IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

Civil Action No. HBC 188 of 2012

BETWEEN : **BEACHCOMBER ISLAND RESORT LIMITED** a limited liability company having its registered office at Lautoka.

PLAINTIFF

AND : **INTERNATIONAL FREIGHT AND CLEARANCE SERVICES LIMITED** a limited liability company having its registered office at c/- Shyam Narayan & Co, 1st Floor, Crown Investments Building, Nadi

DEFENDANT

AND : **BRENDAN LUKE HANNON** shareholder/director of Beachcomber Island Resort Ltd, Fineline Holdings Ltd and Anchorage Beach Resort, of Vuda, Lautoka.

1ST THIRD PARTY

AND : **TUBREN AIRFREIGHT CONSULTANTS** of Nayau Street, Samabula North, Suva.

2ND THIRD PARTY

AND : **FINELINE HOLDINGS LIMITED** a limited liability company having its registered office at 52 Narara Parade, Lautoka.

3RD THIRD PARTY

RULING

1. There are some interim mareva injunctive orders in place in this case against the first third party, Brendan Hannon. These were granted by Mr. Justice Sapuvida on the application of the plaintiff. Before me is an application by the plaintiff seeking the following orders.

    1. The Plaintiff and the 3rd Third Party through its directors and shareholders that includes the 1st Third Party, be restrained from disposing the shares or assets in the Plaintiff and the 3rd Third Party.

2. In the alternative as a condition of sale of the shares or assets in the Plaintiff and the 3rd Third Party, the Plaintiff, the 1st and the 3rd Third Parties be ordered to deposit the sum of $8.8 million into court or such sums as this Honourable Court deems just, to satisfy the Defendant's claim against them.
3. Such other orders as this Honourable court deems just and reasonable.
4. The time for service be abridged.
5. The costs of this application be paid by the plaintiff, the 1st and 3rd Third Parties on a solicitor client indemnity basis.

2. The onus is still on the plaintiffs at first *inter-partes* hearing to convince this Court that the *mareva* injunction granted *ex-parte* in their favour should continue as an interim injunction[1]. They must establish that they have a good arguable case and that there is a real risk that Hannon may remove or conceal his assets or deal with them so as to defeat their claim. Also, they must make a full and frank disclosure of all material facts known to them (including those unfavourable to their case). In addition to all that, the plaintiffs must give an undertaking in damages in case they fail on the merits of the action or the mareva injunction turns out to be unjustified.

A GOOD ARGUABLE CASE

3. "A good arguable case" is a higher threshold (of evidence) than that of "a mere arguable case" or that of the case of an interlocutory injunction under the **American Cyanamid** test[2].

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[1] The Fiji Court of Appeal in Westpac Banking Corporation v Prasad[1999] FJCA 2; [1999] 45 FLR 1 (8 January 1999):

When the matter comes back into the list, it will not be for the defendant to establish why the injunction should be dissolved. It carries no onus. Instead, the plaintiff has the task of persuading the court that the circumstances of the case are such as to require the injunction to be continued.

[2] In **Silver Beach Properties Ltd v Jawan** [2011] FJCA 48; ABU0042.2009 (29 September 2011) the Court would say as follows:

22. ....it is clear that the presence of a mere arguable case is not sufficient to issue a ***Mareva Injunction***. .... the standard of proof in establishing the presence of a *prima facie* case is always higher than the standard required in cases where the interlocutory **injunctions** are issued with the view of maintaining the *status quo* until a final determination is made.

23. This proposition is supported by the decision of Lord Donaldson, M.R in the case of **Polly Peck International Plc. v. Nadir and Others** (No.2)(1992) 4 All ER 769 at pp785-786. In that judgment His Lordship said:

4. But, while a *"good arguable case"* is a higher threshold than the **American Cyanamid** test, it (i.e. the *"good arguable case"* threshold) is still a notch below the standard required in a summary judgment application under Order 14 of the High Court Rules 1988[3].

HAS THE APPLICANT ESTABLISHED A "GOOD ARGUABLE CASE"?

5. I am of the view that the plaintiffs have established a good arguable case before me. As stated, they do not have to prove their claim clearly. Yet, they must do better than raise a *mere arguable case.*

6. The facts, which are mostly undisputed, from which the plaintiff's cause of action arise are as follows. Hannon was an employee of the third third-party which was a consultancy firm. The third third-party used to rent a portion of the premises owned by the plaintiffs. In another portion of that same premises, the plaintiffs were operating their business.

7. The plaintiffs apparently engaged the third third-party for their consultancy services.

"I therefore turn to the principles underlying the jurisdiction. (1) So far as it lies in their power, the Courts will not permit the course of justice to be frustrated by a defendant taking action, the purpose of which is to render nugatory or less effective any judgment or order which the plaintiff may therefore obtain. (2) It is not the purpose of a ***Mareva injunction*** *to prevent a defendant acting as he would have acted in the absence of a claim against him. Whilst a defendant who is a natural person can and should be enjoined from indulging in a spending spree undertakes with the intention of dissipating or reducing his assets before the day of judgment, he cannot be required to reduce his ordinary standard of living with a view to putting by sums to satisfy a judgment which may or may not be give in the future. Equally no defendant whether a natural or a juridical person, can be enjoined in terms which will prevent him from carrying on his business in the ordinary way or from meeting his debts or other obligations as they come due prior to judgment being given in the action. (3) Justice requires that defendant by free to incur and discharge obligations in respect of professional advice and assistance in resisting the plaintiff's claims. (4) It is not the purpose of a* ***Mareva injunction*** *to render the plaintiff a secured creditor, although this may be a result if the defendant offers a third party guarantee or bond in order to avoid such an* ***injunction*** *being imposed. (5) The approach called for by the decision in* ***American Cyanamid Co. v. Ethicon Ltd**[1975] UKHL 1; [1975] 1 All ER. 504, (1975) AC 396 has, as such, no application to the grant of refusal* ***injunction*** *which proceeds on principles which are quite different from those applicable to other interlocutory* ***injunctions****."*

[3] This point was made clear in **Third Chandris Shipping v Unimarine** [1979] 2 All ER 972.In that case, the Court at 975, cited **Rasu Maritima SA v Perusahaan Pertambangan** [1977] 3 All ER 324, [1978] QB 644, as, *inter alia*, authority that the granting of the relief of **mareva injunction**:

........should not be confined to cases strong enough for a judgment under RSC Ord 14. The plaintiffs need only show a good arguable case.

8. Apparently, somehow, by virtue of his position as an employee in the third defendant's consultancy firm, and because the said consultancy firm was involved in some aspects of the plaintiff's business, Hannon was allowed by the plaintiffs in some aspect of the management of the plaintiff's business. In that regard, Hannon was *inter alia* entrusted with blank cheques out of which he was entrusted to make payments after filling in the blank for the purposes of the plaintiffs' business operations.

9. Hannon however, over a period of time, would draw funds totalling over $8 million dollars. He then deposited these into the accounts of the first defendant, in which he has a major interest and also into his own personal account.

10. That Hannon made these payments is supported by the many bank statements adduced by the plaintiffs. Hannon does not appear to dispute these. Ms Lidise insists that just because the payments were made does not establish fraud on the part of Hannon.

11. In my view, all that the plaintiffs need establish at this interlocutory stage is that the payments were not authorised by the plaintiffs, or that the plaintiffs do not owe monies to the same amount to either the first defendant of the 1st third party and on account for which supposed debt the payments were purportedly made by Hannon.

12. I am of the view that the plaintiffs have established a good arguable case as such.

<u>APPLICANT'S BELIEF THAT DEFENDANTS ARE DISPOSING OFF THEIR ASSETS</u>

13. To determine "real risk of dissipation of assets", the Fiji Court of Appeal in **Silver Beach Properties Ltd v Jawan** [2011] FJCA 48; ABU0042.2009 (29 September 2011) underscores the need to examine the facts carefully:

> 24. ....Such an examination of the facts is necessary in order to ensure the satisfaction of a decree in the event the Court holds with the applicant in the main action. This requirement too, depends mainly on the facts placed before court by the respective parties.

14. As a starting point, I observe that Hannon is a Fijian. Having said that, I also note that even if he were not Fijian and were a holder of a foreign passport that in itself does not establish *per se* a real risk of dissipation of assets". The fact that a party against whom a mareva injunction is sought is a foreigner is, itself, not enough ground to raise a presumption that there is a serious risk of dissipation.

15. As Lord Denning said in **Third Chandris** (supra) at paragraph at page 985:

> The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgement or award is satisfied. The mere fact that the defendant is abroad is not by itself sufficient.

16. In my view, in special circumstances, the fact that a defendant is not a foreigner does not necessarily preclude a risk of dissipation. A Fijian is equally capable of disposing his assets offshore just as well as a foreigner.

17. There are some strong decisions that advocate the view that a "serious risk of dissipation" may be inferred from the facts raised at the "good arguable case" stage of the inquiry.

18. The type of evidence from which the court can make that inference was addressed in **Third Chandris** (supra). As Mustill J said at page 977 paras f to h:

> But what standard of proof is required? Counsel for the charterers argues that the plaintiff must show likelihood that his claim will prove fruitless if an **injunction** is refused. If likelihood involves the idea of "more likely than not", I consider that the level is pitched too high. In most cases the plaintiff cannot produce affirmative proof to this effect. All he can show is that a danger exists, and this is all that it seems to me the reported cases require. How does

he prove such a danger? Prima facie by demonstrating that the asset is present, that it is moveable and that the defendant is abroad. Of course this always leaves the possibility that the defendant can point to facts which demonstrate he is someone who can be relied on to meet his obligations. Conversely, the plaintiff may be able to give concrete instances of events which put the defendant's reliability specifically in doubt.

19. Hence, in a case where fraud or dishonesty is alleged, once a good arguable case is established that the defendant has acted fraudulently or dishonestly, it is hardly necessary to require specific evidence of risk of dissipation.

20. The same applies where an applicant has established a good arguable case of an unacceptably low standard of commercial morality if it gives rise to a feeling of uneasiness about the defendant. In **Patterson v. BTR Engineering (Aust) Ltd & Ors** (1989) 18 NSWLR 319 at 325 paras E to G, Gleeson CJ of the New South Wales Supreme Court commented obiter as follows:

> ....I consider that Giles J was correct in taking the view that the evidence as to the nature of the scheme in which the appellant was allegedly involved, which established a prima facie case against him, was such as to justify the conclusion that there was a danger that the appellant would dispose of assets in order to defeat any judgement that might be obtained against him and that such danger was sufficiently substantial to warrant the **injunction**. There is no reason in principle why the evidence which is relevant to the first of the issues earlier referred to might not have a bearing on the second, and this will especially be so where the prima facie case is made out against a defendant is one of serious dishonesty involving diversion of money from its proper channels. The present is not a case in which a plaintiff who claims simply to be an unsecured creditor seeks to prevent a dissipation of assets which have no particular connection with the claim in question. This is a case in which the plaintiff claims that the defendant, making use of a corporation controlled by him, fraudulently misappropriated a large sum of money which, if it is still under the control of the appellant, would be quite likely to constitute, directly or indirectly, the bulk of his assets. As Giles J held, the nature of the scheme in which, on the evidence to date, the appellant appears to have engaged, is such that it is reasonable to infer that he is the sort of person who would, unless retrained, preserve his assets intact so that they might be available to his judgement creditor.

21. In **Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft mbH & Co**, the judge said that:

> "It is not enough for the plaintiff to assert that the assets will be dissipated. He must demonstrate this by solid evidence... It may consist of direct evidence that the defendant has

previously acted in a way which shows that his probity is not to be relied on... Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there..."

22. In **Ang Chee Huat v. Thomas Joseph Engelbach**[1995] 2 MLJ 83,the Malaysian Court of Appeal took the view that the conduct of the appellant lacked probity and honesty. This, the Court held, supported a finding that there was a real risk of dissipation. Similarly, in **Amixco Asia Pte Ltd v Bank Negara Indonesia** [1992] 120 SLR 703, the Singaporean Court of Appeal accepted that there is a co-relation between objective evidence of prima facie dishonest conduct and the real risk of asset dissipation.

UNDERTAKING AS TO DAMAGES

23. I am satisfied with the plaintiffs undertaking as to damages.

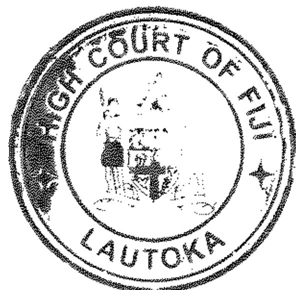
COMMENTS

24. Ms Lidise argues that Hannon has other real properties that can be offered up as security. She argues that Hannon had been at a stage of sealing a deal regarding the sale of his interest in Beachcomber Island Resort for the consideration price of over $22 million dollars when the mareva injunctions were granted ex-parte. Mr. Kumar has misgivings about their security value because most of these properties are either i-taukei leases or state leases. He is concerned about the lack of regulatory consent in this regard. Ms. Lidise argues that the deal is worth so much more than the amount that the plaintiffs are seeking.
25. Mr. Kumar argues that a bank guarantee would be sufficient to the amount of the claim.

26. Ms Lidise argues that the Hannon's bankers may not be in a position to give that guarantee to the amount of the plaintiff's claim just as yet. She further submits that the ex-parte orders granted and which are currently in place are only hindering the sale of Beachcomber Island Resort.

27. The best solution in my view is that Hannon be allowed to go ahead with the sale of Beachcomber Island Resort and that the amount of the plaintiff's claim be deducted from the proceeds of sale which is then to be held on trust in the account of Young & Associates until further order of this court. The mareva injunction is to continue to apply to Hannon's other assets and to be discharged upon the filing of an affidavit by Young & Associates confirming the deposit of the sum of FJD$8 million (FJD$8,000,000 -00) into its trust account out of the sale proceeds of Beachcomber Island Resort.

28. Parties to bear their own costs.



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Anare Tuilevuka
JUDGE
Lautoka

22 December 2016.