[2021] JMCC Comm 42

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU 2021 CD 00030

BETWEEN	**DINSDALE WILLIAMS**	**APPLICANT**
AND	**OPAL WALLACE**	**1ST RESPONDENT**
AND	**CENTURY SALES 2020 LIMITED**	**2ND RESPONDENT**

IN CHAMBERS

Mr Lemar Neale instructed by NEA/LEX Attorneys-at-Law for the applicant

Mr Patrick Foster QC and Mrs Camille Wignall Davis instructed by Nunes, Scholefield, DeLeon & Co for the respondents

September 2, 2021 and October 29, 2021

Civil Practice and Procedure – Freezing Order Application – Rule 17.1 (1) of the CPR – Appointment of Receiver after Judgment – Rule 51 of the CPR – whether Freezing Order can be granted against 3rd party.

PALMER HAMILTON J

[1] This is an application made by Mr Dinsdale Williams for a post-judgment freezing order against the respondents. Before examining this application in greater detail, I should set out some of the factual background.

[2] On February 8, 2021, Mr Williams commenced proceedings against the 1st respondent, Opal Wallace, to recover damages for breach of contract.

[3] Mr Williams averred that on or about June 15, 2020, a Purchase of Business Agreement was executed whereby he agreed to sell and Ms Wallace agreed to purchase certain assets of the business of Century Sales Limited for J$110,000,000.00 payable in 8 monthly instalments due every 6 months commencing June 19, 2020 and ending on December 31, 2023.

[4] Mr Williams stated that Ms Wallace failed to carry out her obligations in accordance with the terms of the agreement. He complained that, as a result, he suffered loss and damage and incurred expense.

[5] He claimed the following:

(i) the sum of J$108,700,000.00 as damages for breach of contract

(ii) in the alternative, the sum of J$16, 200,000.00

(iii) interest at 1% above the commercial bank's prime lending rate pursuant to the Law Reform (Miscellaneous Provisions) Act

(iv) costs

[6] On March 22, 2021 Ms Wallace filed her defence. She denied that she breached the agreement. She indicated that she did take possession of the assets and she paid the sum of $1,300,000.00 to Mr Williams. Among other things, she stated that Mr Williams misrepresented the stock count and value of the assets. She stated that it was Mr Williams who breached the contract. She filed an ancillary claim on March 24, 2021.

[7] Mr Williams filed a notice of application for court orders on April 29, 2021. Among other things, he asked that summary judgment be granted on the claim.

[8] On June 17, 2021, Laing J made, among others, the following orders:

(i) Summary judgment is granted to the claimant/applicant on the claim

(ii) Costs of this application are awarded to the claimant to be taxed if not agreed.

[9] On June 25, 2021, the learned judge made further orders:

(i) Judgment for the claimant in the sum of J$108,700,000.00 as damages for breach of contract

(ii) Interest is awarded on the sum of J$108,700,000.00 at the rate of 10% per annum from June 17, 2021 until the judgment is satisfied

(iii) Costs to the claimant to be taxed if not agreed.

[10] Following the grant of summary judgment in his favour, Mr Williams filed[1] a without notice of application for charging orders and attachment of debt orders.

[11] On July 7, 2021, Batts J ordered[2] as follows:

(i) Provisional attachment of debt and charging order made until July 22, 2021 with respect to the judgment debt of J$108,700,000.00 plus interest at 10% per annum from June 2021 over:

> ALL THAT parcel of land part of BEGGARS BUSH in the parish of Saint Catherine being the Lot numbered THIRTY-ONE on the plan part of the Beggars Bush, aforesaid deposited in the Office of Titles on the 18th day of September, 1974 of the shape and dimensions and butting as appears by the said plan and being part of the land comprised in Certificate of Title registered at Volume 1111 Folio 296 of the Register Book of Titles

---

[1] This was done on July 5, 2021
[2] The learned judge made other orders which are not outlined herein

(ii) All shares owned or held by the defendant in Century Sales 2020 Limited

(iii) Any and all bank accounts held by the defendant at the National Commercial Bank Jamaica Limited, Bank of Nova Scotia Jamaica Limited, JN Bank Limited, First Global Bank Limited, CIBC First Caribbean International Bank Limited and Sagicor Bank Limited (the Garnishees)

(iv) Inter partes is fixed for July 22, 2021 at 10 am for one hour

(v) Claimant is to serve Lindy Fabian Wallace, the mortgage on title being the National Housing Trust, Century Sales 2020 Limited, Danyielle Colin Dale Donaldson and all the Garnishees.

[12] Ms Wallace, on July 19, 2021, filed a notice of application for court orders seeking orders including:

(i) An extension of time within which to apply for leave to appeal the orders of Laing J made on June 17 and 25, 2021

(ii) That the defendant be granted leave to appeal the orders of Laing J

(iii) That the defendant be granted a stay of execution of the orders

(iv) That the provisional attachment of debt and charging order of Batts J be discharged until the appeal is heard.

[13] On July 22, 2021, Batts J adjourned the aforementioned notice of application. The provisional attachment of debt order was varied to allow Ms Wallace to access to $100,000.00 per month for reasonable living expenses.

[14] Subsequently, Mr Williams, on July 28, 2021, filed a notice of application for court order seeking the following orders:

(i) The respondents be restrained and an injunction granted restraining each of them, whether acting in concert, by themselves, their servants and/or agents or otherwise howsoever from disposing, dissipating, charging, pledging, diminishing the value of or procuring the disposal, dissipation, charging, pledging or the diminishing of the value of or otherwise dealing with the assets including the stocks of the 2nd respondent wheresoever the same may situate up to the value of J$110,000,000.00.

(ii) The respondents be restrained and an injunction granted restraining each of them from transferring or withdrawing or procuring the transfer of withdrawal of any sums from any or all bank accounts in the name of the 2nd respondent.

(iii) An order compelling the respondents to disclose by affidavit evidence within 24 hours of the service of the order the names of all financial institutions whether within or outside the jurisdiction where the 2nd respondent holds an account.

(iv) An order appointing Mr Dalma P James, Chartered Accountant, as Receiver to take possession of the assets of the 2nd respondent.

[15] This application is the freezing order application with which I must contend. It was supported by an affidavit sworn by Mr Williams on July 27, 2021. Though I refer to the application as the freezing order application, it is acknowledged that Mr Williams has asked for a disclosure order and an order appointing a receiver.

[16] On August 13, 2021, after considering Ms Wallace's notice of application filed on July 19, 2021, Laing J made the following orders:

(i) Orders granted in terms of paragraphs 1-5 of the defendant's notice of application filed July 19, 2021 save that "stayed" is substituted for "discharged" in paragraph 4.

(ii) The orders at paragraphs 1-4 are subject to:

> The defendant closing and not continuing to operate in any manner whatsoever the business which is the origin of the dispute between the parties in the claim, and securing the stock and equipment related thereto until the appeal is determined; and

(iii) That the Notice of Appeal is filed within 14 days of the date hereof.

(iv) Costs reserved pending the outcome of the appeal.

The freezing order application

[17] It is important to point out that Ms Wallace filed an affidavit in response to this application on August 25, 2021. Mr Williams then filed a further affidavit on September 1, 2021.

The applicant's submissions

[18] Mr Neal, counsel for Mr Williams, made submissions in respect of the court's jurisdiction to grant the injunction sought and appoint a receiver.

[19] He submitted that the court's jurisdiction to grant the orders sought is found in section 49 (h) of the Judicature (Supreme Court) Act. In addition to the Act, part 17 of the Civil Procedure Rules ('CPR'), 2002 (as amended) empowers the court to grant interim relief in the form of injunction and freezing order even after judgment has been given.

[20] Mr Neal stated that section 49 (h) of the Act confers wide powers on the court to grant an injunction. He stated that this provision is almost *ipsissima verba*[3] with

---

[3] Latin term meaning "the precise words"

section 25(8) of the Judicature Act 1873 which was interpreted by Jessel MR in **Beddow v Beddow** (1878) 9 Ch 89.

[21] It was submitted that when section 49 (h) of the Act and rules 17.1 (a) and (f) and 17. 2 (b) are read together, they empower the court to grant a freezing order and appoint a receiver after judgment to aid in the execution thereof. It was stated that this position is supported by the case of **Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd** [1984] 1 WLR 1097.

[22] Counsel stated that rule 51 of the CPR provides for the appointment of a receiver and outlines the conditions and basis for such appointment.

[23] Mr Neal then made submissions with respect to whether the court has the jurisdiction to grant the injunction sought against the 2nd respondent company which was never a party to the substantive claim and is now a party to the action.

[24] Counsel referred to the case of **T.S.B Private Bank International S.A v Chabra et al** [1992] 1 WLR 231. He pointed out that in the case the court on its own motion added a company against whom the claimant had no cause of action and granted a mareva injunction[4] against it.

[25] Mr Neal submitted that the judgment of **T.S.B Private Bank International S.A**, although in the context of a pre-judgment mareva, was expressly approved by the English Court of Appeal and made applicable to post-judgment marevas in **Mercantile Group (Europe) A.G. v Aiyela et al** [1993] 3 WLR 1116.

[26] It was submitted that once the allegations made against the third party are arguable, even if unsubstantiated, the courts are likely to entertain jurisdiction to grant a mareva injunction.

---

[4] Also known as a freezing order

[27] In contending that the jurisdiction is now settled, counsel cited the English Court of Appeal case of **Yukong Line Limited (SK Shipping Limited) v Rendsburg Investments Corp et al** [2000] All ER (D) 2437 to support his position.

[28] The court's attention was brought to the 7th edition of Gee on Commercial Injunctions wherein several circumstances in which a court may exercise jurisdiction against a third party were outlined.

[29] It was submitted that whilst there is no cause of action against the 2nd respondent, the order sought against it is ancillary and incidental to the cause of action which the applicant had against the 1st respondent which resulted in a judgment.

[30] Mr Neal contended that Ms Wallace is the alter ego of the 2nd respondent. He stated that the assets and stocks which were purchased from Mr Williams were purchased by Ms Wallace in her personal capacity. Subsequent to the execution of the agreement, she formed the 2nd respondent. It was argued that the 2nd respondent is therefore a repository for Ms Wallace's assets and stocks.

[31] Counsel stated Ms Wallace financed the purchase of the assets and stocks by way of seller financing. She was the party to that agreement and not the 2nd respondent. Therefore, when she incorporated the 2nd respondent she used it as the vehicle to carry out the business of selling the stocks. It was submitted that, as the assets and stocks were financed by a loan by Ms Wallace, it is arguable that the 2nd respondent holds the assets and stock on trust or as her nominee.

[32] Counsel contended that, in any event, Ms Wallace is the majority shareholder holding 70% of the issued share capital of the 2nd respondent. Her son is the minority shareholder holding the remaining 30% of the shareholding. They are both directors of the 2nd respondent. Ms Wallace therefore has a controlling majority and controlling interest in the 2nd respondent.

[33] It was submitted that Ms Wallace, being aware of the judgment has refused to pay. Further, since she does not have sufficient assets in her name or sufficient funds

in the bank, it is reasonable to assume that she is taking steps to put her assets beyond the reach of the court to render the judgment empty.

[34] Mr Neal stated that the only known assets of Ms Wallace are the assets and stocks that the 2nd respondent is in possession of. He asserted that as majority shareholder, Ms Wallace is free to deal with the assets and stock of the 2nd respondent. He argued that her continued disposal of the assets in the ordinary course of business of the 2nd respondent will diminish the value of her shares and the assets available to satisfy the judgment. He stated that Ms Wallace would be benefitting from the sale of the stocks by the 2nd respondent.

[35] It was contended that Ms Wallace has access to the assets and stocks even if the 2nd respondent is not a nominee. This is by virtue of Ms Wallace's entitlement to dividend or her ability to put the 2nd respondent in liquidation as posited by the learned author of Gee on Commercial Injunctions. There is therefore good reason to suppose that the assets of the 2nd respondent can be reached by one route or another and made compulsorily available to satisfy the judgment.

[36] It was pointed out that incidental to the granting of the freezing order in relation to the 2nd respondent is the appointment of a receiver to take possession and control of stocks and assets with a view to their disposal to satisfy the judgment. It was submitted that the court ought to appoint the receiver proposed by Mr Williams on such terms as the court considers just.

[37] It was further submitted that given that this is a post-judgment relief where the issue of liability is no longer extant and Mr Williams becomes immediately entitled to the fruits of his judgment, the court should therefore dispense with the giving of security by the receiver.

The 1st and 2nd respondents' submissions

[38] Mr Foster, QC submitted that no evidence has been presented by Mr Williams to show there is a real risk of dissipation of assets. He pointed out that the company

is no longer operating and the business assets subject to the Purchase of Business Agreement have been secured and no sales are taking place.

[39] Learned Queen's Counsel contended that there has to be compelling evidence before the court which it can use to objectively assess that there is a real risk of dissipation; and no such evidence exists. He contended that it is speculative to say based on what is before the court that a real risk exists.

[40] Mr Foster argued that this application has been rendered obsolete in view of the orders made by Laing J and there is no evidence that-that order has been breached. He submitted that there are layers of orders that offer the protection that Mr Williams needs.

[41] With respect to granting a freezing order over the assets of the company, Mr Foster submitted that certain requirements must be satisfied:

(i) The company has to appear to be holding assets to avoid execution of the judgment;

(ii) There has to be evidence of a risk of dissipation by the conduct of the party

[42] He submitted that in situations where assets are apparently the property of a third party, the jurisdiction should be exercised with caution, restraint and appropriate respect for the legitimacy of the third party.

[43] Mr Foster reiterated that there is no evidence to support Mr Williams' application. He also relied on the case of **Hasheba Development Company Limited v Petroleum Corporation of Jamaica Limited et al** [2021] JMCC. Comm. 10 ('Hasheba Development Company Limited').

Analysis

[44] Section 49 (h) Judicature (Supreme Court) Act confirms the court's power to grant injunctions (of which the freezing order is an example).[5]

[45] Rule 17.1(1) of the CPR, as amended, also provides that the court may grant interim remedies including:

> *"(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;"*

[46] With respect to post-judgment freezing orders, some of the cases which have been cited by Mr Neal clearly establish the court's ability to grant such orders.

[47] In **Orwell Steel Ltd v Asphalt Ltd** (supra) Farquharson J declared at page 1100:

> *"…there seems to be no logical reason why a Mareva injunction should not be used in aid of execution. Indeed in one sense it could be said that there is greater justification for restraining a defendant from disposing of his assets after a judgment than before any claim has been established against him."*

[48] In **Hasheba Development Company Ltd**, Laing J, when discussing the law relating to freezing orders, said:

---

[5] See Broad Idea International Ltd v Convoy Collateral Ltd (British Virgin Islands); Convoy Collateral Ltd v Cho Kwai Chee (also known as Cho Kwai Chee Roy) (British Virgin Islands) [2021] UKPC 24 paragraphs 11-21, 48, 49, 88, 89.

> *"[29] A freezing order may be granted prior to the trial or at any stage of a claim. It is therefore not disputed that the Court has the jurisdiction to grant a freezing order post judgment in support of execution. In the case of* ***Orwell Steel v Asphalt & Tarmac (U.K.) Ltd*** *[1984] 1 WLR 1097, Farquharson J found that there is a power to grant an interlocutory injunction between final judgment and execution and there was no logical reason why a Mareva injunction should not be used in aid of execution."*

[49] He also said:

> *"[31] The Mareva injunction temporarily freezes assets which are required to satisfy a judgment which has already been obtained or an expected judgment. The purpose of such "freezure" (per Lord Denning in* ***Z Ltd v A-Z*** *supra) is to prevent their dissipation within or removal from the jurisdiction of the Court. It is trite law that it gives the plaintiff no security over the property frozen and does not give a charge in favour of any particular creditor. Its purpose is to maintain the integrity of the Court process by preventing the Defendant from making himself judgment proof."*

[50] Some of the cases cited by counsel clearly establish that the court's orders may, in certain circumstances, extend to third parties. In **Mercantile Group (Europe) A.G. v Aiyela et al** (supra), Sir Thomas Bingham MR said, at page 1124:

> *"…for if the jurisdiction did not exist the armoury of powers available to the court to ensure the effective enforcement of its orders would in my view be seriously deficient. That is in itself a ground for inferring the likely existence of such powers, since it would be surprising if the court lacked the power to control the wilful evasion of its orders by a judgment debtor acting through even innocent third parties. The jurisdiction is of course one to be exercised with caution, restraint and the appropriate respect for the legitimate interests of third parties. But that the jurisdiction exists both in relation to the disclosure order and the Mareva injunction, I do not doubt."*

[51] There is no dispute in respect of these matters; therefore, I need not discuss them in any greater detail.

[52] In **Hasheba Development Company Ltd**, Laing J explained what an applicant must demonstrate before the court can grant a freezing order. He stated:

> *"[34]…One of these fundamental principles to which I have repeatedly made reference,* ***is that the Applicant for a freezing order must demonstrate a real risk that the Defendant will dissipate his assets so as to deprive the Claimant of the fruits of his judgment. This must be done by solid evidence****...." (Emphasis added)*

[53] I will therefore turn to the affidavits filed in the matter. In his July 27 affidavit Mr Williams stated that he obtained judgment on his claim for breach of contract. He stated that Ms Wallace purchased assets from him in her personal capacity. He then indicated that subsequent to the execution of the [purchase of business] agreement and the delivery of the assets and stocks to Ms Wallace, she incorporated the 2nd respondent. Mr Williams averred that the assets being sold by the 2nd respondent are those which Ms Wallace purchased from him.

[54] Mr Williams further stated that in seeking to enforce the judgment he was able to locate a property which Ms Wallace is registered as a joint proprietor; that property is now subject to a provisional charging order but it will not be sufficient to satisfy the judgment. He then revealed that he obtained a provisional attachment of debt order which was served on 6 banks. He divulged that Ms Wallace only had accounts at 2 banks and the funds in those accounts are insufficient.

[55] Mr Williams stated that Ms Wallace is the majority shareholder and the alter ego of the 2nd respondent. According to Mr Williams, she has a right in or is otherwise beneficially entitled to the assets and stocks of the 2nd respondent.

[56] Importantly, at paragraph 14 he stated:

> *"The 1st Respondent has refused to settle the judgment. I have not been able to trace any other property that belongs to her. The vehicle that she drives is not registered in her name.* ***The 1st Respondent not having any money in her bank accounts in circumstances where she is operating a business has caused me to fear that***

> ***she has put her assets beyond the reach of the court to stultify the judgment****." (Emphasis added)*

[57] He then stated:

> *"15. The Respondents' continued disposal of the assets and stocks in the ordinary course of business of the 2nd Respondent will amount to a diminution in the value of the shares of the 1st Respondent and will frustrate or defeat the judgment. Further, the 1st Respondent would be benefitting from the sales made by the 2nd Respondent and I do not know where she puts the money."*

[58] Mr Williams' July 27 affidavit was filed prior to certain orders of the court. Paragraph 5 of Ms Wallace's evidence, outlined hereunder, will serve as a refresher of memory regarding the series of events.

[59] Ms Wallace's evidence, in part, is as follows:

> *"5. The Claimant obtained a summary judgment against me as stated in paragraph 3 of his Affidavit. However, I was granted leave to appeal the said judgment on August 13, 2021 by order of the Honourable Justice Laing. The Judge also granted a stay of execution of the summary judgment and imposed the following conditions…I verily believe these conditions are more than adequate to meet the concerns (though unfounded) which the Claimant has raised on his application.*
>
> *…*
>
> *7. I have also complied with the other condition of the August 13, 2021 Order in that I immediately ceased selling the stocks purchased from the Claimant and will not engage in any further sales until I am granted permission from the court to do so. The stock is presently being kept securely in the stores from which I previously operated and I have locked and placed a closure sign on the doors to the stores. I have no intention of disposing of the said stocks in any way and will keep them securely stored until the court directs otherwise.*
>
> *…*

> *13. I still have a significant portion of the stock received from the Claimant as I was only able to sell a very small portion of it over the period. It is currently being secured in compliance with the order of August 13, 2021 in the shops which are now closed…There is therefore no basis to fear any depletion of the stock as asserted by the Claimant in his affidavit.*
>
> *…*
>
> *22….In any event, the Claimant is free to inspect and verify the stock inventory currently being secured in compliance with the order of August 13, 2021…"*

[60] In Mr Williams' September 1 affidavit, at paragraph 12 he stated that he fears that Ms Wallace has taken steps to put her assets beyond the reach of the court which is evident in her having insufficient funds in her accounts after the entry of the judgment. He indicated that his fear is borne out by the fact that in addition to being director and majority shareholder in Century Sales 2020 Limited, Ms Wallace deposed that she is a shareholder, director and Chief Operating Officer of TK Financing Limited. He stated that his investigation also revealed that Ms Wallace is also a shareholder and director of a company called KB Sitrof Financial Services Limited.

[61] He then stated:

> *"14. In the circumstances, it is just for the court to freeze the assets of the 1st Respondent outside of that which is already subject to the provisional charging order pending the outcome of the appeal. Further, even though the business has been ordered closed by the court, the Respondents are free to operate the bank accounts as those are not made subject to the order of the court. The Respondents are therefore free to deal with those accounts. Therefore, I believe it would be just for the court to cause the Respondents to disclose the 2nd Respondent's bank accounts and make them the subject of a freezing order."*

[62] In my judgment, the evidence presented by Mr Williams conveys his fear that assets will be dissipated but this is not sufficient.[6] He has pointed to the lack of funds in Ms Wallace's bank accounts despite her claim that she has been operating her own businesses in Jamaica for approximately 4 years.

[63] According to Ms Wallace, she has conducted her business, financial and personal affairs with a measure of stability and consistency over an extended period of time and particularly since she has been in business.

[64] It is my understanding that, in light of these statements, Mr Williams believes that her bank accounts should look less barren. Mr Williams also pointed to the different companies to which Ms Wallace is connected.

[65] In my view, this does not constitute solid evidence that there is a real risk that Ms Wallace will dissipate assets. In the absence of evidence regarding her account activity (which could show if there has been any recent transfer of funds), it is difficult to arrive at the conclusion that Ms Wallace had flourishing accounts which were substantially depleted in an effort to avoid execution of the judgment.

[66] Ms Wallace's statement that she has conducted her business, financial and personal affairs with a measure of stability and consistency over a period of time, arguably, implies a healthy financial state but this court is not in a position to objectively assess whether Ms Wallace is indeed financially savvy. Many will agree, that someone who, from all outward appearances, should be doing well financially, may not be doing well.

[67] Furthermore, an individual's involvement with companies does not necessarily mean that he or she is financially well off or that the alter ego theory is applicable (which enables the court to freeze the assets of those companies). Notably, there

---

[6] See the 4th edition of the text 'Mareva Injunctions and Anton Pillar Relief' by Steven Gee QC, the last paragraph on page 197

is no documentary evidence before the court regarding the profitability of the companies.

[68] It is important to take a closer look at some of the cases. In the **Orwell Steel Ltd** (supra) case, Farquharson J simply stated that the plaintiff was aware that the defendant owned a number of asphalt laying machines and vans and according to the evidence there was a reason to believe that the defendant would dispose of those vehicles and its other assets by transferring them to another company in order to avoid execution on them. The learned judge did not speak in detail about the evidence.

[69] In **Mercantile Group (Europe) A.G. v Aiyela et al** (supra) the plaintiff discovered that the defendant, Mr Aiyela, was channelling his income, including a $3,000,000.00 commission for negotiating a Nigerian fertiliser contract on behalf of an American corporation, to an undisclosed company which he controlled.

[70] Further, a High Court judge, had made an order requiring the defendant's wife, Mrs. Aiyela, to provide detailed financial information about herself and her husband. She was required to give particulars of the companies or trusts which she or her husband had caused to be formed and the assets which they held, her own and her husband's bank accounts, credit card accounts, properties, motor cars and other chattels. In response to this order Mrs. Aiyela gave certain information but did not disclose accounts with the Midland Bank in Tolworth, Surrey in her name and that of a company which she controlled. Interestingly, a payment had been made into her account from Nigeria on the instructions of the defendant. The defendant, in this case, also evaded service.

[71] In **T.S.B Private Bank International S.A** (supra) there was evidence that the defendant and his wife had left the jurisdiction and did not appear to have any intention of returning. Additionally, there was no evidence as to what to the defence was or any evidence in respect of the defendant's assets and his relationship with various companies.

[72] Mummery J said:

> *"There is no evidence from [the defendant] as to what defence he intends to raise. He lived in England, for a period (I do not know how long), until the demand was made on him on the guarantee. Very soon after the demand was made on him he left England for India, apparently for good. He has not complied with the order which I made for disclosure and affidavit evidence as to the company's assets."*[7]

[73] Mummery J, on page 237, conducted an analysis of the evidence before the court regarding dealings with a specific property and its ownership, (which shifted from the defendant to a company); this, the learned judge said, supported the claims that in substance the assets of the company were the assets of the defendant and that the defendant appeared to organise his affairs through a complex structure of companies, in such a way that all assets within the jurisdiction were held via companies and the companies or the subsidiaries were merely agents or nominees of the defendant.

[74] In **T.S.B Private Bank International S.A**, the defendant also refused to inform the plaintiff of his current address because he was of the view that such information would likely be used by the plaintiff in order to pursue him at that address.

[75] In some of the cases where a post judgment freezing order was granted, it had been shown that the respondent was a person willing to produce false documents (forgeries); had recently transferred shares (funds or property); had disobeyed court orders; or had exhibited a pattern of evasiveness about his assets. These are, of course, just some of the factors which may be taken into account in assessing the likelihood of dissipation[8].

---

[7] At page 239

[8] See Griffin Underwriting Ltd v Verouxakis [2021] EWHC 226 (Comm). See also the 4th edition of the text 'Mareva Injunctions and Anton Pillar Relief' by Steven Gee QC, pages 195 to 199

[76] In this case, in deciding whether a freezing order should be granted it is important to consider whether or to what extent the assets are already secured or incapable of being dealt with. I have found myself in agreement with Mr Foster's submissions that Laing J's August 13 order provides some protection to Mr Williams. In his July 27 affidavit Mr Williams expressed concerns about the continued disposal of the assets and stocks in the ordinary course of business. As previously mentioned this affidavit precedes Laing J's orders; and the learned judge's orders address this issue. Ms Wallace's evidence regarding her compliance with the order has not been challenged and she indicated that she still has a significant portion of the stock she received from Mr Williams as she was only able to sell a very small portion of it over the period.

[77] Mr Williams stated that the respondents are free to operate the bank accounts as those are not made subject to the order of the court. He alleged that Ms Wallace is the alter ego of the 2nd respondent.

[78] If a court finds that a company and its shareholder are alter egos it concludes that, in reality, they have a single personality. In these situations, there is usually a disregard of the corporate form. Some tell-tale signs include the use of alleged corporate funds or other property for personal purposes, commingling corporate and personal funds, shuttling funds between personal and corporate accounts, using the corporation as a "shell" to advance personal rather than corporate interests, and otherwise abusing the corporate form.

[79] In determining whether the alter ego theory applies, the court often evaluates the total dealings between shareholder and the company; and, to reiterate, the court is generally assisted by evidence which answers the following:

(a) *Whether corporate formalities have been followed and to what degree;*

(b) *Whether company and individual property have been kept separate and to what degree;*

(c) *The amount of financial interest, ownership, and control the individual has over the company;*

(d) *Whether the company has been used for personal purposes.*

[80] The evidence, in my view, is insufficient to determine that the alter ego theory applies. I cannot confidently conclude that Ms Wallace is acting as a living embodiment of the 2nd respondent.

[81] Mr Neal did bring the court's attention to the 7th edition of Commercial Injunctions by Steven Gee QC; the learned author, at pages 484 to 486, noted:

> *"Where the circumstances show collusion between the defendant and the third party or impropriety involving the third party, or some participation, on the part of the third party, in attempts by the defendant or the judgment debtor to render itself judgment proof, or a risk of dissipation of the assets of the third party which otherwise might be reached for satisfaction of the judgment, then it may be appropriate for a freezing order to be granted against the third party itself. Such order does not involve any "piercing of the corporate veil."*
>
> *Examples where the jurisdiction may be usefully exercised are:*
>
> 1. *The defendant to the substantive claim has caused assets to be held by or vested in a third party who is acting as a nominee for the defendant. The nominee is simply holding the assets which fall within the scope of "his assets," i.e. assets owned beneficially by the defendant.*
>
> 2. *The non-party is a debtor or "banker" or has some form of liability to the defendant which is or will be enforceable. This may be for example on a pre-existing loan, the advance being unrelated to the judgment debt. Where there is no risk of dissipation on the part of the third party of its assets and the relationship between the judgment debtor and the third party is at arm's length, the court may still freeze the proceeds of the loan. Where there is evidence that the judgment debtor controls the third party and there is a risk of dissipation established against the*

judgment debtor and the third party the assets to be frozen are those of the non-party for the non-party's liability to the defendant.

3. *The defendant has some right in respect of, control over, or other right of access to the assets, and there is good reason to suppose that the assets can be reached through one route or another and made compulsorily available to satisfy the claim or a judgment based on it. If a defendant has set up or operates a network of off-shore trusts and companies to hold assets over which he has de facto control this can be an appropriate case for the granting of Mareva relief against the relevant non-party, pending inquiries into whether the assets can be compulsorily applied to the claim. The non-party may be engaged in a scheme with the defendant and associated persons or entities to strip out the assets so as to defeat enforcement of a judgment against the defendant, which may subsequently be challenged enabling the judgment to be satisfied. There may have been a transfer of assets by the defendant to the third party liable to be set aside under s 423 of the Insolvency Act 1986.*

4. *If the defendant is a shareholder in a private company and were left free to deal with assets of the company this could affect the value of his shareholding and could diminish the value of his assets. This may justify an order requiring prior notice of dealing with the company's assets or an injunction restraining dealings with the company's assets, albeit that the company is a third party. Where the defendant owns 100 per cent of a company beneficially it might be that those assets are held by the company as a nominee or trustee for him because they have been acquired using the defendant's money and there is a resulting trust…*

5. *Even if the company is not a nominee, the defendant has access to the company's assets through distributions made to him as a shareholder or through placing the company in liquidation or obtaining a dividend. The claimant also has access to the benefit of the assets of the*

> *company through execution on the defendant's shares in it, which can be realised by sale. The same might be done after judgment by a receiver appointed over the shares in aid of enforcement of the judgment. This route can be protected by a Mareva injunction."*

[82] Whilst the passages convey that the court is vested with a broad discretion in respect of whether a freezing order can be granted against the third party, the learned author was careful to point out that each case is fact sensitive.

[83] A freezing order is an equitable remedy which is granted at the court's discretion and the appropriateness of the order should be treated as a question turning on all the facts in the individual case.

[84] Having regard to the evidence before me and the August 13 orders of Laing J[9], I will not grant a freezing order and I will not order that a receiver should be appointed, pursuant to rule 51.2 of the CPR, to take possession of the assets of the 2nd respondent. Since Mr Williams has not satisfied the court that there is a real risk of dissipation there is no basis upon which I can grant a freezing order.

[85] That being said, Ms Wallace indicated that she has been complying with the orders of Laing J and she has no intention to act without the permission of the court. If the business has been closed, I do not see why it should be an issue to disclose the names of all financial institutions whether within or outside the jurisdiction where the 2nd respondent holds accounts. I do not see the prejudice or unfairness that the respondents would suffer if ordered to disclose.

[86] The evidence is that the 2nd respondent was incorporated after the execution of the purchase of business agreement[10]. If it has a bank account (s), is it likely that its bank accounts also came into existence after the incorporation? Perhaps. Ms

---

[9] Which includes a stay of execution
[10] The agreement was executed on June 15, 2020

Wallace deposed that she was only able to sell a small portion of the stock. I do not know where those funds ended up. So, until the appeal is determined, the court urges the respondents not to deal with any monies in the bank accounts in the name of the 2nd respondent without 3 days' notice being given to Mr Williams' attorney-at-law.

Conclusion

[87] Having regard to the foregoing, my orders are as follows:

(i) The applicant's notice of application filed July 28, 2021 is partially refused

(ii) The respondents ought to disclose by affidavit evidence the names of all financial institutions whether within or outside of the jurisdiction where the 2nd respondent holds bank accounts. This should be done within 48 hours of the service of this order

(iii) Costs awarded to the Respondent to be apportioned 65% of the costs, with 35% to the Applicant, to be taxed if not agreed.