

IN THE COURT OF APPEAL, FIJJI ISLANDS
AT SUVA

CIVIL ACTION NO. ABU0035 OF 2008

[Lautoka High Court Action No. HBC 357 of 2007]

BETWEEN : SILVER BEACH PROPERTIES LTD. *Appellant*
AND : SAIJAD JAWAN *Respondent*

Counsel : S. Maharaj for the Appellant
D. Samusamuvodre & S. Sharma
for the Respondent

Date of Hearing : 30th September 2008
Date of Ruling : 26th January 2009 (In Open Court) - 9.00am

R U L I N G

[1] **Background**

On the 11th of June 2008 Phillips J. in the High Court at Lautoka dissolved a Mareva injunction which she had granted on the 30th of November 2007 and subsequently extended. On the 17th of June 2008 I granted ex-parte on behalf of the Appellant Orders as follows:

- i) **Staying all orders made on the 11th of June by Phillips J.**

ii) That the Respondent be restrained from transferring, dealing with or in any way disposing of or removing from the jurisdiction, any of his property money or assets over which he has ownership or control within the jurisdiction of this Court including:

a) Residential Property contained in Crown Lease No. 12965 L/D Reference 4/11/1715.

b) Motor Vehicle Registration No. S. J. Khan.

c) Ten rental cars (registration numbers provided) registered with the Land Transport Authority as Saijad Jawan trading as Power Rentals.

d) Substantial moneys in Westpac Bank Account Nos. 538609-40, 980148738 and 9801519373 at Sigatoka or elsewhere in Fiji.

e) Substantial Fiji National Provident Fund saving under FPNP No. 1424202

iii) That the Respondent forthwith disclose and within 14 days after service of the order on

him make and serve on the Appellant's solicitors an Affidavit disclosing the full value of all and each of his assets within the jurisdiction of this Court identifying with full particularity the nature and whereabouts of all such assets and whether the same be held in his own name or jointly or by nominees such as his wife or children or companies on his behalf and particularly specifying:

a) The identity of all banks, financial institutions or other accounts held in his name or names either jointly or by nominees on his behalf and the balance of each of such accounts and the name and address of the branch at which it is held.

b) Any other assets, money or goods owned by him and the whereabouts of the same and the names and addresses of all persons having the possession, custody or control of such assets, moneys or goods at the date of service of this order.

iv) An order that all the trading Banks in Fiji provide to the Appellant access and liberty to inspect and take copies of any entries in the Bankers books relating to all Bank accounts

held by them in the name of Saijad Jawan also known as Saiyed Khan and also known as Saijad J. Khan and his wife and/or children pursuant to Section 7 of the Bankers' Books Evidence Act Cap. 45.

- v) That there be an Order restraining the Respondent from withdrawing any moneys from any of the Banks within the jurisdiction of this Court.
- vi) That copies of all Orders made be served on all the Banks within the jurisdiction of this Court to give effect to Orders (ii), (vi) and (v) above.

[2] On the 10th of July 2008 the Respondent's former solicitors issued a Notice of Motion inter-partes seeking an interim stay of all the Orders which I made on the 17th of June 2008 and that the Appeal filed by the Appellant be listed as an inter-partes hearing.

[3] I confess not to be able to understand the purpose of the second order sought. In any event it is not necessary to concern myself with that question because on the 27th of June the Respondent swore and filed an Affidavit in answer to that of Robert Uma Sen the Regional Financial Controller of the Appellant disputing most of the allegations made by Mr Sen in his Affidavit of the 10th of June 2008 in support of the motion on which I made the ex-parte orders referred to above.

- [4] I have not yet given a Ruling on whether I should maintain the orders I made ex-parte in favour of the Appellant because on the 8th of July 2008 the Appellant filed a Notice of Motion inter-partes seeking leave to issue an order of Committal for contempt of Court against the Respondent.
- [5] The Appellant alleged that the Respondent had failed to file an Affidavit disclosing the full value of his assets and that between the 19th of June 2008 to the 3rd of July 2008 the Respondent also failed to file an Affidavit indentifying all his bankers and all other information relating to moneys held by him or in the name of his wife, children or nominees in various banks.
- [6] The matter came before me inter-partes on the 22nd of July 2008 when I ordered the Respondent to file and serve an Affidavit as to his assets and liabilities by the 24th of July 2008 and gave leave to the Appellant to file an Affidavit in reply by the 29th of July 2008.
- [7] The Respondent complied with my order and purported to list his assets and liabilities.
- [8] The Appellant disputes this for reasons set out in an Affidavit which Mr Sen swore on 5th of August 2008. The Affidavit consists of 10 paragraphs and at least 85 annexures. That is my count of them although I should add there may be one or 2 omissions to that number. When one adds to that the Affidavits filed on behalf of the Respondent with their numerous annexures and the citation of cases by both parties, I estimate that I have spent at least 12 hours so far in the preparation of this Ruling. I am compelled to say that much of that time was unnecessary because if the parties

had shown any willingness to attempt to settle this case, which it is obvious they have not, but which in my opinion cried out for discussions or even mediation, much of the time I have spent would have been unnecessary.

- [9] Of course I realise that the parties are entitled to have their case heard by the Full Court of this Court but my comment refers really to the length of the proceedings until now. I venture to suggest that if the High Court had power to require the parties to submit to mediation by a properly qualified mediator before an action could proceed, the Court's and the parties' time could have been much more usefully employed.

[10] **The Present Motions**

A reasonable observer of these proceedings to date might wonder whether it was possible for the parties to engage in any further interlocutory proceedings in this Court. The answer to that observer is, yes because on the 5th of August 2008 the Respondent issued a Notice of Motion seeking the following orders:

- i) **That the Respondent be granted leave to withdraw the sum of \$100,000.00 (one hundred thousand dollars) from the \$212,000.00 (two hundred and twelve thousand dollars) held at Westpac Banking Corporation Sigatoka Branch in Account No. 9801519373 jointly in the name of the Respondent and his wife and that the said**

money be invested by the Respondent in his rental car business.

- ii) That the Respondent be granted leave to either transfer or invest his private motor vehicle registration number S J Khan into his rental car business.
- iii) That the Mareva injunction order against the Respondent's private motor vehicle be temporarily stayed and that the Respondent be allowed to use his motor vehicle in the rental car business.
- iv) That the other Mareva injunction orders continue until the substantive appeal is determined by this Court.

[11] Not to be denied, on the 16th of September 2008 the Appellant issued a Notice of Motion seeking the following Orders:

- i) That the Respondent appear before this Court for the purposes of oral examination and cross-examination in respect of his assets and other properties, moneys held by him for his nominees and also be cross-examined on all of the Affidavits sworn and filed herein.
- ii) That there be abridgement of time of day for the service and hearing of the application.

iii) That the costs of the application be paid by the Respondent on an indemnity basis.

[12] The Appellant's application was supported by two Affidavits of Robert Uma Sen filed on the 17th of June and 5th of August 2008 and an Affidavit in Reply by Tammie Tam filed on the 18th of September 2008.

[13] **The Oral Examination of the Respondent**

On the 30th of September 2008 the Respondent appeared before me and was cross-examined by counsel for the Appellant on his assets and his Affidavits.

[14] The Respondent stated that he had worked for the Naviti Resort as its Financial Controller and in that capacity also for a property which the Appellant bought in Vanuatu. He was the Financial Controller of the Appellant from May 2002 to October 2007. He began employment at the Naviti Resort in 1989 as an Accounts Clerk and was promoted to Financial Controller eventually. The Head Cashier and one Lellie Laulau who was the payroll clerk worked under him. He said Robert Sen was the original Financial Controller. At a farewell function in October 2007 Mr Sen was present with other people. The Respondent denied telling Mr Sen that he was buying a house in New Zealand and that he owned any properties in New Zealand. He agreed that he had visited New Zealand where he had friends and family and for medical check-ups. He has a multiple visa for New Zealand as does his wife which enables him to go there at any time. He did not remember being

called to the office of Jamal Sen the General Manager of Warwick International in the South Pacific to explain certain things relating to his employment as Financial Controller.

[15] He stated that he owned a house in Olosara which was mortgaged to the ANZ Bank but owned no land in Sigatoka. He does own a Rental Car business. He said that \$93,000.00 was owing to the ANZ bank on mortgage and the value of the property is \$200,000.00. He has ten cars in his Rental Car business and owes \$100,000.00 on them under a Bill of Sale to the ANZ bank. He said the valuation of his Rental Cars was \$180,000.00 and the average rental was between \$5,000.00 and \$6,000.00 per month.

[16] He repays approximately \$4,200.00 per month on the house and the Bill of Sale. He has two employees in the Rental Car business who carry out repairs and maintenance to the cars and he also pays \$500.00 per month to the Rental Car manager. He pays \$300.00 per month to the mechanic.

[17] He said he made no money from the business. He said he resigned from the Appellant because of his health. At the time of the employment with the Appellant he was earning \$64,000.00 per annum. He resigned in April 2007 after giving six weeks notice. The company asked him to stay on for a while because it could not find a suitable replacement. In July 2007 it got a suitable assistant Financial Controller and the company then asked the Respondent to train this person for six months on his normal salary just to help the company. He agreed and did so train the new appointee. He agreed that after the injunction was dissolved by Phillips J. in the High Court, he withdrew \$30,000.00 from his bank account. He

referred the Court to his supplementary Affidavit of the 4th of July 2008 where he gave details of what he spent of his various assets and liabilities. He agreed that when he was in New Zealand for eight days in November 2007 he withdrew almost everyday about \$800 New Zealand dollars. He also agreed that the bank deposit of \$212,000.00 and his Toyota Prado motor vehicle are the only two assets he possesses which are not encumbered. He said that he deposited all car rentals in his overdraft account. He said he had disclosed all this in his various affidavits. He said that he went to New Zealand because there are better medical facilities available but he did not want to settle there.

[18] In my opinion the Respondent was not broken in his cross-examination because he repeated only what he had said in his Affidavits.

[19] It was submitted by his counsel that so far the Appellant has not established any conduct of the Respondent to indicate that he is trying to dissipate the effect of the Mareva injunction.

[20] The cars in the business need replacing and he needs to use the money he wishes now to withdraw, namely \$100,000.00. Counsel pointed out that the original claim made by the Appellant was \$330,000.00 but this was reduced to \$256,000.00. Mr Samusamuvodre submitted that the withdrawal of \$100,000.00 by the Respondent would not have any effect on the Respondent's ability to meet a judgment should the Appellant be successful. He also submitted that to transfer the Toyota Prado motor vehicle into the rental business would not affect his ability to pay any judgment if the Appellant's appeal was successful. In replying to these

submissions Mr Maharaj said that it would be wishful thinking to accept the Respondent's claims because the Respondent's credibility is contingent on many factors. For example, said Mr Maharaj, the Respondent said that he made no money after the Rental Car business and yet he told the Court that he wishes to invest his private vehicle in this business. Surely if the business were not making any money there will be no need for the Respondent putting his own motor vehicle into it. Mr Maharaj pointed out the purpose of the Mareva injunction is to preserve the status quo and the purpose of the Respondent's application was to use his assets which are so far unencumbered. In reply to this Mr Samusamuvodre said that there has been no evidence contradicting the Respondent's claim that he was trying to dissipate his assets and that to say otherwise was clear speculation. The reason why the Respondent has made this application was to enable him to carry on his normal business, a right which the law on Mareva injunctions fully endorses.

[21] I find much force in the Respondent's submissions on the question of speculation. The main reason why Phillips J. dissolved the injunction was because she too considered that there was no force in the Appellant's submissions to her.

[22] **Ruling of the 11th of June 2008**

She stated at paragraph 8 that the Appellant's claim was premised on its allegation that the Respondent unlawfully in breach of his expressed terms and conditions of employment and in breach of a fiduciary duty to his employer stole and unjustly enriched himself in the sum of \$316,947.03. This, as I have just said, was

subsequently reduced by the Appellant. Phillips J. said, and I agree, that the Appellant equated the responsibility of ensuring the banking of company money to its allegation that this failure supports its contention that the Respondent misappropriated the moneys which were not banked. The Judge did not agree. She said, *"This is a quantum leap to say the least. Surely the Plaintiff (Appellant) was well aware of its own banking procedures during the period in which the Respondent was its financial controller. The Respondent would have been answerable to the General Manager. The internal and external audits of the Appellant's account would have or should have alerted the Respondent's superior officers of the short comings, if any, in its banking procedures. The Respondent's version of the Appellant's banking procedures has not been challenged by any credible evidence to the contrary. On the Respondent's version he was not responsible for banking of the company moneys. At this interlocutory stage it would be "precarious" (which I take to mean unwise), to arrive at any findings that just because he was overall in charge of the Accounting department he had misappropriated funds that are now missing. At this stage the accounts are still being audited. Even the Appellant accepts that the audit is still in progress"*. The Judge continued, *"More importantly the Appellant has disclosed in answer to the Respondent's affidavits that the Appellant itself engaged in the practice of withholding foreign currencies for the use by the company in order to save unfound exchange losses. The threshold requirement of establishing a good arguable case on its substantive claim has not been met"*. Again, I say I find much force in the learned Judge's reasoning.

[23] **Should I Grant the Orders Sought by the Respondent?**

I have said that the Respondent was not broken in cross-examination by the Appellant on the motion which I heard on the 30th of September 2008. That being so, on one view it would be unfair to deny the Respondent the order he requests of payment to him of \$100,000.00 from his \$212,000.00 deposit. On the other hand I am mindful of the fact that the core reason of the Mareva injunction is to preserve the status quo. This of course should not be of indefinite duration. So far the Respondent has impressed me as a credible witness. I am mindful of what Kerr L. J. said in Z Ltd. -v- A [1982] 1 All ER 556 at 571-72:

"[It is an abuse to use the jurisdiction] in circumstances where there may be no real danger of the defendant dissipating his assets to make himself "judgment proof" ... [Relief should only be granted where there are] reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, in whole or in part, but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him ... the great value of this jurisdiction must not be debased by allowing it to become something which is invoked simply to obtain security for a judgment in advance, and still less as a means of pressuring defendants into settlements".

[24] In Ninemia Corp -v- Trave Schiffahrts [1984] 1 All ER 398 at p.406, Mustill J. (as he then was) said:

"These dicta must be approached with some caution for the law and practice on the grant of Mareva injunctions has not stood still since the jurisdiction was first devised". The Judge then gave certain examples of this and continued at paragraph (h) *"Nevertheless, certain themes can be seen to run through the cases. It is not enough for the Plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms ..."*.

The Judge then gave some examples of these which I need not mention.

[25] The Appellant filed an Affidavit of Tammie Tam, the Executive Director of the Naviti Resort sworn on the 16th of September 2008 two weeks before the Respondent was cross-examined. In paragraph 7 Ms Tam says that *"The valuation reports provided are qualified"*. This is incorrect in that only one valuation report, that of Westate dated 12th April 2008, was provided by the Respondent and annexed to his Affidavit sworn and filed on the 24th of July 2008. In it the valuers state that their assessment is based on the unaudited financial accounts presented to them for the financial years ending 2006 and 2007 so, to that extent the report is qualified but then the remaining paragraphs of it paint an optimistic picture of rental car businesses. The report says this

scenario makes such investment ventures viable for such companies (i.e. Rental Car Companies).

[26] Tammie Tam then says that the Respondent has not provided any evidence of what income is received from the rental car business. This is simply not true because in paragraph 8 of the Respondent's Affidavit sworn on the 5th of August 2008 he gives details of the rental received from the business and of its liabilities.

[27] Under cross-examination Mr Javan said that the rental income average per month was \$5,000.00-\$6,000.00. It is true, as Ms Tammie says, that the Respondent has not so far produced the VAT returns or income returns to prove what moneys were received. He has also not produced any records to show how many vehicles were hired on rental although he claims all his ten vehicles were hired out.

[28] In paragraph 8 of her Affidavit Ms Tam says:

"That upon the dissolution of the injunctive orders by the Primary Judge, the Respondent without any delay, withdrew and dissipated the sum of \$30,000.00 from his bank account number 553860940".

[29] I find the use of the verb dissipate unnecessarily pejorative. I ask why, once the injunction was dissolved, was the Respondent not at liberty to spend the \$30,000.00 in any way he wished? He was no longer restricted by the Court order.

[30] In the next sub-paragraph Tammie Tam states:

“That the Respondent on the guise of using financial difficulties is attempting to dissipate the two only unencumbered assets, the term deposit and vehicle registration number S J Khan”. As I have said, I was impressed by the way the Respondent gave evidence on the 30th of September. Ms Tam then continues, “That once the Respondent is permitted to withdraw moneys from his term deposit and transfer his vehicle S J Khan for rental business, there is every likelihood that he will go overseas and dissipate the moneys there”. This is like so much of the Appellant’s case so far as I have said, pure speculation.

[31] Paragraph 8(vi) of Ms Tam’s Affidavit reads:

“That he has neither provided any documentation regarding his property in New Zealand nor has he denied that he has a property in New Zealand and there is every likelihood, that the Respondent once the funds are released, would fly away and settle in New Zealand to frustrate the Appellant in the execution of any judgment”.

[32] The Respondent denied this claim in his sworn evidence and as a matter of law the Court must accept it as true unless there is

evidence to the contrary. So far there is not. A similar comment applies to sub paragraph 8(vii) which states:

“That it is very evident that the Respondent is making every effort to dissipate his unencumbered assets, that are the moneys in term deposit and vehicle S J Khan so that in the end the Appellant is left with nothing”.

[33] I am far from satisfied that the Respondent is making every effort to dissipate his unencumbered assets. Phillips J. quoted part of a Decision of Gault J. who has been a member of the Court of Appeal and Supreme Court here, in 1989(1) PRNZ451- Bank of New Zealand -v- Hawkins. The Judge stated what an applicant for a Mareva injunction must show. I will not quote his remarks because they have been stated in various other forms in the many cases on this subject. However he said this, and it is worthy of re-iteration, ***“Mere assertion of belief that the Defendant might dissipate his assets, unsupported by solid ground justifying that belief, is insufficient. On the other hand, affirmative proof of likelihood of dissipation or of nefarious intent, is not necessary”.***

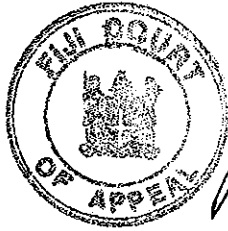
[34] I also do not agree with the allegation by Ms Tam about the Respondent's evasive attitude to disclosure of all material facts. The Appellant was given the opportunity to break the Respondent on his assertions that he had made full and frank disclosure and in my judgment failed to do so.

[35] It will be obvious from what I have said that I consider the Appellant's case as presented so far is lacking in any substantive

evidence of the likelihood of the Respondent absconding so as to defeat the Appellant. Once again I refer to the remarks of Kerr L.J. supra and particularly his statement that *"The great value of this jurisdiction must not be debased by allowing it to become something which is invoked simply to obtain security for a judgment in advance, and still less as a means of pressuring defendants into settlements"*. It must be remembered however that the main purpose of a Mareva injunction is to preserve the status quo. Accordingly I am prepared to grant the Respondent some of the relief which he seeks. I can see no real risk in allowing him to withdraw the sum of \$65,000.00 from the \$212,000.00 held in his Westpac Banking Corporation account at Sigatoka and this money be invested by the Respondent in the rental car business.

[36] I am somewhat hesitant however in allowing him to use his private motor vehicle S J Khan in the Rental Car business. This is a question of exercising my discretion and such questions always trouble Judges when the facts of a given case are, as I regard those in this case, fairly evenly balanced.

[37] The result therefore is that I order the Respondent be given leave to withdraw the sum of \$65,000.00 from the \$212,000.00 held in Westpac Banking Corporation Sigatoka branch account number 9801519373 but decline to grant the orders sought in the Respondent's Notice of Motion paragraphs 2 and 3. Costs will be in the cause.



John E. Byrne

[John E Byrne]

JUDGE

At Suva

26th January 2009

