[2015] JMSC Civ. 35

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 01171

BETWEEN	**KAON NORTHOVER**	**1ST CLAIMANT**
AND	**K ANN JSA**	**2ND CLAIMANT**
AND	**MINETT LAWRENCE**	**DEFENDANT**

IN CHAMBERS

Mr. Joseph Jarrett, instructed by Jospeh Jarrett and Co. for the Claimants

Christopher Dunkley & Amina Whitely, instructed by Gordon & Watson for the Defendant

Heard: January 21 & 22, 2015

PROPOSED EXTENSION OF FREEZING INJUNCTION EARLIER GRANTED BY THE COURT IN FAVOUR OF THE CLAIMANTS – APPLICATION FOR EX PARTE DISCLOSURE ORDER MADE BY COURT TO BE SET EXPLANATION OF WHAT IS AN EX PARTE HEARING – DISTINCTION BETWEEN EX PARTE AND INTER PARTES HEARING – DISCLOSURE ORDER – APPLICATION TO SET ASIDE DISCLOSURE ORDER – DEFINITION OF 'RELEVANT PROPERTY OR ASSETS'

ANDERSON, K. J

[1] The ex parte injunction freezing the defendant's assets, was initially ordered by Mr. Justice Frank Williams, on December 16, 2014 and was then scheduled to have been effective for 6 days, following upon which there was to have been an *inter partes* hearing on December 22, 2014 at 10:00 a.m.

[2] A chambers hearing was held on December 22, 2014, as scheduled, with the defendant and her counsel then having been present and having been served with the

documents filed by the claimants in support of their prior ex parte application for a freezing order.

[3] Whilst legal issues pertaining to whether that injunction should have remained in place, or should have been discharged, or should have been extended by this court, were not, this court accepts, then argued upon by the respective parties, this court cannot and does not accept the defence counsel's submission that the hearing on December 22, 2014, was an ex parte hearing. Once the defendant was present and aware of the possibility that at that hearing on December 22, 2014, the freezing order which had earlier been obtained against her, may have been extended and provided that the defendant had, as at December 22, 2014, been served with the documents in support of the claimants' application for the freezing order, that hearing on December 22, 2014, was not an ex parte hearing. A hearing is not to be and cannot properly be categorized as ex parte, simply because a party who is served with documents pertaining to a court hearing concerning a matter in respect of which they are a party and who is in fact, moreover, present at that hearing, chooses for whatever reason, not to, on that date, argue against the making of whatever order the court may possibly grant or make, on that date. **Rules 17.4 (6) and 7 of the CPR** make clear what is to be considered as being an *inter partes* hearing. In this case, the claimants had fulfilled those prerequisites before the *inter partes* hearing commenced on December 22, 2014. That was not what transpired in the **National Commercial Bank Jamaica Ltd. v Olint case** – [2009] 1 W.L.R. 1405 and that is why, in that case, the Privy Council frowned upon this court embarking on a hearing of an application for injunctive relief, in circumstances wherein no notice of that hearing had been provided to the party expected to be most detrimentally affected by the making of such injunctive order and in addition, no documents pertaining to the party's application for injunction relief, had been served on the opposing party, prior to the commencement of the hearing. Even if there is short service of those documents, in terms of time, short service is better than no service of same, at all.

[4] As such, the injunctive relief granted by this court initially on December 16, 2014 and extended on December 22, 2014 until January 21, 2015 has lawfully been in place until January 21, 2015.

[5] As at today's date though, January 22, 2015, that injunctive relief earlier granted, has now expired. The same perhaps would not have expired, if an oral application had been that oral application could and should have been made yesterday afternoon for that injunctive relief to remain in effect until further order of this court. When this matter came up for hearing before me and after I had heard arguments on whether the injunctive relief ought to be extended in time so as to remain in place until the conclusion of this claim. No application though for an extension of the operation of the injunction until today's date, was then made. As such, no such order was made. This court cannot and should not be expected to do counsel's work for counsel. It is always the duty of counsel to seek relief which they require, on behalf of their client, on any give occasion before this court. That is so whether an attorney operates a very small sized law practice or a very large sized law practice. Counsel's duties to clients do not and cannot vary, depending on the size of the law practices which they operate.

[6] Insofar, therefore, as the injunctive relief earlier granted by this court, expired yesterday, this court is now precluded from granting any extension of same. See: **Ramkaise Manogeesingh & ors. v Airports Authority of Trinidad & Tobago & anor.** – [1993] 42 WIR 301 (C.A. – Tr. & Tob.), esp. at pp. 323g – 325a, per Persaud, J.A – his judgement was a dissenting judgment in terms of the appeal court's conclusion as to how the appeal should have been decided, but, at pp. 323g – 325a**,** what Persaud J.A clearly and carefully set out were reasons as to why a court cannot properly extend injunctive relief which has expired due to the sheer effluxion of time.

[7] In that regard, see also: **Bolton v London School Board** – [1878] 7 Ch.D. 767**,** esp. at p. 771 per Malins, V.C. & **Boyce v Gill** – [1891] 64 LT 824, at p. 826, per Kebewich J.

[8] Freezing or Mareva injunctions are, essentially, the equivalent of nuclear weapons, insofar as law is concerned. The granting of such injunctions by this court must always be scrupulously considered. Its purpose is not to assist a claimant to secure a potential judgment, but rather, to prevent a defendant from dissipating his/their assets with the intention or effect of frustrating the enforcement of a prospective judgment. See: **Fowie v Le Poux** – [2007] 1 W.L.R. 320**,** per Lord Bingham of Cornhill – Referred to at para. 7–13 of the text – Injunctions – **David Bean et al,** 11th Edition (2012).

[9] The claimant must show a good, arguable case. This means a case which is more than barely arguable, or barely capable of serious argument, but it does not mean a case which the judge believes to have better than a 50% chance of success. See: **The Niedersachen case** – [1983] 1 W.L.R.1412. The reason for this is obvious. The purpose of the Mareva injunction remedy is not to secure a potential judgment. It is rather, to ensure that a defendant does not , in an effort to fraudulently limit the reliefs that may become available to a claimant, in the event that that claimant were to succeed in obtaining judgment against him, dispose of his assets. It is really a remedy therefore, which is more designed to protect against court processes for enforcement of judgments being thwarted by a defendant who fraudulently intends to, or is doing so, by disposing of his or her or their assets whilst a claim is then pending. See: **paras. 7 –27 and 7 –28 of injunctions text**, referred to above.

[10] In submissions made before me, the claimants' counsel made it clear that he was relying on what he contented was clear evidence of the defendant's fraud in dissipating her assets subsequent to the filing of the claimant's claim against her and that the claimants are essentially seeking to secure a potential judgment that may be made in their favour, by requesting this court, or applying to this court, to extend the injunctive relief which was earlier granted. The latter – mentioned aim of the claimants does not, at all, constitute a valid basis upon which the freezing order made by my brother judges, could properly now be extended. In fact, if fraud in dissipation of assets is not proven, that should, in and of itself, constitute a proper basis upon which, if an application had

been made before me, to discharge the freezing order, such contention of the claimant's counsel should properly lead to said freezing order being discharged.

[11] There exists dispute on facts, as to whether or not the defendant has been acting in a fraudulent manner, in disposing, it is alleged, of certain assets of hers, subsequent to this claim having been filed against her. Mr. Northover has provided evidence in that regard and Mrs. Lawrence has also provided her own evidence, expressly responding to and disputing such allegations of fraudulent conduct on her part, in that respect.

[12] Fraud, is of course, always an allegation which is easy to make, but very, very difficult to prove. Thus, as was stated in the case **Mason v Clarke** – [1955] A.C. 778, at para. 794 – *'Charges of fraud should not be lightly made or considered.'* See also on this point: **Hornal v Neuberger Products Limited** – [1957] 1 Q.B. 247.

[13] The burden of proof of fraud in the alleged dissipation by the defendant of her assets, rested squarely on the shoulders of the party who is seeking the extension of the freezing injunction. That of course, is the claimants. If there exists serious doubts in this court's mind in that regard, this court must resolve those doubts in favour of the defendant, since otherwise, a burden would be cast upon the defendant to satisfy this court that the injunctive relief earlier granted by this court, should not be extended. As she though, is not the person applying for any extension of same, no burden of proof is cast upon her, as regards the claimants' application for that extension. Furthermore, since a freezing injunction should, in the final analysis, only be granted by this court if it would be just and convenient and overall, in the interests of justice to do so, surely, it could not be in the interests of justice to extend the freezing order made against the defendant, in circumstances wherein this court is not clearly satisfied that she has in fact been going about the deliberate process of dissipating her assets in order to make herself judgment proof, and/or that she has been doing so in order to fraudulently deprive the claimants of the potential fruits of their potential judgment.

[14] Where there exists disputed matters of fact, as per evidence of respective parties, on a disputed interim application, such as is the case here and now, it is not,

other than in the rarest of cases wherein the alleged factual dispute between the parties is patently more fanciful than real, permissible for this court to accept as being truthful, one party's evidence, over that of the other. See: **Ramona Chin & Lascelles Chin** – [2007] 71 W.I.R. 271 **& Edward Seaga & Western Broadcasting Services Limited** – [2007] 70 W.I.R. 213.

[15] Accordingly, since the burden of justifying the extension of the freezing order, rested exclusively on the claimants' shoulders and since it was the claimants who, when this matter was heard before me, needed to satisfy me that the legal prerequisites for the granting of the extension had been met, their failure to lead evidence which this court can now properly accept in that regard, by means of entirely disregarding the evidence given on pertinent issues of fact, by the defendant, must mean that also, for that reason, the extension of the freezing order, ought not to be granted.

[16] Furthermore, by the claimants' counsel's own acceptance as he made known to this court yesterday, that as far as he and his clients presently know, the defendant no longer has any assets in her possession which she would be at liberty to dispose of, as, when and/or howsoever she may wish, it is apparent that the freezing order, if extended, would serve no useful purpose other than to make life and the conduct of her business by the defendant, far more difficult than it would typically otherwise be. This court should never act in vain, in granting an equitable remedy as additionally, this court should not assist in the creation of injustice. The purpose of a freezing order is not to punish the respondent, but rather, to protect the applicant. See: **Gill v Flightwise Travel Service Limited** – [2003] EWHC 3082**,** per Neuberger J.

[17] An order was made for disclosure by the defendant, of all of her assets. This court will, at this time, only offer its view that Jamaica's rules of court do not, in fact, permit such an order to be lawfully made. A person in Jamaica, has a constitutional right to privacy and thus, if that right is to be interfered with, or restricted in any way, such interference or restriction should only be carried out in accordance with settled law, whether such be of common law or statutory origin.

[18] As is presently the law in Jamaica, set out in **Jamaica's Civil Procedure Rules (hereinafter referred to as 'the CPR')**, this court is empowered to make an interim order directing a party to provide information about the location of '*relevant property or assets*' *or* '*to provide information about relevant property or assets, which are or may be the subject of an application for a freezing order.'*

[19] As such, this court cannot lawfully, to my mind, order the disclosure by a person of all of his or her assets, for the purpose of facilitating a party who/which is seeking a Mareva injunction ('freezing order'). The position is the same whether that Mareva injunction is to be sought subsequent to such disclosure as applied for, or is being sought simultaneously with the application for disclosure.

[20] Jamaica's rules of court in civil matters in this court, make it clear that this court can order the disclosure of information as to the location of relevant property or assets and/or provide information about relevant property or assets which are or may be the subject of an application for a freezing order.

[21] The critical question to be answered by this court therefore, in deciding as to whether to grant such a disclosure order, is whether such order being sought in respect of, *'relevant property or assets.'* This last quoted phraseology is defined in **Part 17 of the CPR.** It is therein defined, in **rule 17.1 (2)**, as, '*property which is the subject of a claim, or as to which any question may arise on a claim.'* This court has, no doubt that 'relevant assets' and 'relevant property' are to be treated as equivalent in terms of their meaning.

[22] In the circumstances, it is not, to my mind, proper for this court to enable a party to go on a fishing expedition by expecting this court to facilitate the disclosure by any person of 'all of his/her assets. For those reasons alone therefore, this court would have, if necessary, discharged the disclosure order made, in terms of disclosure by the defendant of all of her assets.

[23] The disclosure orders made re: Rajkumar Ltd. could, it seems to me, have been dealt with by the court and counsel, during disclosure for the purposes of trial. There is no reason that I can see, that existed in this case, justifying the claimants in having sought and obtained that particular disclosure order, ex parte.

[24] If, the defendant now has or has had possession of the documents to be disclosed re: Rajkumar Ltd. and those documents are 'directly relevant,' as per **rule 28.1 (4) of the CPR**, then she will have to disclose same, in accordance with any order for standard disclosure which may hereafter, as is the usual course, be made by this court.

[25] For the reasons provided above, coupled with the fact that from as of this time onwards, there no longer exists any freezing injunctive relief in place, in relation to the defendant, this court has discharged the disclosure orders earlier made by this court.

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Hon. K. Anderson, J.