

Filing Cabinet

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. CL K027/2001

BETWEEN	GERTRUDE KEENE	1 <sup>ST</sup> RESPONDENT 1 <sup>ST</sup> CLAIMANT
AND	JACQUILINE GRANT	2 <sup>ND</sup> RESPONDENT 2 <sup>ND</sup> CLAIMANT
AND	NANCY TULOCH-DARBY	1 <sup>ST</sup> DEFENDANT
AND	DERRICK DARBY	2 <sup>ND</sup> DEFENDANT
AND	CARLTON HARRISON	APPLICANT

Ms. Audré Reynolds instructed by Patrick Bailey & Co. for the Respondents.

Mrs. Georgia Gibson-Henlin and Ms. Tavia Dunn instructed by Nunes Scholefield Deleon & Co. for the Applicant.

**Heard 17<sup>th</sup> and 25<sup>th</sup> November 2005**

**Campbell, J.**

1. On the 12<sup>th</sup> day of June 2001, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were granted a

Mareva Injunction in the following terms;

1. That the Defendants be restrained until the trial of this matter or further Order in the meantime whether by themselves or their servants and/or agents or otherwise howsoever from disposing of, pledging, charging, transferring, diminishing or in anyway howsoever dealing with any of their assets wheresoever situate within this jurisdiction whether in their own name or not and whether solely or jointly owned.

2. The Defendants shall forthwith upon service of any order in terms of Paragraph 1 herein upon them, or either of them, disclose to the Plaintiffs full information concerning the nature and location of their assets wheresoever situate and shall disclose all relevant documents in their possession custody or power concerning such assets identifying with full particularity the nature of such assets and their whereabouts and whether the same be held in their own name, or in the name of either of them, or by nominees or otherwise on their behalf and the sum standing in any accounts, such disclosure to be verified by affidavit to be made by the Defendants, jointly and severally, to be filed and served on the Plaintiffs' Attorneys-at-Law within seven (7) days of this Order or notice thereof being given.

2. The Orders directed to the Defendants had a provision which allowed for the payment of legal fees in defending this action, and permitted banks to make set-off in relation to facilities that were made to the Defendants prior to the injunction. The Plaintiffs gave the usual undertakings as to damages. The Plaintiffs' attorney also attached a penal notice to the order which was served on the Defendants. The notice was along these lines:

If you, the within named Nancy Tulloch-Darby and Derrick Darby neglect to obey this order you will be liable to imprisonment for the purpose of compelling you to obey the same order.

3. Consequent on paragraph 2 of the Injunction, Derrick Darby on the 25<sup>th</sup> July 2001, swore an affidavit containing a list of his assets, paragraph 4 of which stated inter alia;

Premises situated at 93 Chisholm Avenue in the parish of St. Andrew and is registered solely in the name of Derrick Darby and registered at Volume 1295 Folio 164.

4. The Applicant now seeks to amend this Mareva Injunction by excluding from the order the property situate at 93 Chisholm Avenue, Kingston 13, in the Parish of Saint Andrew. And similarly by deleting any reference to that land from a Caveat no. 1231997.

5. In his affidavit in support of his application, Mr. Harrison asserts a beneficial interest in 93 Chisholm Avenue. He claims to have been in occupation of the property since 1988, when Derrick Darby closed the car rental agency he operated on the same property and Harrison decided to purchase the property. Harrison says he paid a deposit of \$640,000.00 to Derrick Darby and began to process a mortgage from the CIBC Building Society. He exhibits a letter from the Building Society over the signature of their Mortgage Manager, Winston Lindo dated 14<sup>th</sup> July 1997.

6. It is unchallenged that Harrison paid \$83,130.00 to Clinton Hart & Co. for the processing of the mortgage, but was unable to complete even after payment, because Derrick Darby was incarcerated. Mr. Harrison says that he was unaware of the Mareva Injunction and the Orders made thereon until an attempt was made to lodge the transfer for endorsement by the Registrar of Titles. Harrison has now paid the full purchase price and paid off the mortgage.

7. The 1<sup>st</sup> and 2<sup>nd</sup> Claimants have resisted Harrison's application contending that there is no Sales Agreement evidenced by the Applicant, because the

purported Sales Agreement was undated. Moreover, argues the Claimants, the document is unstamped and therefore is precluded from being relied on. The Claimant states that the action of Derrick Darby in signing the transfer of the 29<sup>th</sup> July 2003 constitutes a breach which precludes Harrison from relying on that “unlawful” act. That the act of transferring of the property and receiving funds to do so is an effort to circumvent the injunction.

8. For relief to be granted to the Claimants on an application for a Mareva Injunction, it must be “just and convenient” to do so. An examination of the circumstances may make it inappropriate to grant such relief. The starting point is the Order itself and the recognition that the Order is directed at Derrick Darby and Nancy Tulloch-Darby. It is an Order *in personam*, it is aimed at the Defendants personally, their servants and agents, and does not give to the Claimants proprietary rights over the assets that fall within the injunction granted. Because no right over property is created, a bona fide purchaser for value who has no notice of the Mareva, will obtain a good title.

In Creatanor Maritime Co. Ltd. v Irish Marine Ltd. (1978) 1 WLR 966.

Buckley LJ, said;

“A mareva injunction, however, even if it relates only to particularized asset...is relief in personam.... All that the injunction achieves is in truth to prohibit the owner from doing certain things in relation to the asset. It is consequently, in my judgment, not strictly accurate to refer to a mareva injunction as a pre-trial attachment.”

9. Mr. Harrison's entitlement to enforce the Agreement for Sale arose long before the Injunction was granted. He had been in occupation since 1988. In 1997, Harrison deposited \$640,000 on the purchase of the land and started the mortgage process. That was some four years prior to the grant of the Mareva Injunction. Even if it is assumed that the caveat that was lodged provides notice to Harrison, equity had always recognised that an oral contract followed by a sufficient act of part performance would exclude the operation of the Statute of Frauds. (See Doctrine of part performance, Modern Law of Real Property – Tenth Edition page 349.) Therefore Harrison had an enforceable right to a valid title to the premises prior to the grant of the Mareva Injunction.

10. Harrison could not have had any notice prior to acquiring his rights. In any event there is nothing in the Injunction directed at Harrison. In Z Ltd. v A-Z and AA-LL (1982) 2 WLR 288; (1982) 1 All ER 556; per Eveleigh LJ;

“A defendant is not guilty of breach of an injunction unless he has notice of it: a third party with notice should only be liable when he knows that what he is doing is a breach of the terms of the injunction: and, since mens rea based on knowledge of the quality of the act is necessary to constitute contempt of court in interfering with the course of justice, in case of a bank or other corporate body it is necessary to show that the person to whom the notice was given authorized the disposal of an asset, or knowing that a payment was likely to be made under an authority derived from him, deliberately refrained from taking steps to prevent it, before the corporation can be guilty of contempt of court (560b, c, 581e, 582g).”

11. Where there is a conflict between the Plaintiffs for a Mareva Injunction and third parties, acting without notice, the third parties' rights will prevail over that of the Claimant. In Halsbury Laws of England, para. 313, it is noted;

313. Protection of third parties.

“The court must bear in mind not only the balance of convenience and justice between Claimant and the Defendant, but above all also as between Claimant and third parties. Where assets of a Defendant are held by a third party incidentally to the general business of the third party, such as accounts of the Defendant held by a bank ,..., an effective indemnity in favour of the third party will adequately hold this balance, .... **However, where the effect of service must lead to interference with the performance of a contract between the third party and the Defendant which relates specifically to the assets in question, the right of the third party in relation to his contract must clearly prevail over the Claimant's desire to secure the Defendant's assets for himself against the day of judgment**” (emphasis mine).

12. This is illustrated in Galaxia Maritime SA v Mineral Import Export (1982) 1 WKLR 539, where an Injunction was granted restraining cargo owners removing cargo out of the jurisdiction. Shipowners were given notice of the Injunction and faced possible contempt charges. Shipowners applied for a discharge, it was refused. On appeal it was allowed as it created too great an interference with the business of third parties.

13. The application for amendment of the Mareva Injunction dated 12<sup>th</sup> June 2001 is granted by excepting all that parcel of land registered at Vol. 321 and Folio 86 of the Register Book of Titles and all that parcel of land registered at Vol. 1295 and Folio 164 of the Register Book of Titles which together are known as 93 Chisholm Avenue, Kingston 13 in the Parish of St. Andrew.

14. The Caveat No. 1231997 is amended by deleting reference to all those parcels of land registered at Vol. 321 and Folio 86 and Vol. 1295 and Folio 164 of the Register Book of Titles. Costs to the Applicant to be agreed or taxed.

