



[2020] JMSC Civ. 228

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN PROBATE AND ADMINISTRATION

CLAIM NO. SU2019ES02162

**IN THE MATTER OF THE ESTATE of
GEORGE DALEY (also known as
GEORGE ERNEST DALEY) also
known as CARL GEORGE ERNEST
DALEY**

BETWEEN JEFFREY DALEY

**APPLICANT/
CLAIMANT**

**AND HAMILTON CARL DALEY
(Also known as CARL HAMILTON DALEY)
Executor in the Estate of GEORGE DALEY
(Also known as GEORGE ERNEST DALEY
also known as CARL GEORGE ERNEST DALEY)**

**RESPONDENT
/DEFENDANT**

IN CHAMBERS

(By remote hearing)

Garth McBean Q.C. and Pauline M. Brown Rose for the Applicant/Claimant

M. Georgia Gibson Henlin Q.C. & Nicola Richards instructed by Henlin Gibson Henlin for
the Respondent/Defendant

HEARD: 26th October and 13th November, 2020

**Freezing Order- Good arguable case- Real risk of party dissipating assets- Where
there is hardship on the defendant his legitimate interests must prevail over that of**

the claimant– Court’s objective is to obtain just results- Serious issue to be tried- Adequacy of damages- Balance of convenience- Accounting by Executor- Court must not act in vain

WOLFE – REECE, J.

INTRODUCTION AND BACKGROUND

[1] The claim herein relates to the administration of the Estate of George Ernest Daley also known as Carl George Ernest Daley (hereinafter referred to as the deceased). Substantively, the Claimant is seeking, among other things, to have the Grant of Probate issued to the Defendant on 26th February, 2019 revoked and the Defendant removed as Executor (he is the principal executor with power reserved to Sharon Daley, another sibling). This application is as a result of the Claimant’s view that an injunction, specifically a Freezing Order is required to prevent the removal and/ or dissipation of monies received for the Estate by the Defendant. He is therefore asking the Court grant a freezing order over certain funds and to preserve the status quo until the substantive issues herein are determined.

THE CLAIM

[2] On the 4th November, 2019, the Claimant filed a fixed date claim form, an affidavit in support and an affidavit of urgency. He also filed a notice of application and a notice of intention to rely on computer generated statements on said date. In his claim, he sought the following orders, that:

- 1) *The Grant of Probate issued by the Supreme Court of Judicature on the 26th day of February, 2019 to the Defendant to act as Executor in the Estate of the deceased in suit no. 2018 P 01708 be revoked forthwith;*
- 2) *The Defendant be removed as Executor in the Estate of the deceased whether acting as the Principal Executor or with power reserved to him;*
- 3) *Sharon Daley, Executor with Power Reserved, be appointed the sole Executor in the said Estate with power reserved to the Administrator General of Jamaica to apply for a Grant of Letters of Administration with Will Annexed;*
- 4) *Further and/ or in the alternative should Sharon Daley be unwilling or unable to act as the sole Executor with power reserved to the Administrator General for Jamaica, the Administrator General of Jamaica*

be appointed to apply for Letters of Administration with Will Annexed in the said Estate;

- 5) *Further and/ or in the alternative that should the Administrator General for Jamaica be unwilling or unable to act as sole Administrator for the said Estate, that the Registrar of the Supreme Court be empowered to appoint a reputable Firm of Attorneys-at-Law to so act and to be remunerated by the Estate for their professional services as both Administrator and Attorneys-at-Law for work done in their respective capacities;*
- 6) *The Defendant within thirty (30) days of the Order revoking the Grant of Probate made to him deliver up all documents inclusive of any Duplicate Certificates of Title held by him for the said Estate to the Executor or Administrator newly appointed by the Court herein, together with a Statement of Account of Income and Expenditure of the Estate to date from the date of death of the deceased and that a list of the documents delivered by the Defendant and a copy of the Statement of Account of Income and Expenditure be filed herein and served on the Claimant's Attorney-at-Law;*
- 7) *The Defendant within thirty (30) days of the Order revoking the Grant of Probate made to him, pay over all monies received and/ or being held by him for and on behalf of the said Estate to the newly appointed Executor and Administrator of the Estate;*
- 8) *The Defendant do quit and deliver up possession of the property known as 36A South Street, Old Harbour, St. Catherine to the newly appointed Executor or Administrator of the said Estate, or alternatively pay rental to be determined by the Executor or Administrator of the Estate for the duration of his occupation of the said property until it is sold;*
- 9) *The costs of the claim be borne by the Defendant in his personal capacity; and*
- 10) *Liberty to apply.*

THE APPLICATION

[3] On the 13th February, 2020, the Applicant filed a further amended notice of application which is now before the Court for determination. The Orders being sought are as follows:

1. *A Freezing Order prohibiting the disbursement of Thirteen Million Dollars (\$13M) or any sum whatsoever now being held by the National Commercial Bank Jamaica Limited/ National Commercial Bank Insurance Company (hereinafter referred to as NCB) in the name of Monica Daley for the Estate of GEORGE DALEY (also known as GEORGE ERNEST DALEY) until the determination of this claim.*
2. *An injunction prohibiting the Defendant from selling, transferring, charging or disposing of any of the real property situate at and known as 36A South*

Street, Old Harbour in the parish of St. Catherine and 38 South Street, Old Harbour in the parish of St. Catherine and personalty of the Estate of GEORGE DALEY (also known as GEORGE ERNEST DALEY) until the determination of this claim;

3. *That the Defendant do render an Interim Statement of Account to be filed in this claim and served on the Claimant's Attorney within twenty-one (21) days of the date of an Order being made herein detailing all monies received by him on behalf of the Estate of George Ernest Daley and all disbursements made and deposits held at any financial institution since the date of death of the deceased up to the date of an Order being made herein;*
4. *An Order for specific disclosure against the Defendant that he provides documentary proof within twenty-one (21) days of an Order being made herein of the Accounts and/ or investment(s) and/ or financial instruments bearing the Applicant's name, whether solely or jointly with Monica Daley now existing in the sum of Thirty-Nine Million, Five Hundred Thousand Dollars (\$39.5M) or any sum whatsoever as asserted by the Respondent in an email dated 25th October, 2019 to the Claimant;*
5. *The Claimant gives the usual undertaking as to damages in respect of the injunctive relief sought herein; and*
6. *Costs to be costs in the claim.*

[4] The Application is made on the following grounds, that:

- (1) The Respondent/ Defendant does not reside in Jamaica;
- (2) There is a real risk that any sums received for the Estate will be sent overseas including any and/ or the portion due to the Claimant/ Applicant under bequests made in the Last Will and Testament of ERNEST GEORGE DALEY dated 2nd March 2004;
- (3) The Defendant is conflicted between his personal interests and his duties and obligations as Executor and has already demonstrated that he will not administer the Estate impartially or equitably;
- (4) The Defendant has stated categorically that the Claimant/ Applicant has already been paid more than his entitlement under the Will and is holding money due to the Estate of Ernest George Daley thereby imputing that the Defendant, as Executor, does not intend to honour the bequests made to the Claimant Applicant in the said Will of the George Ernest Daley dated 2nd march

2004. In the special circumstances of this case the Applicant seeks an order for specific disclosure against the Defendant/ Respondent for proof of sums he states that the Applicant has already received or;

- (5) That on or around the 22nd October, 2019 the Defendant and Monica Daley attended on the NCB, Old Harbour in the parish of St. Catherine where Monica Daley as the surviving Account holder of an investment at National Commercial Bank Insurance Company gave written authority for the whole amount on the investment to be released to the Defendant in his capacity as Executor of the Estate of George Ernest Daley;
- (6) The Defendant has been collecting rental from the said property and operating an office from there for several years without accounting to the Estate; and
- (7) The Defendant/ Respondent does not operate a legal practice from the address for service given on the Grant of Probate and documents filed in support of same and therefore has not stated a true address for service of legal process within the jurisdiction.

[5] There were six (6) affidavits filed by the Applicant herein and one (1) by the Respondent. For ease of reference, the affidavits filed by the Applicant have been numbered and will be referred to accordingly:

- 1) Affidavit of Jeffrey Daley filed 4th November, 2019 - Affidavit No. 1;
- 2) Affidavit of Urgency filed 4th November 2019 - Affidavit No. 2;
- 3) Supplemental Affidavit of Jeffrey Daley filed 4th December, 2019 - Affidavit No. 3;
- 4) Affidavit of Jeffrey Daley in Response to Affidavit of Hamilton Carl Daley filed April 15, 2020 - Affidavit No. 4;
- 5) Further Supplemental Affidavit of Jeffrey Daley filed 15th July, 2020 - Affidavit No. 5; and

6) 2nd Further Supplemental Affidavit of Jeffery Daley in Response to Affidavit of Hamilton Carl Daley filed 15th October 2020 - Affidavit No. 6

[6] Having heard the submissions by Learned Queens Counsel for the Applicant and the Respondent I reserved judgment which I now deliver. Even though I have not made specific reference to the individual submissions, I have considered them in full to come to the determination of this Application.

ISSUE 1: *Whether a Freezing Order should be granted prohibiting the disbursement of Thirteen Million Dollars (\$13M) or any sum held by NCB in the name of Monica Daley for the Estate until the substantive claim herein is determined?*

Summary of The Evidence:

[7] The Applicant referred to this sum of money as the monetary fruits of an Omni Investment Plan by the deceased, whilst the Respondent viewed it as the surrender value of a life insurance policy. In any event, the life insured by the plan was Monica Daley, with the owner being the deceased. A copy of the policy revealed that the accumulated value as at 5th September, 2017 was Twelve Million, Seven Hundred and One Thousand, Five Hundred and Eleven Dollars and Sixty-Two Cents (\$12,701,511.62). The Respondent gives its surrender value as being Thirteen Million, Five Hundred and Seventeen Thousand, Eight Hundred and Forty-Four Dollars and One Cent (\$13,517,844.01). This sum he received in 2019.

[8] The Applicant averred that following the visit of the Respondent and Monica Daley to National Commercial Bank (NCB), he received an email from the Respondent asserting that he would not be getting any money collected since he (the Respondent) discovered at the bank that the Applicant was holding Thirty-Nine Million, Five Hundred Thousand Dollars (\$39.5M) in a joint account with Monica Daley. Thus, in the Respondent's view, the Applicant had already received a significant amount of money from the Estate (**See Affidavit No. 1**). He further stated that on 25th October 2019, the Respondent was given full custody of Thirteen Million Dollars (\$13M) more or less at NCB.

- [9] The Applicant stated that the Respondent lives in England and is here in Jamaica for very brief periods; if he is unrestrained, there is a real likelihood that the Respondent will convert the funds received for the Estate and send them to the United Kingdom where he resides. He says that it is clear to him from the Respondents' dealings with the assets of the Estate so far that he cannot impartially administer the assets of the Estate and is most likely to dissipate the money received for the Estate from NCB if he is unrestrained from doing so. In his view the Freezing Order is needed to achieve this. **(See Affidavit No. 3)**
- [10] He added further that the Policy Anniversary Statement shows that the accumulated value as at December 2016 was over Twelve Million, Three Hundred Thousand Dollars (\$12.3M), yet the Respondent has chosen to understate the balance as over Five Million Dollars (\$5M). This he says is another attempt by the Respondent to hide the value of assets in the Estate to suit his own end. He says the Respondent states that the sum has '*been assigned to the costs and expenses of the Probate and Administration*' of the Estate yet has given no explanation as to what the Thirteen Million Dollars (\$13M) was required to cover. In addition, there is the significant rental income which the Estate has already earned and which remains unaccounted for. **(See Affidavit No. 4)**
- [11] The Respondent position is that the sum relating to the life insurance policy's surrender value has been assigned to the cost and expense of the probate and administration. He averred that it is in a bank account at NCB that is used for that purpose; the present balance in that account is over Five Million Dollars (\$5M) and he understands that a full accounting is ultimately necessary and required to close the Administration process. He explained that in relation to the four (4) assets, he was in the process of gathering the assets and had in fact retained Henlin Gibson Henlin attorneys at law to cause the Applicant and Monica Daley to account for the assets of the Estate that are or have been in their possession and/ or control.
- [12] He added that even though Probate was granted on 26th February 2019, the Estate duty was not paid until August 2019 and it is only at that point he was in a position

to formally move to the stage of Administration; none of the assets of the Estate have been realised as yet he explained. He further added that illogically or by misunderstanding of the facts, the Applicant has demanded an immediate payment from the Estate but the duty on the Executor is to administer and account at the end of the process.

- [13]** He said the Applicant wrote to him by email stating that he (the Respondent) was in receipt of Thirteen Million Dollars (\$13M) from the bank to share and demanded that he be paid Two Million, Six Hundred Thousand Dollars (\$2.6M) by the 31st October, 2019. He said that he found this to be an outrageous statement from the Applicant. He was of the view that the Applicant had appeared to have confused the money from the sale of the Ascot property, which could be equally shared in accordance to the Will, with the surrender value of the life insurance policy, which is not a specific gift under the will but assigned to pay the probate and administration expenses.
- [14]** Furthermore, the documents he signed did not instantly release the insurance money to him. He said the process took two (2) weeks and thus, even if it had been appropriate (which it was not), it would have been impossible for him to meet the Applicant's deadline for payment. In any event, the surrender value of a life policy went into the general estate to be accounted for in the winding up process. The insurance proceeds could not be shared according to the Will and has been available to cover amongst other things, costs for the Grant of Probate. Additionally, he expressed that the funds he expected to receive was the Ascot money that is in the sole control of Monica Daley and it was his intention to distribute the said funds in accordance with the deceased' will but these funds were not released; instead he received the surrender value of the life insurance policy.

LAW & ANALYSIS

[15] It is not in dispute that this Court has the power to grant interim remedies such as freezing order/mareva injunction. The Civil Procedure Rules Rule 17.1(1)(f) provides the;

The Court may grant interim remedies including-

(a)-(e)...

(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;

[16] **In Agro Expo Farms Ltd v Rockwill Concrete Services Ltd**, [2010] JMCA App 21, the Court of Appeal (COA) reviewed the law relating to the Mareva Injunction known as the Freezing Order. Harrison JA posited that,

“[9] The mareva injunction (now known as a freezing order), is an extraordinary remedy and in the exercise of granting such an order, a court should be mindful of the burden it would cast upon a defendant at a stage when there was no final adjudication of the plaintiffs' rights. So far as concerns defendants who are within the jurisdiction of the court and have assets here, it is well-established that the court should not, in advance of any order or judgment, allow the creditor to seize any of the money or goods of the debtor or to use any legal process to do so.

[10] In *Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft mbH & Co. K.G. The Niedersachsen* [1984] 1 All E.R. 398, Mustill, J., after examining and considering statements in a number of cases cited in arguments, at pages 402-3 said:

"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: **(i) 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. (emphasis mine) It seems to me plain that the second proposition is justified by common sense and by the authorities."

[11] It is also not enough for the claimant to assert a risk that the defendant's assets will be dissipated. He must demonstrate this by solid evidence - see *Jamaica Citizens Bank Limited v Yap* (1994) 31 JLR 42. **In discussing the requirements for the grant of a freezing order the court held in that case that the following must be established:**

"... first, that the plaintiff has a good arguable case, the standard of which is evidence which is more than barely capable of serious argument...and second, by "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." (emphasis mine)

[12] In *Barclay-Johnson v. Yuill* [1980] 3 All E.R. 190, a *mareva* injunction was granted and the court held *inter alia*, that the grant of such an injunction was not barred merely because the defendant was not a foreigner or a foreign-based person, although the defendant's nationality, domicile and place of residence could be material to a greater or lesser degree in determining whether there was a real risk that the assets would be removed from the jurisdiction. The essence of the jurisdiction was the existence of a real risk that the defendant would remove his assets from the jurisdiction and thereby stultify the judgment sought by the plaintiff.

....

[14] In *Yap's case* (*supra*) Rattray P. stated at page 50:

"If the grant of the Injunction inflicts hardship on the defendant, his legitimate interests must prevail over the interest of the plaintiff. However, these 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."

[15] Regarding the merits of the substantive claim, the minimum threshold for the exercise of the discretion is the establishment of a 'good arguable case'. According to Kerr LJ in the *Ninemia* case, the expression means "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 per cent

chance of success". This test will not be satisfied if the claimant does not have the evidence to substantiate the case relied upon, or if the case is likely to be struck out and may not be satisfied if there is an arguable defence."

- [17] It becomes clear from the law that unless the Applicant has a good arguable case that is, (evidence that is more than capable of serious argument and yet not necessarily one which the judge believes to have a better than 50 percent chance of success), and can by solid evidence show on a balance of probabilities that there is a real risk that the assets will be dissipated, (either by removal or in some other way by the Respondent) and that consequently a judgment or award in his favour would remain unsatisfied, the Order should not be made. I am also mindful that I must consider whether such an Order would inflict hardship on the Respondent because if it does, then his legitimate interests as the Executor of the Estate must prevail over the interest of the Applicant.
- [18] On a careful consideration of the evidence, I am of the view that the Applicant's substantive claim does meet the threshold of a good arguable case. The question is then whether there is a real risk of the assets of the Estate being dissipated by the Respondent. I do not believe so. The Respondent resides overseas but whilst this is a factor for consideration, it is only one of the factors and the circumstances must be examined on a whole in making a determination.
- [19] The Applicant is concerned that the Respondent still intends to remit payments for the monies he is holding in spite of the claim and application herein. He exhibits the email to Affidavit No. 6 in proof of this sent by the Respondent to their sister Sharon Daley, the other Executor in the Will. I have noted the content of same but the essence of the Freezing Order remains whether there is a real risk of the monies being dissipated by the Respondent; mere intention is insufficient and in any event, his intention by the email is to give the money to his siblings- the beneficiaries, not dissipation.
- [20] I have also noted in reviewing the evidence that the Applicant and the Respondent are at cross purposes as it relates to which money is to be shared amongst the

siblings. The Respondent has said that the money from NCB is not gifted under the Will (and this is so) and he has used it for probate and administration purposes. There is no evidence or indication from him that the money he intends to distribute is this money. On his evidence he was surprised to have received it; he was expecting the Ascot money which is why he travelled to Jamaica. The Applicant has not proved otherwise in this regard.

- [21]** The remaining sum of the NCB money is at the branch in Old Harbour. I have inferred from the email that the money the Respondent is intending to distribute is the Ascot money which he says is in the possession of Monica Daley. Further, he did indicate that the money he offered to his siblings as payment for their interest in 36A South Street would come from the Ascot money and in any event, the totality of this sum would exceed what remains in the probate and administration account at NCB, Old Harbour.
- [22]** The Respondent's email to the Applicant that he would not receive anything out of this sum of money is insufficient by itself to suggest that the Respondent will dissipate the assets. Further, he has offered no evidence of any instance in which the Respondent has dissipated any of the assets of the Estate. The Respondent has said that the assets of the Estate have not yet been realized. It does seem to me that the Applicant may employ other means to satisfy himself that the Respondent is in fact acting properly in his post as Executor.
- [23]** Finally, were I to grant a Freezing Order, the Court has to consider how it would impact the Respondent's role as the Executor and him fulfilling his legitimate duties accordingly. I am mindful that there are several beneficiaries under the Will, which has been probated for nearly two (2) years and the Executor resides overseas. There is no doubt that such an order would impact his ability to carry out his functions and lead to inevitable hardship in administering the Estate in some aspects. On a review of the totality of the evidence herein, the application for the Freezing Order is denied.

ISSUE 2: *Whether an injunction should be granted prohibiting the Respondent from selling, transferring, charging or disposing of any of the real properties situate at and known as 36A South Street and 38 South Street and personalty of the Estate until the determination of this claim?*

Summary of The Evidence:

[24] In regards to 36A South Street, the Respondent offered the sum of One Million, Five Hundred Thousand dollars (\$1.5M) to each sibling in respect of their interest in the property. The applicant averred that this would mean that this asset which would have a market value in the region of Thirty- Five to Forty Million Dollars (\$35M-\$40M) would be purchased by the Respondent from the Estate for Six Million dollars (\$6M). (See exhibit JD-13B, letter dated 6th September, 2019). The said letter he says, makes it clear that the Respondent's focus was on securing the said property for himself although it is devised to all five siblings. **(See affidavit 1)**

[25] Further, the Applicant stated that the Respondent is collecting One Hundred and Ten Thousand Dollars (\$110,000.00) p/m for rental but in the letter he mentions the rent as being Twenty-Five Thousand Dollars (\$25,000.00) p/m. The respondent is still yet to account for the full amount of rental collected since he took over possession of the property from Monica Daley over four (4) years ago. He added that the Respondent claims that he has maintained the property but the lease imposes a 'full repairing obligation' on the tenant. (See affidavit no. 4)

[26] The Applicant averred that access to the house on this property has always been through the adjoining property (36 South Street) owned solely by Monica Daley and access can be had through the main driveway which goes to the rear of the house at 36A South Street. Monica still shares occupation with the Respondent and has not impeded or restricted access through 36 South Street since she has to use the same driveway to access the rear of 36A South Street for her Table and Chair Rental business operated from the Storeroom. The Respondent is already

operating an office from the property and wanted access to the side rather than the rear of the house for his own convenience.

- [27]** The Respondent averred that there is one commercial tenant in occupation and operating a Beauty Spa Business. He says that he gave the tenant a formal holding lease at a reduced rent of twenty-five thousand dollars (\$25,000.00) p/m and that was paid for 2016- March, 2019. The rent was revised from 1st April 2019 to One Hundred and Ten Thousand Dollars (\$110,000.00) p/m. The tenant has a full repairing obligation to the extent of her demise and may offset costs and taxes from the rent. The rent is deposited to a dedicated bank account used solely for the probate account. The lease is exhibited as HCD 3.
- [28]** He opined that the matter of this property as a gift in the will has been misread by the Applicant as it is a conditional life interest to Monica Daley; subsequently, it is to be sold and the proceeds shared. He explained that he wrote his siblings in a non-compelling manner making an offer as an attempt to balance many sensibilities without the necessary upheaval, hostilities and threat of litigation which forcing a sale of the property would include. He has however abandoned that idea and intends to sell same subject only to the condition of any life interest proved extant.
- [29]** He has also never had any personal use, created any private space or occupied any part of the said property as an office and/ or workspace. There was no parking available at the property without having to go into and across the adjacent 36 South Street which is owned solely by Monica Daley; cars were left parked out along the road. He said that there was a real risk of the tenant leaving and his resolution was to construct an independent driveway serving only 36A South Street. This provided ample car parking spaces for the tenant's now thriving business. This cost One Million (\$1M).
- [30]** As it pertains to the 38 South Street, the Applicant states that Monica Daley informed him that she paid Eight Hundred Thousand Dollars (\$800,000.00) for

property taxes and duties recently at the request of the Respondent. The Respondent failed to disclose this and has not reported on income being earned by the commercial building now being occupied by the Old Harbour Fire Brigade. The Respondent replied that this commercial property has been exclusively under the control of Monica Daley. She collects all rents and does not account to the Estate. She informed him that the Fire Brigade moved out and that she had expressions of interest from prospective buyers; he said that he informed her that the property would have to be valued.

LAW & ANALYSIS

[31] In **Howard Jacas (Executor estate Sylbert Juan Jacas, deceased) v Bryan Jacas and Anor** [2014] JMSC Civ. 190, Simmons J, as she then was, opined that

“[29] The principles which guide the court when considering whether or not to grant injunctive relief are to be found in the case of **American Cyanamid v. Ethicon** (supra). In that case, Lord Diplock stated that before granting an injunction the Court must be satisfied that the claim is not frivolous or vexatious and that there is a serious issue to be tried.

[30] Where the court finds that there is in fact a serious issue to be tried, it must then be determined whether damages would be an adequate remedy. In the event that damages would not be an adequate remedy, it must be determined whether the defendant would be adequately compensated under the claimant’s undertaking as to damages.

[31] Where there is doubt as to the adequacy of damages and whether the claimant’s undertaking would provide enough protection for the defendant the court must then decide where the balance of convenience lies. These principles were approved and applied in **National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd.** [2009] 1 W.L.R. 1405.

[32] In this matter, the claimant has alleged that the defendants are intermeddling in the estate and is seeking to restrain the defendants from collecting the rent from the tenants at the property. It should however be noted, at this stage of the proceedings where the evidence is incomplete, the court is concerned with trying to ensure that a just result is achieved. According to Lord Hoffman in **National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd.** (supra), the purpose of an injunction is “to improve the chances of the court being able to do justice after a

determination of the merits at trial” and the court is required to “...assess whether the granting or withholding an injunction is more likely to produce a just result”.

[32] I have carefully considered the evidence filed herein and the authorities filed by the Applicant. I note too that the disputed facts will be determined at the hearing of the substantive issues. The significant question now is whether an injunction should be granted pending the hearing of the matter on the merits. I am mindful that at this point the objective is to increase the chances of the court doing justice after a determination of the merits at trial. So I have to assess whether granting or withholding an injunction is more likely to produce a just result.

Is there a serious issue to be tried?

This Court is not seeking to conduct a mini trial or resolve any issues between the parties but I note the following:

- (1) The Applicant is seeking to have the Respondent removed as Executor because in his view the Executor is conflicted and unable to treat with the assets of the Estate in an impartial and objective manner. Whilst there is evidence suggesting some level of animosity amongst the Executor and beneficiaries; it is undisputed that the Respondent is one of the Executors appointed under the Will and he is in possession of a valid Grant of Probate;
- (2) Revocation of the Grant and delivering up monies and documents are all contingent on the Respondent being removed as Executor;
- (3) Given the Order sought in the application for an account to be rendered by the Respondent, the Applicant does not have to await a trial to be informed of the income and expenditure of the Estate;
- (4) At present there is no evidence of any inappropriate actions by the Respondent as the Executor; and

(5) Sharon Daley, the other Executor has not filed any evidence herein indicating her willingness or the lack thereof.

[33] In the circumstances as they are, I am not of the view that there is a serious issue to be tried. In the event that I am wrong however, I will go on to consider the adequacy of damages.

Adequacy of damages?

[34] The Applicant has said that he is financially independent and able to satisfy any undertaking as to damages were an injunction to be awarded (**See affidavit no.5**). However, I am of the view that an award of damages to the Applicant would adequately compensate for any loss incurred by him if this Court withheld the grant of an injunction. It does seem that the ultimate objective of the Applicant is to secure a monetary benefit from the Estate. Thus, if the substantive issue is resolved in his favour, an award of damages to the Applicant would be a just result.

Balance of convenience

[35] In weighing the risk of doing injustice to one side or the other, I consider that the Respondent as an Executor has lawfully obtained a Grant of Probate. I bear in mind his duties and responsibilities as an Executor to administer the Estate in accordance with the terms of the Will, specifically, that the Will provides for the properties in question to be sold and the proceeds shared equally. I consider too that the other Executor is not a party to the claim and that prima facie, there is no evidence of inappropriate conduct by the Executor. I am also very mindful of the acrimonious relationship between the Applicant and the Respondent and their interests as beneficiaries.

[36] Given the evidence proffered herein, specifically that the parties herein seem to be at cross purposes and there is obvious misunderstanding as to the possession of certain assets, I believe that the injustice to the Executor is more evident if an injunction is granted prohibiting him from carrying out the terms of the Will. In the

circumstances, I have concluded that the balance lies in favour of not granting the injunction.

ISSUES 3- *Whether an Order should be made requiring the Respondent to render an Interim Statement of Account to be filed in this claim and served on the Applicant's Attorney within twenty-one (21) days of the date of the Order being made herein detailing all monies received by him on behalf of the Estate and all disbursements made and deposits held at any financial institution since the date of death of the deceased up to the date of the Order being made?*

Summary of Evidence:

[37] The evidence herein has revealed that there is significant disagreement and misinformation regarding income and expenditure relating to the Estate. I do take note of the letter dated 6th September, 2019 from the Respondent to Sharon Daley about the rent being Twenty-Five Thousand Dollars (\$25,000.00) when he would have known that the rent had been significantly increased several months before. I have also noted the sum of money he said he expended to fix the drive way. Further, the Respondent has referred in his evidence to two accounts which he says are used for probate: the one that he says the rent goes to and the other being the NCB money at the Old Harbour branch, which he says is now just over \$5M.

[38] On the evidence, Monica Daley paid Eight Hundred Thousand Dollars (\$800,000.00) for estate duty last year August on the direction of the Respondent. However, the source of this money was not indicated. The Grant of Probate was issued last year February and the Respondent did say that estate duty had to be paid before he could move forward with administering the Estate. With the circumstances being as they are, the uncertainty and distrust between the Executor and the beneficiaries I am of the view that an Order should be made for an Accounting to be done by the Respondent.

ISSUE 4- *And Whether an Order for specific disclosure should be made against the Respondent requiring him to provide documentary proof within twenty-one (21) days of the Order being made herein of the Accounts and/ or investment(s) and/ or financial instruments bearing the Applicant's name, whether solely or jointly with Monica Daley now existing in the sum of Thirty-Nine Million, Five Hundred Thousand Dollars (\$39.5M)?*

Summary of Evidence:

[39] The Applicant in his affidavit filed on November 04, 2019, averred that the deceased constructed and operated for several years a Banquet Hall known as Ascot Hall and in or around August 2011 the said property was sold for Seventy Million Dollars (\$70M). He acted as the Attorney having Carriage of Sale for the deceased and he paid over the net proceeds of sale to the deceased. He has exhibited a cheque with the sum of Sixty-Three Million, Six Hundred and Seventy-Nine Thousand, Eight Hundred and Sixty-Three Dollars and Ninety-One Cents (\$63,679,863.91)- **(See affidavit 1)**.

[40] He said that he has never held any joint account with Monica Daley or with any other person or in his sole name where he has received any funds from the proceeds of sale from the Ascot Hall property or any other money for the deceased. He said the cheque was received by Monica Daley at the time because the deceased was then wheelchair bound and could not access the stairs to his office; however, the cheque was made payable to the deceased.

[41] The Respondent averred that Monica Daley, joint account holder of the fixed deposit account which kept the Ascot money is unwilling to account for it. He states that he is in the process of gathering the assets and had in fact retained a firm to cause the Applicant and Monica to account for the assets of the estate that are or have been in their possession and/ or control. He expressed that Monica Daley improperly withdrew the Ascot money from the joint account and failed to account to him as the Executor. He is of the view that Monica Daley is holding the Ascot Money which belongs to the estate.

- [42]** It is the Respondents contention that in August 2019, following the payment of the estate duty, Monica Daley repeated an indication she had given to him and the Applicant that she would release the Ascot money once probate had been granted. In a conversation with him on the telephone whilst he was overseas, she told him to come from England to receive money to share and he immediately wrote to all his siblings to advise them of this development. This is the money he came to Jamaica to receive and share equally but Monica Daley had other plans to share the much lesser sum from insurance policy as if it was the Ascot money.
- [43]** The Respondent said that he and Monica Daley visited the bank and when it was their turn to be dealt with by the customer service representative, she 'flipped character'. He further expressed that from her specific utterances he gathered that the Ascot Money was solely hers, that she had given a share to the Applicant's son and moved the money out of the fixed deposit account into a joint account. He stated that Monica Daley advised him that the new joint account with the Ascot money was with the Applicant. The Ascot Money has not been released to him, they are in the sole control of Monica Daley; what was released to him was the surrender value of the life insurance policy.
- [44]** In reviewing the evidence given in regards to this issue, it has become apparent that the sum of Thirty-Nine Million, Five Hundred Thousand Dollars (\$39.5M) referred to by the Applicant in his evidence and the Respondent in his email to the Applicant, is in reference to the remaining balance of the Ascot money. I have had sight of the letter dated 29th November, 2019, from NCB wherein it indicates that it has not located any joint account(s) that exist or have existed in the names Jeffery Daley (Applicant) and George Ernest Daley (deceased) and/ or Jeffrey Daley (Applicant) and Monica Daley. I have also reviewed the email dated 20th January 2020, (exhibited as JD-2 to the Applicant's further supplemental affidavit) wherein the Respondent informs Sharon Daley that Monica Daley expressed that the deceased intended for her to keep all the Ascot money.

[45] The Respondent has essentially averred that it was Monica Daley who implicated the Applicant as a joint account holder. Monica Daley is not a party to this claim nor has she placed any evidence before this Court. Also given the letter from NCB to the Applicant under the hand of legal Counsel Mrs. Whyms-Stone it is patently clear an Order for specific disclosure against the Respondent would be redundant see the Court acting in vain.

DISPOSITION

[46] In accordance with the findings made above, the Court makes the following Orders:

- 1) A Freezing Order prohibiting the disbursement of Thirteen Million Dollars (\$13M) or any sum whatsoever now being held by the National Commercial Bank Jamaica Limited/ National Commercial Bank Insurance Company in the name of Monica Daley for the Estate until the determination of this claim is denied;
- 2) An injunction prohibiting the Respondent from selling, transferring, charging or disposing of any of the real property situate at and known as 36A South Street, Old Harbour in the parish of St. Catherine and 38 South Street, Old Harbour in the parish of St. Catherine and personalty of the Estate until the determination of this claim is denied;
- 3) The Respondent is to render an Interim Statement of Account to be filed in this claim and served on the Applicant's Attorney and all other beneficiaries under the Estate of George Ernest Daley also known as Carl George Ernest Daley within thirty (30) days of the date of this Order being made detailing all monies received by him on behalf of the Estate and all disbursements and payments made and deposits held at any financial institution since the date of death of the deceased up to the date of this Order;

- 4) An Order for specific disclosure against the Respondent that he provides documentary proof within twenty-one (21) days of an Order being made herein of the Accounts and/ or investment(s) and/ or financial instruments bearing the Applicant's name, whether solely or jointly with Monica Daley now existing in the sum of Thirty-Nine Million, Five Hundred Thousand Dollars (\$39.5M) or any sum whatsoever as asserted by the Respondent in an email dated 25th October, 2019 to the Applicant is denied; and
- 5) Costs of this application to be costs in the claim.