[2017]JMCC Comm 23

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016 CD 00225

BETWEEN	**ALLIANCE FINANCE LIMITED**	**CLAIMANT**
AND	**CAPITAL SOLUTIONS LIMITED**	**1ST DEFENDANT**
AND	**MARK JONES**	**2ND DEFENDANT**

Hugh Small QC and Conrad George instructed by Hart Muirhead Fatta for the Claimant

Christopher Dunkley, Carissa Bryan and April Grapine-Gayle instructed by Ballentyne Beswick & Company for the Defendant

HEARD: 7, 21 and 27 June and 19 July 2017

MAREVA INJUNCTION - APPLICATION FOR FREEZING ORDER OVER MONIES HELD BY FINANCIAL INSTITUTION ON BEHALF OF CLIENTS - CLIENT ENTERED INTO AGREEMENT TO ASSIGN BENEFICIAL INTEREST IN SUMS HELD BY FINANCIAL INSTITUTION TO SECOND FINANCIAL INSTITUTION TO WHICH CLIENT IS INDEBTED - SECOND FINANCIAL INSTITUTION CLAIMING TO BE BENEFICIALLY ENTITLED TO SUCH SUMS ASSIGNED - FINANCIAL INSTITUTION REFUSING TO PAY - WHETHER SECOND FINANCIAL INSTITUTION HAS AN ARGUABLE CASE IN TRUSTS - PAYMENTS BEING MADE OUT TO OTHER CLIENTS FROM THE FUND - WHETHER SUCH PAYMENTS QUALIFY AS DISSIPATION OF ASSETS FOR THE PURPOSE OF A FREEZING ORDER

EDWARDS, J

Introduction

[1] After hearing arguments on an application for a freezing order brought by Alliance Finance Limited (Alliance), I refused the application with costs to Capital Solutions Limited (Capital Solutions) to be agreed or taxed. I gave leave to appeal as requested by counsel for Alliance and promised to put my reasons in writing. Having given leave to appeal, I had hoped to give written reasons within the shortest possible time, however, it was not possible to do so before now and for that I apologise to counsel on both sides.

[2] The background to this matter is a convoluted mix of claims and applications, most of which, happily, are not germane to this decision. In brief, there is one character common to both parties and his name is Mark Anderson Jones. Mr Jones had separate relationships with both Alliance and Capital Solutions. It would appear that he also had a relationship with an entity known as Black Brothers Limited. The exact nature of the relationship between Mr Jones and the three (3) companies I have named is a bit sketchy at this point but seemed to involve some form of investment. There is, however, no relationship between Capital Solutions and Alliance.

[3] It is claimed that Mr Jones had invested in Black Brothers through the vehicle of Capital Solutions, facilitated by its Managing Director. For reasons which are not important to this case, Capital Solutions sued Black Brothers and its principal for a sum amounting to US$4 million plus interest, arising from several loan facilities extended to Black Brothers since 2003, utilizing investor client funds, (in suit CD 201400131). It is of note that Alliance had sought to intervene in that case and having failed in its bid to do so, filed its own claim against Black Brothers and others. Alliance had in fact secured an ex-parte freezing order against Black Brothers (in suit 2016 HCV 03723). This, it eventually had to have discharged, having learnt that payment had already been made to Capital Solutions on its successful judgment against Black Brothers.

[4] Capital Solutions, in the meantime, having been successful in its suit against Black Brothers, is now in possession of the funds secured from that judgment. Mr Jones claims to be entitled to a share of those funds to the tune of US$1,200,000.00 as one of Capital Solutions' investor client in the loan investor scheme to Black Brothers. Capital Solutions denies this claim. Alliance, however, claims that it has evidence of this fact. It claims that Capital Solutions had pledged the sums from part of the judgment proceeds to Mr Jones and produced to the court a copy of a 'To Whom It May Concern' letter written without prejudice and ostensibly signed by the Chief Executive Officer of Capital Solutions. Capital Solutions, of course, denies any knowledge of this letter or purported 'pledge' as it 'forms no part of their record.' Alliance is unable to produce the original of this letter.

[5] Alliance claims that it entered into an agreement with Mr Jones to assign his beneficial interest in these sums to it. Capital Solutions denies that it was ever a debtor to Mr Jones and disavows any knowledge of any security, pledge or assignment of any debt owed by it in favour of Mr Jones, as creditor, for the benefit of Alliance.

[6] This claim of an assignment came about because it also happened that Mr Jones was a client of Alliance. He now owes money to Alliance. Alliance claims that it loaned Mr Jones, between July and September 2014, US$1,080,000.00 recorded on three (3) promissory notes. Mr Jones defaulted on the loan and, as a result, the loan sum owed now exceeds US$1,200,000.00 in principal and interest. Mr Jones, thereafter, in an undated and unstamped agreement between himself and Alliance, purported to assign to Alliance his interest in the judgment sum, in satisfaction of this debt.

[7] Mr Jones, who is a citizen of the United States, is now said to be an involuntary guest of the United States Government in one of its Federal facilities.

[8] Capital Solutions is denying that Mr Jones is entitled to any of the funds it received as a result of the judgment in its favour against Black Brothers. Alliance claims that there is evidence that Capital Solutions knows that Mr Jones is entitled to part of the proceeds and had previously so acknowledged. Alliance has, therefore, sued Capital Solutions for those funds it claims Mr Jones is now a trustee of, having declared his intention to assign the funds to Alliance.

[9] Alliance's present cause of action is, therefore, now based on trust principles. The claim is that Capital Solutions has pledged the sum of US$1,200,000.00 from the Black Brothers judgment sum to Mr Jones and that Mr Jones by his intended assignment of his beneficial interest in this sum to Alliance has declared himself a trustee of the funds on behalf of Alliance. Further, that Mr Jones having failed to bring action to recover the sums owed, Alliance, as his beneficiary, is entitled to bring a derivative action to recover the sums. As a result of this claim to bring derivative action Alliance has added Mr Jones as defendant to the claim.

[10] I perhaps should also point out that Mr Jones is also a 25% shareholder and former director of Capital Solutions.

The Application

[11] The application is for a freezing order to restrain Capital Solutions from disposing of, transferring, charging, diminishing, withdrawing or in any way dealing with the proceeds of a judgment in the suit against Black Brothers brought by Capital Solutions on behalf of its investor clients up to the limit of US$1,200,000.00.

[12] Alliance claims Capital Solutions holds, for the benefit of Mr Jones, the sum of US$723,000.00 and US$600,000.00 as a participant in this investor scheme. Alliance claims that the funds are being dissipated because Capital Solutions is paying out the funds to its client on whose behalf it sued but has failed to acknowledge its debt to and to pay out the sums due to Mr Jones. Alliance claims to be in fear that unless the sums are frozen there will be none left to

satisfy the judgment, if they are successful in their claim. Alliance relied on the affidavits of Mr Peter Chin, a director of Alliance, which formed part of the records.

[13] Capital Solutions strenuously opposed the grant of a freezing order. It relied on the affidavits of Vanceta Ramsay, Chief Executive Officer of Capital Solutions, which also formed part of the records.

The Submissions

[14] The submissions by Mr George for Alliance may be summarised as follows;

i. Mark Anderson Jones borrowed money from Alliance which he has not repaid and this is not in dispute and is provable by evidence.

ii. Mark Anderson Jones has attempted to satisfy this debt to Alliance by assigning his rights to the funds obtained by Capital Solutions from the judgment against Black Brothers.

iii. Capital Solutions is denying Mark Anderson Jones' right to those funds despite its own acknowledgement previously that he is so entitled.

iv. Mark Anderson Jones was a director/shareholder and a client of Capital Solutions through which he had invested in Black Brothers. On the 29 April 2010 he was provided with promissory notes from Black Brothers, for his acceptance in the sum of US$ 460,000.00 and US$23,000.00 as security for the loan to Black Brothers brokered by the Managing Director of Capital Solutions. He was also provided with a list of the individuals to be paid on which his name appeared alongside two figures which accorded with the sums invested and the promissory notes. Capital Solutions have since produced a second list which now excludes Mark Anderson Jones. Vanceta Ramsay has not provided any explanation for this anomaly.

v. Mark Anderson Jones having assigned his share of the proceeds of the Black Brother's judgment to it, Alliance now has a good arguable case as shown in their Re-Re-Amended Claim and Particulars of Claim against Capital

Solutions, which is now denying Mark Anderson Jones' right to the funds and is refusing to pay.

vi. That the clear words in the undated agreement to assign his interest to Alliance show a clear intention to part with the entire beneficial interest in the sums pledged to him by Capital Solutions in favour of Alliance. Those words give rise to a trust obligation on the part of Mark Anderson Jones in favour of Alliance. This is supported by the principles set out in **Paul v Constance** [1977] 1 ALL E.R. 195.

vii. Either on the basis of the assignment or on the principles in **Paul v Constance** and in view of the affidavit evidence of Mark Anderson Jones, Alliance is entitled to the sums pledged to Mark Anderson Jones by Capital Solutions.

viii. In any event, there is documentation from Capital Solutions which admits to Mark Anderson Jones being entitled to US$723,000.00 so that Alliance would at least be indisputably entitled to that sum.

ix. Mark Anderson Jones having refused to take legal action against Capital Solutions, Alliance by virtue of being the assignee of the funds is entitled to bring derivative action to recover the sums.

x. The freezing order is necessary because Capital Solutions in negotiating the recovery of the funds from Black Brothers agreed to take a lesser sum, so that the funds to be distributed are less. The result is that there is an excess of claims to the funds over and above the amount claimed and there is not enough money to cover the rights of everyone on the list.

xi. Capital Solutions has no legal or equitable claim to the funds but is strenuously refusing to pay it over. There is ample evidence that if unrestrained the funds will be dissipated. There are senior directors of Capital Solutions on the list who have a personal interest in the funds.

xii. The conduct of the principals of Capital Solutions since Alliance has indicated its claim is curious to say the least.

xiii. The question of priority is one for trial but does not affect a freezing order.

xiv. An undertaking as to damages has been given, which has been fortified.

[15] Mr Dunkley made written and oral submissions which may be summarised as follows;

i. Capital Solutions denies that Mark Anderson Jones made any investment in Black Brothers through Capital Solutions and Capital Solutions did not engineer or broker any such investment.

ii. Capital Solutions never received any money from Mark Anderson Jones to lend to Black Brothers and if he had lent money to Black Brothers the claim should be against Black Brothers and not Capital Solutions.

iii. The promissory notes referred to by Alliance were not proof of any security for any loan provided by Mark Anderson Jones.

iv. Mark Anderson Jones' name did not appear on any list as an investor but the list referred to by Alliance was prepared for the purpose of the Board of Directors and his name was placed there to facilitate him as an equity investor.

v. Alliance has failed to demonstrate any risk of dissipation.

vi. No document has been provided to show where Capital Solutions has any money for Mark Anderson Jones. The document purporting to be a 'pledge' document is not an original document, no proper explanation has been given for the missing original and the copy presented is a fraud.

vii. The sums now held by Capital Solutions are under the direct regulation by the Financial Services Commission (FSC) and Capital Solutions is already restrained from making any payments out without the permission of the FSC. The written directive from the FSC was sent to the attorneys for Alliance who have failed to disclose this to the court.

viii. The claim by Alliance is questionable. It first claimed an assignment and when that could not be sustained they have amended to claim in trust. However Mark Anderson Jones' affidavit before the court does not refer to a trust but to an assignment. There is, however, no document exhibiting this

assignment; their best case being dependent on an undated, unstamped document.

ix. There is a conflict in the case brought by Alliance but even on its best case it has not shown that there is any real risk of dissipation.

x. For Alliance to say that it is afraid that it will be cheated if the order is not given is not sufficient. It is not entitled to use a freezing order as security for the debt.

xi. Alliance has failed to demonstrate that the balance of convenience lies in their favour.

xii. That on the original claim for assignment they had no arguable case and on the claim as Re-Re-Amended they still have no arguable case.

xiii. Alliance has not come to court with clean hands and has failed to make full and frank disclosure to the court.

xiv. The freezing order is for security as Mark Anderson Jones has a multiplicity of creditors.

xv. There is no likelihood funds will be dissipated under the regulation of the FSC.

xvi. It is unusual to seek a freezing order against a licensed regulated financial institution because of the potential damage it may cause. The ex-parte order now in place has placed the 1st defendant in a position where it could not make payments to legitimate customers and proprietary funds are now unnecessarily restrained, acting as an impediment to its investment programmes.

Reason for decision

[16] The applicant applied for a freezing order more, popularly referred to as a Mareva Injunction, to freeze sums held by Capital Solutions in the amount it claims is owed to it by virtue of the fact that Mr Jones had declared himself a trustee of the sums on behalf of Alliance.

[17] The power of the court to grant such an order is to be found in section 49 (h) of the Judicature (Supreme Court) Act (the Act) and supplemented by the rules of court in Part 17 of the Civil Procedure Rules 2002 (CPR). Section 49 (h) states that:

> *"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..."*

[18] Part 17, rule 17.1 of the CPR states:

> "The court may grant interim remedies including-
>
> (a) an interim injunction;
>
> (b) an interim declaration;
>
> (c) an order
>
> .....
>
> (f) an order (referred to as a **"freezing order**"-
>
> (i) restraining a party from removing from the jurisdiction assets located there; and/or
>
> (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not;

[19] The purpose of this type of interlocutory order is to prevent any judgment which a claimant may successfully achieve from becoming *brutum fulmen.* In that regard it is usually granted to prevent the dissipation of assets before trial, so that there will be property belonging to the defendant which will be available to satisfy the judgment. Therefore, in order to be successful on an application for a freezing order, the applicant must show that there are reasonable grounds to believe that the defendant is dissipating assets or there is danger of him doing so to frustrate

the judgment. See the reasoning of Denning LJ in the seminal case of **Mareva Compania Naviera SA v International Bulkcarriers** [1980] 1 ALL ER 213.

[20] Though neither the Act nor rules state how the discretion to grant an injunction should be exercised, guidance may be found in the cases in which the court has granted or refused such an order. The injunction is usually granted where it is just and convenient to do so but must also be granted sparingly and with great caution. See **Mercedes-Benz AG v Leiduck** [1996] 1 A.C. 284 at 297 per Lord Mustill. It is not an attachment and gives no proprietary right to the asset frozen and no advantage over the defendant's other creditors. A freezing order cannot be used to enforce a claimant's rights but merely ensures that once a judgment is obtained there are assets from which the claimant can secure the fruits of that judgment.

[21] The guidelines for the grant of a freezing order can be found in most cases on the issue but was most clearly identified by Lord Denning in the earlier case of **Third Chandris Shipping Corp** (1979) QB 645; where it was said that;

a. The claimant must show that it has an arguable case;

b. The claimant must make full and frank disclosure of all material facts especially if the application is being made ex-parte;

c. The claimant must identify the assets to be frozen;

d. The claimant must show that there is a real risk of dissipation of assets to defeat his judgment;

e. The balance of convenience must lie in favour of the grant; and

f. The claimant must give an undertaking as to damages.

[22] Such an injunction could hardly be justified unless the applicant shows at least an arguable case. Therefore, on any preliminary view of the case the applicant must establish that it has a good arguable case. Added to which, is the condition that the applicant has to establish that there is at least a risk of dissipation. In **Jamaica Citizens Bank v Dalton Yapp** [1994] 31 JLR 42, the Court of Appeal,

in outlining the requirements for a freezing order to be granted, stated that a good arguable case was one which was more than barely capable of serious argument but not necessarily one which had a 50% chance of success. The court also said that there should be solid evidence that there is a real risk of dissipation of assets by removal or in some other way, so that the judgment or award in favour of the claimant would remain unsatisfied.

[23] In this instant case, Alliance is basing its best arguable case on trust. In the affidavits filed by Mr Peter Chin it outlined its best case against Capital Solutions, the grounds on which it has based its claim and the amount. On the basis of that evidence I have to consider whether this is one where the order is necessary and convenient in the interest of justice. If this case goes to trial, the trial judge has to decide whether Mr Jones was entitled to any of the proceeds of Black Brothers judgment and if yes, did he declare himself a trustee of those funds for benefit of Alliance.

[24] Reference was made to paragraph 7 of an affidavit filed by Mr Jones on 5 December 2016 in proceedings before this court where it is agreed by both sides that he claims to have assigned his beneficial interest to Alliance. I have not seen this affidavit. It was not in any bundle presented to me, neither was it shown to me. However, for the purpose of this application I accepted that it exists since both sides agree that it does.

[25] Alliance, firstly, based its claim on an acknowledgment of or pledge of the judgment sums to the tune of US$1,200,000.00 in favour of Mr Jones by Capital Solutions. It presented to the court a copy of a letter which it says amounts to a pledge. Capital Solutions says this copy letter is a fraud. The original of the letter, Alliance says, cannot be found. It is dated April 9, 2015 and addressed to 'Whom It May Concern.' It purports to be signed by Vanceta Ramsay, Chief Executive Officer of Capital Solutions Limited. It states that it is confidential and written without prejudice. The validity of it is left for trial.

[26] Alliance, secondly, relies on a document assigning to it the sums it says is owed to Mr Jones by Capital Solutions. However, the document purporting to assign Mr Jones' interest which was presented to the court is undated and unstamped. This resulted in the claimant abandoning its original claim of an assignment and amending the claim to one in trust. According to Mr. George, it is badly drafted and falls short of what is necessary for a legal assignment.

[27] Alliance, thirdly, relies on a list it says was prepared by Vanceta Ramsay on which the name of Mr Jones appears with a figure against his name and the letters "BB". Alliance claims that this is acknowledgment that Capital Solutions holds funds on behalf of Mr Jones from the Black Brothers judgment proceeds to the tune of the amount appearing beside his name on the list.

[28] Lastly, Alliance relies on the judgment on admission entered against Mr Jones in the claim it brought against him for the outstanding loan sum, (in claim 2016 CD 00225).

[29] It is at this stage difficult to say exactly what will be the outcome of this claim in trust against Capital Solutions. There are several imponderables. Firstly, Capital Solutions does not acknowledge the validity of the Re-Re- Amended Claim and Particulars of Claim, for though Alliance was given permission to amend by Laing J, within 7 days of the order permitting the amendment, they failed to do so. In the eyes of Capital Solutions the amendment is, therefore, invalid until an application is made for relief from sanctions or for permission for the Re-Re-Amended Claim and Particulars of Claim to stand as filed outside of the time limited to do so. Capital Solutions has, therefore, not yet filed any defence to this Re-Re-Amended Claim. It has filed a defence to the Amended Claim which it says still subsists.

[30] In that Amended Claim and Particulars of Claim it is unclear as to what Alliance is basing this declaration of trust on. In paragraphs 11, 12 and 13 of the Amended Particulars of Claim filed September 7, 2016 it avers that Capital

Solutions has declared a trust in favour of Mark Jones in the amount of US$1,200,000.00. That Mark Jones has assigned his rights to the beneficial interest to Alliance and that through this assignment Alliance holds the beneficial interest in the said sum and is entitled to call on it to be paid. It is to this claim that Capital Solutions has filed a defence.

[31] The permission to amend that claim was granted by Laing J on 14 December 2016. This is the subject of much angst by the 1st defendant. Laing J's order, as I said before was for the Re-Re-Amended claim to be filed within 7 days of his order. This was not done. It appears to have been filed in January 2017. Capital Solutions argues that no permission was given for it to stand as properly filed out of time and therefore the previous claim to which it has filed a defence, is the only claim before the court, as a result, it has not filed any defence to the Re-Re-Amended Claim and Particulars of Claim. Alliance has not filed any application to allow it to stand as properly filed. That is an issue that requires resolution at some later stage.

[32] Be that as it may, the Re-Re-Amended Claim avers that Mr Jones invested in Black Brothers at the suggestion of the Managing Director of Capital Solutions and through Capital Solutions, the sums of US$400,000.00 and US$230,000.00 on 15 March 2007 and 28 March 2007, respectively. That Mark Jones on advice of the attorney for Capital Solutions agreed for his loan to Black Brothers to be included in the proceedings being taken by Capital Solutions against Black Brothers. That Capital Solutions undertook a trust obligation to Mark Jones to pay to him the sums claimed on his behalf. That Mark Jones, having become an equity partner with shares in the company, also became a director in 2009. That the FSC is aware of Mark Jones' interest in the 1st defendant.

[33] It also avers that Mark Jones is a judgment debtor, having been sued and judgment entered against him on admission. It further avers that the 1st defendant has pledged US$1,200,000.00 to Mark Jones by letter dated 9 April 2015. At paragraph 21 of the Particulars of Claim it repeats that the 1st defendant has

declared a trust in favour of Mark Jones, that Mark Jones has assigned his rights and through this assignment the claimant holds the beneficial interest.

[34] There is an alternative claim for monies had and received and for a tracing remedy and for the right of the claimant to bring derivative action, Mark Jones having failed or neglected to do so.

[35] I am unable to say at this stage whether Alliance has shown that it has a good arguable case in trust. It seems to me that the trust is based on the assignment and on the affidavit of Mr Jones. The applicant claims in essence that Mr Jones has shown an intention, confirmed in his affidavit, to part with his beneficial interest in the funds held by Capital Solutions in favour of Alliance by an assignment and by so doing he has declared himself a trustee for Alliance. This raises the question however, whether if the assignment is failing must the trust also not fail? Even if it succeeds in proving that there was a declaration of trust, based on the affidavit of Mr Jones and his intention to assign his purported rights, it also has to first prove that Mr Jones was indeed entitled to the funds that he has settled in trust.

[36] I also harbour some amount of misgiving about Alliance's claim to a right to bring a derivative action. I make no findings at this stage in that regard however. Suffice it to say, that on principle, as I know it to be, a derivative action by a beneficiary can only be brought in exceptional circumstances. See **Hayim and another v Citibank N.A. and another** [1987] 1 AC 730 PC. A mere refusal by a trustee to sue does not generally entitle a beneficiary to sue in his own name. There has to be either a breach of trust or some other exceptional circumstances. I therefore, take the view that if the court is being asked to grant a Mareva Injunction over assets held by a licensed financial institution by a claimant, that claimant ought to show that it has at least a good arguable case of a legal or proprietary right enforceable in law or equity and not merely a speculative one.

[37] Alliance relies on an agreement which is unstamped and undated and which its own counsel describes as "badly drafted" and cannot be relied on as an assignment. In that document states *inter alia* that Mr Jones has "undertaken to use his best efforts to obtain a Letter of Undertaking from Capital Solutions Limited that upon fifteen (days) (sic) of the receipt of any moneys that [Mr Jones] is entitled to that sum will be paid over to the [Alliance] as payment for the liquidation of sums owed to the [Alliance] by [Mr Jones]."

[38] Alliance also relies on promissory notes dated March 15 and March 28, 2007 in the sums of US$460,000.00 and US$230,000.00, respectively, with Black Brothers as the promisor and Capital Solutions as the promisee. There is no reference to Mark Jones in these promissory notes.

[39] In support of its claim in trust, Alliance relies on the case of **Paul v Constance** [1977] 1 ALL ER 195. However, though the principles outlined in that case are without challenge and accepted, the facts are entirely different. In that case the trustee was the undisputed owner of the funds over which the court said he declared a trust by virtue of his words spoken, in favour of his girlfriend. In this case, the ownership of the funds in which it is said there was a declaration of trust, is hotly disputed.

[40] In any event, even if I am wrong on this point and there is a good arguable case on the basis of a declaration of trust, (for it is quite possible that the claimant may be able to prove at trial that Capital Solutions does hold money for Mr Jones and that Mr Jones has declared a trust of those funds in favour of Alliance), I would still not have thought that a grant a Mareva Injunction was appropriate in this case. I think such an order should sparingly be granted against a financial institution. See **Polly Peck International plc v Nadir** (No 2) [1992] 4 ALL ER 769 and **Etablissement Esefka International Anstalt v Central Bank of Nigeria** [1979] 1 Lloyds's Rep 445.

[41] A freezing order should also not be granted if it would affect the normal course of business or prevent a company from paying its debts. The potential damage to the reputation and the commercial fall out which it possibly may experience and which could also affect its clients adversely, weighs against the grant of such an order lightly.

[42] The affidavit of Vanceta Ramsay, Chief Executive Officer of Capital Solutions dated 13 September 2016 indicates that it had no notice of any assignment or pledge in favour of Alliance. That the document produced by the Alliance claiming to be a pledge was unknown to it. She also deposed that as a licensed regulated entity it was obligated to report on all client liabilities and none is owed to Mr Jones and no such liability is recorded by it in its company records. Presumably, therefore, Mr Jones has not been reported amongst the list of client liabilities to the FSC. She also points to the fact that Mr Jones made a sworn declaration to the FSC dated February 16, 2016 of his list of creditors in which Alliance is not named as a creditor.

[43] The Vanceta Ramsay affidavit of 18 October 2016 also speaks to the fall out in the company's operations caused by the grant of the earlier ex-parte freezing order against Capital Solutions which resulted in a disruption of the company's operations causing embarrassment and reputational damage. This could sound a death Knell for a financial institution.

[44] The funds obtained by Capital Solutions on behalf of its clients appears (at this stage anyway) not to belong to Capital Solutions. It appears to me to be funds held for the benefit of and is to be paid out to, identifiable clients. It is, therefore, investor clients' funds. It follows, that if, as claimed by Alliance, Capital Solutions holds those funds on trust for Mr Jones, it also holds them on trust for its other clients who are entitled to it. There can be no freezing order made on assets held on trust. See **Federal Bank of the Middle East v Hadkinson** [2000] 1 WLR 1695. In that case the English Court of Appeal had to decide whether a standard form freezing order could cover assets in the defendant's name which

beneficially belonged to third parties. The court held that it could not, as it could only freeze assets in which the defendant had some interest. It could not affect funds for which he was a bare trustee without any beneficial interest in the assets. The wording of a standard form freezing order could not cover such assets. That, in my view, makes perfect sense in principle and in law. For if a freezing order is meant to prevent the assets of a defendant being frittered away so as to frustrate a judgment against him, the assets held by a defendant which truly belonged to third parties could never have formed part of the judgment to which a claimant would be entitled.

[45] In the instant case, if the funds did not beneficially belong to Capital Solutions, but to third parties, they could not ultimately be used to satisfy any judgment against it in favour of Alliance and therefore were not appropriate assets to be covered by a freezing order in the form applied for.

[46] Furthermore, I am not satisfied that there is any evidence of dissipation of assets. To say that Alliance has a list of persons entitled to payment from the proceeds of the Black Brothers' judgment and has been making payments to them, is insufficient evidence of dissipation. That is not the purpose of a Mareva Injunction. It is not to be used to prevent a company from carrying on its legitimate purpose. Neither is it intended to be used to secure and protect identified funds until judgment.

[47] In this case the applicant has not shown one iota of evidence that there is a risk that if Capital Solutions was not restrained it would fritter away its assets in a manner that any judgment Alliance may obtain would not be satisfied.

[48] I also take account of the fact that the claimant has secured a judgment against Mr Jones in Claim 2016 CD 00225, for the full sum owed and has secured a provisional charging order over the shares owned by Mr Jones in Capital Solutions, in its attempt to enforce that judgment. I also take account of the fact

that in gaining an ex-parte freezing order, Alliance failed to disclose that it knew that the FSC had placed a restraint on the funds.

[49] Finally, the assets of Capital Solutions are already under the regulation and management of the FSC which has placed their own restrictions on the company based on "the risk of exposure of the company's assets to external claims arising from the activities of a previous director". The restriction imposed is as follows;

> *"Refrain from disposing of or otherwise transferring any of its assets without the prior written approval by the FSC, except as permitted under these Directions or required in order to comply with these Directions;"*

It is difficult to see from this how a claim that there is a risk of dissipation can be sustained.

[50] I wish to make one final point before disposing of this matter. This claim in trust is a claim for monetary compensation. A freezing order, in such a case, can only be to restrain the defendant from dissipating assets to frustrate the judgment. In this case, to my mind, the substantive claim is for identifiable assets in which the claimant is claiming a beneficial interest. The application is to freeze those assets until the question of ownership is determined. This, in my view, is therefore not a case for a Mareva Injunction but for a relief for the purpose of preserving identified assets until ownership is established. See **Polly Peck International v Nadir** [1992] 4 ALL ER 769. The applicant should therefore, have sought an interlocutory injunction where it would be required to show that it qualified under the principles in **American Cyanamid v Ethicon** [1975] 1 ALL ER 504 which are slightly different from those applicable to a freezing order.

[51] Those principles are well known and I do not consider it necessary to repeat them here. I will say however, that I did consider whether the balance of convenience favoured the grant of such an injunction under the tracing remedy sought by Alliance, but came to the conclusion that it did not. I also considered the fact that, even though they have claimed an alternative tracing remedy, the

funds in question are not the same funds lent by Alliance. Monies lent to Mr Jones by Alliance were lent several years (2011) after the investment in Black Brothers had already been made. The monies not being the same, I have grave doubts about the prospect of success of any tracing remedy.

[52] Furthermore, under the American Cyanamid principles it has not been demonstrated that damages would not be an adequate remedy. The applicants claim is plainly and clearly stated as one for a liquidated sum which if not paid in specie can be sufficiently compensated in the same sum plus interest as damages. See paragraph 16 and 17 PC in **Olint v NCB** UK PC 16. Alliance has not shown any irremediable prejudice that it may suffer if an injunction is not granted.

[53] For these reasons I did not consider that the balance of convenience was in favour of the grant and I therefore, refused the orders sought in the application brought by Alliance Finance Limited.