IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 6797

BETWEEN	FIRST GLOBAL BANK LIMITED	CLAIMANT
AND	ROHAN ROSE	1st DEFENDANT
AND	ANTHONY LEWIS	2nd DEFENDANT
AND	THEODORE LEVY	3rd DEFENDANT
AND	MOBIL IMPORT EXPORT COMPANY LIMITED	4th DEFENDANT

Appearances: B. St. M. Hylton Q.C., Ms. Carlene Larmond and Mr. Kevin Powell instructed by Michael Hylton and Associates for the Claimant; Mr. Walter Scott and Ms. Anna Gracie instructed by Rattray Patterson Rattray for the First Defendant.

Heard January 27, February 1, and April 8, 2010

Freezing Order – Inter partes hearing – Application to set aside Freezing Order for Non- Disclosure – Material non-disclosure - Application to set aside search order – extent of the privilege against self-incrimination – whether U.K. precedents can assist Jamaican Courts.

ANDERSON J.

1. Three days after Christmas Day last, on December 28, 2009, in this Court, Her Ladyship Marjorie Cole-Smith J. granted an ex parte application for a freezing order under Part 17 of the Civil Procedure Rules 2002, against the first defendant herein. At the same hearing, her ladyship also granted an order for search to be made of the first defendant's premises and for

documents to be searched and copies of his computers cloned by the Search Party. The order named Kathryn Denbow, Attorney-at-law as the "Supervising Attorney: for the purposes of the search". On the 8th January 2010, the first defendant filed an application to set aside the Freezing Order and the Search Order and on the 11th January 2010 the Inter Partes hearing came before the court. On that day the hearing was re-scheduled for January 27, 2010 and the Freezing Order extended to the adjourned date.

2. The Freezing Order had been granted pursuant to the filing of a claim in the Supreme Court by First Global Bank Limited (the "Claimant") against Rohan Rose the first defendant ("Rose"), Anthony Lewis the second Defendant ("Lewis"), Theodore Levy, the third defendant ("Levy") and Mobil Import Export Company Limited, the fourth defendant ("Mobil"). The claim is primarily against Rose for breach of contract and breach of fiduciary duty, negligence, fraud and unjust enrichment, and claims inter alia, the sum of US$7,643,131.43. The Freezing Order prohibits Rose from dealing with his assets below the value of the sum of US$ 7,643,131.43. The claims against the other three defendants are for varying sums and are based upon a claim for money had and received and for unjust enrichment purportedly arising out of the actions of Rose.

3. The specific claims against the respective defendants arise out of certain transactions which, according to the allegations of the Claimant, were carried out by Rose while serving as a senior officer of the bank. While it is not the role of this court to determine the truth of those allegations, for completeness I shall very briefly summarize the allegations, bearing in mind always that Rose has denied them in his affidavits.

4. The first set of transactions relate to the role played by Rose as a trader in United States of America treasury securities, on behalf of the bank and

are referred to by the Claimant as the "US Treasury Bond Transactions". According to the Claimant, Rose had specifically limited authority to trade in this area on the bank's behalf. There were set limits on the bank's level of exposure as well as pre-set limits on potential losses arising from trades in those securities. However, according to the Claimant, Rose exceeded his authority thereby causing the Claimant losses in excess of Three Million United States Dollars (US$3,000,000.00). Subsequently, in order to cover up these losses, he undertook further transactions which gave rise to even further losses of over Four Million United States Dollars (US$4,000,000.00)

5. The second set of transactions is referred to as the "Stocks and Securities Transactions". These involved profits of over One Hundred and Thirty Seven Thousand United States dollars (US$137,000.00) made by Rose as a trader in securities between April and May 2008. The Claimant alleges that instead of crediting the bank with these profits, Rose caused them to be incorrectly documented and transferred from the bank. Documents were prepared describing the various amounts as the proceeds of transactions by which the Bank purchased US currency from Standard Bank, but there were in fact, no such transactions. Rose then caused the Bank to draw four separate cheques, all payable to Stocks & Securities Limited for the Jamaican dollar equivalent of the US$ trading profits. The four cheques were then negotiated by Lewis, within a day of their being drawn. Lewis was not entitled to these funds.

6. The third set of transactions is described as the Levy/Mobil transactions. These transactions took place between April 2007 and March 2008 and involved trading profits being used by Rose to replace sums taken from the bank and credited to Levy and Mobil or, in one case, used as part payment for property acquired by Mobil.

7. The matters before me at this time are an application by the Claimant for the extension of the Freezing Order until trial and the further consideration of the Search Order as well as applications by Rose, by way of a Notice of Application for Court Orders, to set aside both orders. To provide for a coherent consideration of the issues which have to be determined, it may be convenient at this stage to set out the grounds upon which Rose relies in his challenges to the freezing and the search orders. These are set out in the Notice of Application.

8. The grounds on which the Applicant is seeking the orders are as follows:

1) The Claimant having made a complaint to the Jamaica Constabulary Force (JCF) in the person of Senior Superintendent Fitz Bailey of the Organised Crime Division; and the JCF having launched an investigation into the complaint, and having had a first interview with the Defendant in the presence of his then Attorney-at-Law Mr. Christopher Townsend, and where it is likely that criminal charges will be laid against the Defendant, this Honourable Court cannot make a Search Order against the Defendant compelling him to disclose documents and information since that would infringe his privilege against self incrimination.

2) The Claimant failed and/or neglected to ascertain and if they had, to state that the Supervising Attorney being proposed by it had recent material experience of the execution of search Orders conducted under the supervision of a Supervising Attorney.

3) There was no undertaking by the Claimant not to inform anyone else of the proceedings except for the purpose of the proceedings.

4) The search team did not include a partner from the Claimant's Attorneys-at-Law.

5) Material non disclosure by the Claimant in that:

   a) It failed to disclose that it made a complaint to the Jamaica Constabulary Force (JCF) in the person of Superintendent Fitz Bailey of the Organised Crime Division; and that an investigation had been launched by the JCF; and that the JCF had done a preliminary interview of the Defendant; and had searched his computer; and that the said investigations were continuing.
   b) It failed to disclose that the Vice President of Finance of the

Claimant Mrs. Clover Moodie was dismissed by the Claimant arising out of her conduct relating to the losses sustained by the Claimant the subject of this action.

c) That the Claimant commissioned a forensic audit by GORDON MOORE of Sepia Associates of 17 Highview Drive, Sewickly PA 15143 U.S.A and that this report is to hand and reveals inter alia that in regards to the trading losses, electronic mail correspondence exists between Wayne Wray the then President of the Claimant and Andrew Messado who is a Senior Financial Officer of Grace Kennedy & Co, the parent company of the Claimant and Gavin Jordan the Assistant Vice President of Finance of the Claimant which speaks to the fact of adverse trading positions and the best way to treat with them.

d) That the position limit of US$10 Million referred to in the Affidavit of Joseph Taffe was not a cumulative position limited but a position limit per trade.

e) That the position limit referred to in the Affidavit of Joseph Taffe aforesaid was only approved by the Board of the Claimant in July 2009 well after the trades the subject of this action were completed.

f) That there is an internal audit report done in January by David Hall the Chief Internal Auditor of Grace Kennedy & Co which was not disclosed.

g) That the said audit by David Hall the Chief Internal Auditor of Grace Kennedy & Co Limited the parent company of the Claimant revealed that:

   i) There was no approved documented policy and procedure outlining the controls that should surround the sales and purchases of securities.

   ii) The Audit did not identify breach of trading positions limits.

6) That the Affidavit of Joseph Taffe does not disclose any probative material to support any allegation of any attempt by the Defendant to dissipate his assets.

7) That there is a real danger that the Claimant will use the documents the fruit of the Search Order in the Criminal proceedings which are likely to be instituted against the 1st Defendant.

8) These proceedings will have an adverse impact on the 1st Defendant's employment and may lead to a termination of his employment; and

9) The Defendant and a third party will be unduly prejudiced and suffer hardship as a result of the grant of the injunction.

9. The applications to set aside the respective orders of Cole-Smith J are strongly resisted by the Claimant and it in turn argues that the freezing

order should be extended to the date of trial and that the search order also ought not to be disturbed.

10. In support of its application to extend the freezing order until trial and in opposition to Rose's application to discharge the freezing order, counsel for the Claimant submits that in order for an applicant for a freezing order to succeed in such an application, two things must be shown. Firstly, the applicant must show that it has a "good arguable case", although not necessarily one with a better than 50% chance of success, and secondly, that there is a risk of dissipation of the assets by the respondent which could deprive the successful applicant of the fruits of any judgment won by the applicant in the substantive action. It was submitted that based upon the allegations, as set out above, the Claimant had, at the very least, a good arguable case. The court must determine the issue of whether there is a "good arguable case".

Good Arguable Case

11. What is a good arguable case? This has been the subject of numerous authorities. Incidentally, it should be borne in mind when looking at some of the English authorities, that the question of "good arguable case" may be considered both in terms of the issue of jurisdiction of the particular forum, (for example for determining whether permission for a writ to be served out of the jurisdiction should be given) as well as the issue of the merit of the substantive claim. While the issue of jurisdiction does not arise on the face of the pleadings herein, if I may be permitted a slight digression, I would mention a decision of the House of Lords in **Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran** [1994] 1 AC 438; [1993] 4 All ER 456, where the House had to consider the test to be applied in granting leave to serve a writ on a party out of the jurisdiction under Order 11 r 1 of the UK Rules of the Supreme Court, in relation to an

action founded on breach of contract, namely, failure to pay on a letter of credit.

12. Lord Goff, who delivered the only substantive judgment of the court, first traced the development of O 11 r 1 and the relevant case law on it, and then said that there were two separate issues to the point. First, it must be shown in accordance with the test of a good arguable case that the case falls within one of the circumstances mentioned in r 1(1). This is the jurisdiction issue. Second, assuming the jurisdiction issue is satisfied, the court must consider the merits of the claim and *on this no more is required than that the evidence should disclose that there is a serious issue to be tried*.

13. It was submitted that given Rose's position within the Claimant bank, the regulatory framework articulated by the Bank of Jamaica Act, the good faith duties imposed upon the said first defendant by the Companies Act and the nature of the allegations which were being made by the Claimant, that the Claimant had easily established the threshold of a "good arguable case". It is not necessary for this court to make findings of fact to the civil standard, nor is it this court's role to seek to determine which of the alternative stories put forward by the applicant and the respondent is more credible.

14. In a Singapore case which I came across, **Bradley Lomas Electrolok Ltd and Another v Colt Ventilation East Asia Pte Ltd and Others** [2000] 1 SLR 673; [1999] SGCA 89, in the Singapore Court of Appeal, Chao Hick Tim JA, in considering the meaning of "good arguable case" said:

> What would amount to a "good arguable case" is put as follows in the **Supreme Court Practice** *1999* (Vol 1, 1998) para 11/1/11, citing from **The Brabo; Tyne Improvement Commissioners v Armement Anversois S/A** [1949] AC 326 and **Vitkovice Horni a Hutni Tezirstvo v Korner** [1951] AC 869:

It indicates that though the court will not at this stage require proof to its satisfaction, it will require something better than a mere prima facie case. The practice, where questions of fact are concerned, is to look primarily at the plaintiff's case and not to attempt to try disputes of fact on affidavit; it is of course open to the defendant to show that the evidence of the plaintiff is incomplete or plainly wrong.

14. In the Notice of Application seeking the setting aside of the freezing order/opposing its extension to the date of trial of the action and seeking discharge of the search order, counsel for Rose sets out the grounds listed above. There is no suggestion among the grounds relied upon, of there being a lack of a good arguable case and indeed, it seems that Rose's counsel seems to accept that that threshold is easily met. I am prepared to hold that the first test of a "good arguable case" has been met and to proceed to consider the other issues raised by Mr. Rose's attorneys-at-law.

Risk of Dissipation

15. I shall now turn to deal with the issue of the real risk of dissipation of assets since the establishment of that fact is a sine qua non of the grant of a freezing order.

16. One of the substantive submissions articulated by counsel for Rose in relation to the application to set aside of the freezing order/opposing its extension, is that the Claimant has not provided any evidence ("*in the affidavit of Joseph Taffe*") of any attempt on the part of Rose to dissipate his assets. In the supporting submissions, it was stated less definitively that there was "no evidence before this court that the 1st defendant will place any sums out of the reach of this Honourable Court".

17. Since it is a condition of the grant of such an order that the applicant must show such a risk of dissipation, in the absence of such evidence, the freezing order should be discharged. In support of this submission,

counsel for Rose cited the decision of the Jamaican Supreme Court in **Half Moon Bay Limited v Earl Levy** Suit No: C.L. H 012 of 1996 and the judgment of Wolfe C.J. delivered May 7, 1997. There his lordship had stated that it is the court which must decide whether the plaintiff's fear of dissipation is justifiable. A bare assertion as such would not suffice. Merely because it would be easy for a defendant to remove the proceeds of sale of his assets from the jurisdiction, is not sufficient to give rise to a finding that there was a real risk of dissipation. Counsel further cited another decision of the Jamaican Court of Appeal, **Wheelabrator Air Pollution Control v F.C. Reynolds** SCCA 91 of 1994 where Carey J.A. stated that

> "with respect to the information as to the risk factor, the plaintiff must state the nature and extent of the defendant's business and location of assets within the jurisdiction."

18. Based on these dicta, counsel asserted that the freezing order should be discharged.

19. For the Claimant it was submitted in response that this was an incorrect reading of the requirement re the risk of dissipation. There was no requirement to show that there was any attempt on the part of Rose, to dissipate. Clearly evidence of such an attempt would be overwhelming. But it was not necessary. Counsel for the Claimant submitted that the nature of the test had been clearly laid down in a ruling in the English Court of Appeal by Stuart-Smith L.J. in **Ketchum International Plc v Group Public Relations Holdings Ltd. and Others** [1997]1 W.L.R. 4. There, his lordship had un-ambiguously stated:

> "In my judgment the judge misdirected himself by relying on the passage already quoted from **Derby & Co. Ltd. v Weldon (Nos. 3 and 4)** [1990] Ch. 65, 76 for the proposition that the plaintiff must show that the defendant intends to deal with his assets for the purpose of ensuring that a judgment will not be met. *It is sufficient if there is a real risk that the judgment in favour of the plaintiff will remain unsatisfied if injunctive relief is refused...*" (Emphasis Mine)

20. It was submitted that the test in Jamaica is that laid down in the Court of Appeal in **Jamaica Citizen's Bank Limited v Dalton Yap** SCCA 121/97. The test articulated by Forte J.A. in the Dalton Yap case has subsequently been cited with approval in this Court by my learned brother Sykes J in a judgment cited by the Claimant's attorney, **Rudolph Shoucair v Kevin Tucker-Brown and Carmen Tucker-Brown**, HCV 01032 of 2004, judgment delivered May 4, 2004. There his lordship stated:

> "As Forte JA said in *Yap's case* (supra) there must be solid evidence that there is a real risk that the assets of the defendant will be dissipated...Solid evidence means that there must be something more than the assertion by the claimant that his judgment may not be satisfied. The evidence adduced by anyone applying for a freezing order must be such that when examined by an impartial, informed and reasonable person he would conclude that there is a real risk of dissipation or removal of assets from the jurisdiction."

21. It seems to me that the existence of the risk does not have to be proven to a very high standard. Thus in **Customs & Excise v Anchor Foods Ltd.** 1990 1 W.L.R. 1139 Neuberger J, (as he then was) said what is required is a "good and arguable case for a risk of dissipation". However, the risk of dissipation must involve a risk of impairing the claimant's ability to enforce a judgment or award. It is not *necessary* for the claimant to prove that the purpose of the defendant's actual or feared conduct is to frustrate the enforcement of any judgment which is obtained, provided that, objectively, that would be its effect.

22. An article by Richard Ashcroft and Hugh Sims of Guildhall in September 2008 (**"Urgent Injunction Applications: Best Practices and Pitfalls to avoid"**) provides a useful summary on the issue of "dissipation of assets" which I respectfully adopt.

> 29. In **Thane Investments Ltd v Tomlinson & Ors** [2003] EWCA Civ 1272 Peter Gibson LJ emphasised (at paragraph 21) the need

for any application for a freezing injunction to be supported by "*solid evidence...of the likelihood of dissipation*".

30. Pointing to some dishonesty on the part of the intended respondent to the injunction is insufficient: **Thane** at para 28. The court will scrutinize with care whether what is alleged to have been the dishonesty of the person against whom the order is sought, in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted (*ibid*).

31. The court will be particularly interested in evidence of such things as a poor credit history, a record of defaulting on other debts or any threat to remove or otherwise deal with the relevant assets: *ibid* at para 26. The defendant's proven links with another country to which he may decamp will also be highly relevant, as will any lack of openness on the part of the defendant in response to enquiries about his intentions in relation to assets being realised.

32. Plainly, the more easily realised or moved the assets identified in the evidence may be, the easier it is to justify a risk of dissipation. Where there is evidence as to the form which the assets take which in itself indicates there has been no attempt to dissipate in the past and, by the nature of those assets, any such dissipation in the future is unlikely, then the court may take a different view. Moreover, the mere fact of asset realization by a defendant is insufficient (at least where the application is not for a "proprietary" freezing order in which the claimant asserts that an asset held by the defendant is really his); there must, as noted above, be some basis for believing that the disposal of assets is unjustifiable: see, for example, **Renewable Power & Light plc v Renewable Power & Light Services Inc & Ors** [2008] EWHC 1058 (Ch).

33. Ultimately the test is not one of probability of dissipation, but of real risk: **Caring Together Ltd v Bauso and Ors** [2006] EWHC 2345 (Ch) at para 64.

34. **Thane** is not a judgment to the effect that allegations of dishonesty are insufficient to found the necessary inference of a real risk of dissipation, but a reminder that in order to draw the inference it is necessary to have regard to the particular allegations of dishonesty and to consider them with some care: **Jarvis Field Press Ltd v Chelton** [2003] EWHC 2674 (Ch) at para 10.

35. There is or may be an appreciable risk in the case of somebody who appears to be guilty not merely of dishonesty, but dishonesty in financial dealings in relation to the use or misuse of assets, that he will take steps to put such assets outside the reach of the people claiming an entitlement thereto: **Jarvis Field** at para 17.

36. The importance of cogent, relevant evidence on this aspect of any application cannot be overstated.

23. I respectfully adopt the foregoing. There clearly is more than passing similarity between the bases on which the Court of Appeal in Dalton Yap held that there was a risk of dissipation. In Yap, the bases upon which it was held that there was a real risk of dissipation were that, (1)the case was based upon allegations of fraud and the probity of the defendant's conduct was in question; and (2) the appellant was experienced in moving funds from one country to another. Both of those factors are pellucidly present here. In the instant case against Rose, there are allegations of fraud, conversion of funds and dishonesty, with the result that his probity is also in question. Secondly, it appears from the evidence that Rose has significant expertise and experience in manipulating financial transactions by way of the internet. He is obviously experienced in moving funds around the world with some dexterity and has the ability to place funds in countries where they would be difficult to trace.

24. For these reasons, I hold that the on an objective test by a disinterested reasonable bystander, the risk of dissipation has been made out. I respectfully adopt as an overarching concern of this Court, the following dictum from Stuart-Smith LJ in **Ketchum International Plc v Group Public Relations Holdings** [1997] 1 W.L.R. 4 at 10f:

> "Justice requires that the court should be able to take steps to ensure that its judgments are not rendered valueless by an unjustifiable disposal of assets".

The First Defendant's other Arguments for setting side the orders.

25. Rose's other submissions in support of his applications may be usefully characterized as partially suggested by the Claimant's attorney. I set these out below and include the challenge to the grant of the ex parte freezing order on the basis of non-disclosure of material fact before Cole-Smith J.

1. Non-disclosure of material facts at the time of the application for the ex parte freezing order. Among those facts allegedly not disclosed by the applicant were:
    a. That a complaint had been made to the police;

b. That the first defendant had offered a computer;
c. That Mrs. Clover Moodie had been dismissed
d. The Moore Report;
e. That the position limit was a per transaction and not a cumulative limit;
f. The approval of the position limit was only ratified in July 2009 after the trades were complete;
g. That there was a report by David Hall which showed that
    i. there was no documented policy and procedure outlining the controls surrounding the sales and purchases of securities; and
    ii. did not identify breach of trading positions;

2. The privilege against self-incrimination – Grounds 1 and 7

3. Experience of the Supervising Attorney-at-Law – Ground 3

4. Absence of an undertaking by the Claimant not to inform anyone else of the proceedings – Ground 4

5. Absence of a partner from the Claimant's Attorneys-at-Law from the Search Party – Ground 5

26. As submitted by Rose's counsel, the lack of full and frank disclosure "is the most powerful and cogent reason for discharging (this) injunction" per Sharma J. (as he then was) in **Coosals Quarry Limited v Trinidad (Teamwork) Limited** [1985] 37 WIR 417. In these circumstances I think it is important to deal with this aspect first.

Non-Disclosure

27. Counsel for Rose cited the above specific instances of purported non-disclosure as providing the basis for setting aside the freezing order. The first is in relation to a complaint made by the Claimant to Senior Superintendent Fitz Bailey of the Organised Crime Division of the Jamaica Constabulary Force. Rose's counsel submitted that the Claimant must have been aware that Rose would have raised the spectre of possible prosecution as an argument against the grant of the search order, and so this was non-disclosure. But I agree with the Claimant's counsel's submission, that there had been no charge laid by any prosecutor against