lightly as they would become fugitives from a final judgment given against them without their explanations having been heard and which might well be enforced against them by other courts."

The purpose of this rehearsal was to express concurrence with Mr. Hylton's submission that this injunction has a worldwide effect and it was valid exercise of the jurisdiction of the initial order of the court below and ought to be restored.

Was it correct for Theobalds J to set aside the Mareva injunction at the inter partes hearing?

The Bank adduced no further affidavit evidence at this stage. Since they were unaware of Yap's assets, apart from his bank accounts, they could have served a notice of disclosure on him so as to make this known: see **Z Ltd** (supra) at p. 577 & **Derby & Co Ltd (No 2)** (supra) at p. 1021. But this ought not be fatal to The Bank's claim that the injunction ought to be confirmed. What approach ought Theobalds J, to have taken in seeking to vary or discharge the injunction?

It must be that Yap ought to come with clean hands. This was recognized in **Avant Petroleum v Gatoil Overseas Inc.** [1986] 2 Lloyd's Rep. 236 at p. 242 where Neil L J said:

> "(4) The Mareva jurisdiction is not to be used so as to prevent the payment of trade creditors in the ordinary course of business. (See, for example, **The Angel Bell** [1980] 1 Lloyd's Rep. 632; [1981] Q B 65 and pp. 637 and 73.) But where the party enjoined seeks the discharge or variation of a Mareva injunction to pay trade creditors or to discharge other obligations, he will have to satisfy the Court that the order sought will not conflict with the policy underlying the Mareva injunction. In many, if not in most, cases the party enjoined will therefore have to show that he has no other free assets which can be used to make the relevant payments. (see for example **A & B v C** (No. 2) [1981] 1 Lloyd's Rep. 559)."

An instance where an intervener succeeded in having terms varied, was **The Angel Bell** [1980] 1 All E R 480. This was on the basis of cogent affidavit evidence. Theobalds J ought to have examined both affidavits so as to determine whether The Bank had a good arguable case and whether there was a risk that Yap would remove his assets from the court's jurisdiction before a judgment. It was also necessary to examine Yap's affidavit to determine whether there were any grounds for varying or setting aside the injunction.

In his reasons for judgment, Theobalds J makes no mention of the serious allegations of fraud made by The Bank and supported by affidavit evidence. The learned judge found that The Bank used its privileged position as Yap's banker, to secure information as regards Yap's account, but this was no more that it was entitled to do by common law. See **Tournier v National Provincial & Union Bank of England Ltd** [1923] All E R Rep. 550 at 554(H). As for statute - see section 45 and paragraph (d) of the Fourth Schedule of the 1992 Banking Act. The appellant could also have obtained an order of disclosure, so as to be aware of all Yap's assets.

Further, Yap's probity is in issue and no proper regard seems to have been given to movements of funds by him from Miami to Hong Kong, nor was any explanation to be found in his affidavit.

Mr. Wright submitted there was no onus on Yap to prove anything. Yet if grave allegations are made, and there is merely a blanket denial, then it is open to the court to find that The Bank has a good arguable case to continue the injunction. In paragraph 11 of his affidavit, Yap states:

> "11. That I am a Jamaican Citizen with substantial assets in Jamaica and have no intention of removing them from the jurisdiction except in the ordinary course of my business. That my actions referred to in paragraph 10 and 11 of Mr. Scott's Affidavit were taken as a direct result of my loss of confidence in the Jamaica Citizens Bank and in accordance with my desire to immediately terminate my Customer Relationship with the Bank, having been terminated as an Employee of the said Institution."

Yet he gives no indication of the extent of his assets. He could have been compelled to disclose: see **T S B Private Bank International S A v Chabra** [1992] 2 All E R 243. Had he disclosed, it might have been appropriate to set aside or vary the injunction. If Yap indeed has substantial assets, then paragraph 15 of his affidavit makes strange reading. It reads:

> "15. That my personal and professional life has been severely disrupted as a result of the actions of the Plaintiff Bank, and since the imposition of this Mareva Injunction, I have had to seek the assistance of relatives and friends to support myself and my family as I am unable to access any funds whatsoever from my accounts."

If he is indeed asset rich, it is odd that the income from those assets are unable to keep him going. In any event, it was open to him to have applied for modest sums for living expenses which the court could grant so as not to make the order result in oppression. See **T D K Tape Distribution U K Ltd v Videochoise Ltd** [1985] 3 All E R 345.

An examination of the learned judge's reasons shows that he was unimpressed by Yap's affidavit. Here is how he puts it:

> " The Defendant's affidavit is a pathetic attempt to provide reasons why the Injunction should not have been granted in the first place. There are certain aspects of the Plaintiff's Affidavit not dealt with by the Defendant specifically, for example, the transfers to Hong Kong. The Defendant dealt with paragraph 8 of the Plaintiff's Affidavit but there is nothing concerning the transfer of funds from Miami to Hong Kong. He described himself as a businessman but there is no indication of the type of business he operates. The Plaintiff has stated in paragraphs 8 and 9 the balances in the Defendant's account and these the Defendant has stated are wholly inaccurate but he has not said what are the correct balances."

Why then did the learned judge discharge the injunction. Here are his own words:

> " On the other hand, the Plaintiff having filed the Writ of Summons herein has not followed it up with a Statement of Claim. The Plaintiff has put forward, in my view, evidence based on information and belief without stating the sources of his knowledge, information and belief. If those paragraphs are deleted, there is nothing on the fact of the Affidavit which I could consider as a proper basis on which the Mareva Injunction was granted in the first place."...

But Ewart Scott, the deponent was the acting managing director of The Bank. The Bank's records, both at home and abroad, in its Miami agency were available to him. So the learned judge was in error on that ground. Theobalds J was plainly wrong in setting aside the Mareva injunction. The authorities mentioned on page 242 of **Avant Petroleum** (supra) **Haemor Productions Ltd v Hamilton** [1983]1A C 191 and **Garden Cottage Foods Ltd v The Milk Marketing Board** [1984] A C 130, recognized that it is appropriate for an appellate court

to treat the matters as at large and exercise its own discretion when the court below exercised its discretion on wrong principles. See also **Evans v Bartam** [1937] A C 473.

Conclusion

I am indebted to the able submissions by counsel on both sides. During the course of the submissions, I was persuaded one way and then the other. But after a full examination of the cases, and reflection on the arguments, I am convinced that The Bank was correct. So the appeal is allowed and I would set aside the order of Theobalds J, and restore the order of Reid J. Costs are to the appellant both here and below, to be agreed or taxed. Since there are allegations of fraud against Yap, and his bank accounts are frozen, it would be in the interests of justice that there be an order for a speedy trial.

RATTRAY P

Appeal allowed. Order of Theobalds J set aside. Order of Reid J restored. Costs to the appellant both here and in the court below to be taxed if not agreed. Speedy trial ordered.