MERCHANT BANK OF FIJI LIMITED

v

GIRDHAR LAL RANIGA & ANOTHER

[HIGH COURT, 1993 (Fatiaki J), 29 July]

Civil Jurisdiction

Practice (Civil) - injunctive relief- extent of duty of disclosure- Mareva injunction- nature of writ ne exeat civitate- purpose of.

Upon application by the defendants for discharge of injunctive relief granted *ex parte* the High Court examined the nature of the Mareva injunction and the writ ne exeat civitate.

Cases cited:

Al Nahkel v. Lowe [1985] 1 Q.B. 235
Allied Arab Bank v. Hajjar [1988] 2 W.L.R. 942
American Cyanimid v Ethicon [1975] 1 All 504
Ashtiani v. Kashi [1986] 2 All E.R. 970
Babanaft Int. Co. v. Bassatne [1989] 1 All E.R. 433
Bayer A.G. v. Winter [1986] 1 W.L.R. 499
Brink's - Mat Ltd v. Elcombe [1988] 3 All E.R. 188
Felton v. Callis [1969] 1 Q.B. 201
House of Spring Gardens v. Waite (1985) F.S.R. 173
Republic of Haiti v. Duvalier [1989] 1 All E.R. 456
Third Chandris Shipping v. Unimarine [1979] 1 All E.R. 972
Westpac Banking Corporation v. Satish Chandra Suva Civil Action No. 356 of 1991.

Interlocutory application in the High Court

R. A. Smith for the Plaintiff
B.C. Patel for the Defendant

Fatiaki J:

On the 3rd of May this Court granted to the plaintiff company an ex parte order in the following terms:

> "1. Before departing from the jurisdiction the first-named Defendant Girdhar Lal Raniga provide the Plaintiff with a list of all his assets whether within or without the jurisdiction;

2. The first-named Defendant Girdhar Lal Raniga be restrained from removing from the jurisdiction or otherwise dissipating, charging disposing of or dealing with any of his assets within the jurisdiction save and unless there should remain within the jurisdiction free and unencumbered assets belonging to the Defendant to a total value of not less than $150,000.00 and that he shall deliver into the custody of the Sheriff until there should so remain within the jurisdiction free and unencumbered assets belonging to him to a total value of not less than $150,000.00, his passport and all passenger tickets held by him;

3. The Plaintiff be at liberty to issue a writ ne exeat civitate directed to the Sheriff of the High Court of Fiji and his deputy and all constables and other peace officers and all customs and immigration officers commanding them that in the event that the first-named Defendant Girdhar Lal Raniga should seek or attempt to depart from the jurisdiction of the High Court without having complied with orders made under 1 and 2 above and unless he shall give them security for $150,000.00 they should arrest him and bring him before a judge of the High Court forthwith or as soon as reasonably practicable."

The order also reserved to the parties liberty to apply generally on 2 days notice.

The order granted in terms what is commonly known as a "mareva injunction" an order for discovery, and leave to issue a writ ne exeat civitate which was duly issued 8 days later on the 11th of May 1993.

On the 13th of May the first defendant filed an Acknowledgement of Service and on the 18th of June, a Statement of Defence raising 7 grounds of defence to the plaintiff company's claim, and an application for the discharge of the above-mentioned ex parte orders supported by an affidavit personally sworn by the 1st defendant together with numerous annexures comprised of various security documents.

The written submissions of learned counsel for the 1st defendant which I found very helpful raise three grounds for the discharge of the ex parte orders, namely:

"(a) the plaintiff does not have a good arguable case;
(b) there is no real risk of dissipation or removal of assets; and
(c) the plaintiff has not made full and frank disclosure of material facts."

I can deal briefly with the first ground and in doing so I remind myself of the observations of Lord Diplock in American Cyanimid v Ethicon [1975] 1 All E.R. 504 at p. 510 when he said:

> "It is not part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. Those are matters to be dealt with at the trial."

In this case the plaintiff company which is principally concerned in the business of providing finance for the purchase of assets of various kinds under a hire purchase scheme alleges that through the fraudulent misrepresentations of the defendants that various named buyers had submitted deposits to their credit for the purchase of vehicles and by inflating the selling prices of the said vehicles, it was, contrary to its normal practice, fraudulently induced to provide 100% financing to each of the purchasers.

The defendants on the other hand deny any fraudulent misrepresentations and allege amongst others, negligence on the part of the plaintiff company's officers, estoppel and the provisions of the recently enacted Fair Trading Decree 1992.

Suffice it for present purposes to say that serious allegations of fraud depending as they do on the interpretation of contractual documents and the oral testimony of witnesses cannot be assessed, much less determined, on the basis of the opposing affidavits and raise serious questions to be tried.

There is no merit in this first ground.

As for (c) counsel complained that the plaintiff company had failed to make reasonable enquiries and search of public records which would have revealed the nature and location of the defendants' immovable assets in Fiji but more importantly that such assets were substantially encumbered.

Counsel submitted that the duty to make a full and frank disclosure in an ex parte application extends not only to facts known to the applicant at the time but also, in addition, to facts that "should have been known ... had he made all such inquiries as were reasonable and proper in the circumstances." (per Balcombe L.J. in Brink's - Mat Ltd. v. Elcombe [1988] 3 All E.R. 188 at 193).

Whilst this Court has no argument with the principle requiring full and frank disclosure in ex parte applications the critical words however must always be "... in the circumstances ...", so that the duty to disclose in each case must be decided upon its own facts without, in my view, striking too fine a balance between the extent and quality of the information known or available and the perceived urgency of the situation giving rise to the ex parte application.

The headnote to Brink's case (ibid) contains the following relevant passage dealing with non-disclosure in ex parte applications:

> "Whether a fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order ... depends on the importance of the fact to the issue to be decided by the judge on the application ... However, the Court has a discretion notwithstanding proof of material non-disclosure ... to continue the order or to make a new order on terms."

In this instance counsel for the plaintiff company submits that there was a genuine fear of the 1st defendant's imminent departure from Fiji and in the circumstances it would have been ridiculous to require the plaintiff company faced with such an emergency to go about collecting information or evidence that adds little (if anything) to what was already known and which might even endanger the objective of the ex parte application.

It is well to bear in mind the observation of Lord Denning M.R. in Third Chandris Shipping v Unimarine [1979] 2 All E.R. Of the nature of a mareva injunction in particular, where he said at p. 985:

> "In it speed is of the essence. Ex parte is of the essence. If there is delay, or if advance warning is given, the assets may well be removed before the injunction can bite."

Having considered the competing submissions and mindful that the 1st defendant has himself fully disclosed his assets within Fiji and also that the present proceedings are at the inter partes stage, at which this Court undoubtedly has a discretion to be exercised afresh on all the evidence available I am not satisfied that the plaintiff company's non-disclosure (if any) is so material as to warrant the summary discharge of the mareva injunction on this ground.

Needless to say the plaintiff company had sought and obtained an ancillary order for discovery of the 1st defendants' assets both within and without the (Court's) jurisdiction and even accepting that the 1st defendant's local assets were or might have been discoverable upon a search of public records, the same cannot be so easily said of his overseas assets of which perhaps the best available source of information would be the 1st defendant himself.

This brings me to a further submission of learned defence counsel in which complaint was made as to the breadth of the ex parte order for discovery.

Counsel's argument as I understood it was one based on principle not on hardship, absence of knowledge, self incrimination or any embarrassment that might be caused to the first defendant complying with the strict terms of the order for discovery.

Presumably therefore in principle the 1st defendant is quite willing to disclose

his assets in Fiji but not those outside Fiji even though as the order is presently worded there is no obligation on the 1st defendant to disclose anything until before departing from the jurisdiction.

Counsel for the first defendant in his written submissions referred extensively to Ashtiani v. Kashi [1986] 2 All E.R. 1970 in support of the broad principle that a mareva injunction should be limited to assets within the jurisdiction and any ancilliary order for discovery should be similarly restricted. In particular counsel referred to the 4 reasons advanced by Dillon L.J. for limiting an order of discovery to assets within the jurisdiction of the Court and to the judgment of Neill L.J. differentiating between a proprietary or tracing claim and one for general damages.

Three years later however in Republic of Haiti v. Duvalier [1989] 1 All E.R. 456, a differently constituted Court of Appeal accepted that the Court had, subject to sufficient safeguards, jurisdiction to grant a mareva injunction pending trial over assets worldwide even where the relief was sought in aid of a foreign monetary claim and not a proprietary claim.

Further in Babanaft Int. Co. v. Bassatne [1989] 1 All E.R. 433 Neill L.J. who was a member of the Court of Appeal in Ashtiani's case (op. cit) said at p. 449:

> "I am satisfied, however, that the Court has jurisdiction to grant a mareva injunction over foreign assets, and that in this developing branch of the law the decision in Ashtiani v. Kashi may require further consideration in a future case."

Needless to say the 1st defendant's assets and liabilities within the jurisdiction leave very little surplus (if any) which might be available to satisfy any judgment which the plaintiff company may obtain against him.

In the circumstances information of the nature and location of the 1st defendant's assets overseas takes on a quite different complexion and must figure more prominently in the exercise of this Court's discretion as to the ambit of any order for discovery that this Court might consider just, necessary and reasonable to make in support of the mareva injunction.

Hoffman J. pertinently observed of a not dissimilar situation in Bayer A.G. v. Winter (No. 3) [1986] F.S.R. 357 at 362:

> "If the effect of a mareva injunction is to secure an adequate fund in this country to meet the plaintiff's claim, there will of course be no need to look for assets abroad. Seeking protective measures in foreign jurisdictions would be merely oppressive. On the other hand, if (as in this case) the fund ... is inadequate, the plaintiff may have to resort to assets in other countries particularly those in which ... judgment would be enforced."

(approved by Kerr L.J. in Babanft's case (op. cit) at p. 467)

I am satisfied that a more limited extra territorial order for discovery is warranted in the circumstances of this case provided that some form of protection is also included in the order so as to prevent any misuse of the information or oppression of the 1st defendant.

Accordingly the order for discovery is amended to read:

> "(1) The first defendant Girdhar Lal Raniga do within 21 days of the date hereof file in Court and provide to the plaintiff an affidavit disclosing with particularity, the nature, value and location in New Zealand of all real and personal assets (including bank accounts) held in his own name or jointly with any other person or nominee or otherwise howsoever on his behalf; provided that the plaintiff shall, other than for the purposes of this action, not make use of any information so disclosed pursuant to this order without the prior consent of the defendant or leave of the Court."

I turn next to ground (b) which deals with the question of the real risk of dissipation of assets. In this regard the written submissions of learned counsel for 1st defendant describes the plaintiff's evidence in support of its claim as being "hearsay ... flimsy and completely discredited by the defendants' affidavit in reply."

The plaintiff company in an affidavit deposed by its manager annexed a copy of the relevant "Non-recourse Agreement" between the plaintiff company and the defendants dated the 1st of August 1990 together with 8 receipts dated in September/October 1992 evidencing the receipt of cheques as deposits by various named purchasers.

Finally the plaintiff company has deposed to various unanswered letters it has written to the defendants pointing out irregularities in certain transactions and requiring rectification and a telephone conversation in which the 1st defendant is reported to have clearly evinced his and his family's intention of leaving the country after disposing of various moveable assets.

In this latter regard the first defendant has deposed

> "16. It is a fact well known in Nadi and elsewhere in Fiji that for the past 12 months I have been planning to take up my permanent residency of New Zealand, granted to me some three years ago and rejoin my other brothers and family in Auckland. To date I have not been able to sell

everything."

and

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"18. I have not transferred any assets outside the jurisdiction of this Court since January 1992."

and finally:

"21. I have no personal bank account in Fiji."

B

Counsel for the 1st defendant forcefully asserts that the plaintiff company's affidavit failed to provide sufficient evidence to satisfy the threshold requirement that there be a real risk that the 1st defendant will attempt to dissipate or remove his assets from the Court's jurisdiction before any judgment the plaintiff company may obtain has been satisfied.

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Learned counsel for the plaintiff company submits equally forcefully that the 1st defendant by his own admission has (up to) January 1992 removed assets out of the Court's jurisdiction and clearly intends to leave the Court's jurisdiction if permitted to. Counsel also points out that the 1st defendant does not deny the ability to provide the requisite security nor has he disclosed his assets as ordered and in the circumstances this Court is entitled to assume that it is within the 1st defendant's power and ability to provide the security but he has chosen not to.

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I must confess to some difficulty in deciding this issue on the evidence as it presently stands. I note however that the injunction as framed does not in terms positively require the defendant to provide any form of security which would clearly be beyond the legitimate and recognised purpose of the mareva injunction.

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I accept that a bare assertion that the defendant is a foreigner or is travelling overseas is an insufficient basis to raise a real risk that he will dissipate or remove his assets but equally a defendant who has permanent residency status in another country and who is selling off assets with a view to eventually migrating overseas presents a more than fanciful risk that assets or the proceeds thereof may be removed beyond the normal territorial jurisdiction of the Court.

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I am reminded of the observation of Mustill J. In Third Chandris Shipping v. Unimarine [1979] 1 All E.R. 972 in a judgment upheld by the Court of Appeal and singularly endorsed by Lord Denning (at p. 982) where he said of the requirement that the assets may be moved from the jurisdiction at p.977:

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> "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."

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In the circumstances mindful that the plaintiff company has a good arguable claim against the defendants and also that the defendant has adopted a somewhat unco-operative attitude towards the plaintiff company's letters of concern, I find that there is a risk that, if the plaintiff should succeed in getting a judgment, it may go unsatisfied unless the mareva injunction is maintained.

B

Finally I turn to consider the writ ne exeat civitate (or 'ne exeat regno' as it is more commonly known). This ancient prerogative writ was first issued in this country so far as I can discern, in the decision of Scott J. in the case of Westpac Banking Corporation v. Satish Chandra (Suva Civil Action No. 356 of 1991).

The basis for the issuance of the writ is identified in the decision as:

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> " ... an equitable and not merely a legal foundation for the issuance of the writ and secondly the issuance of the writ is subject to the restrictions imposed by Section 6 of the Debtors Act 1869, the somewhat less restrictive counterpart of which in Fiji is Section 6 of the Debtors Act (Cap. 32)."

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and at page 9 Scott J. said of its purpose:

> "In issuing a writ ne exeat regno coupled with a mareva injunction the aim of the Court is to require a defendant to provide the plaintiff with a full statement of assets and to preserve those assets before the defendant departs from the jurisdiction. The direct purpose of the orders is not to prevent departure simpliciter."

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Reference was also made to two decisions of the English Court in recent times in which the history and conditions for the issuance of the writ ne exeat regno were discussed. These were the decision of Megarry J. (as he then was) in Felton v. Callis [1969] 1 Q.B. 201 in which the writ was refused and Tudor-Price J. In Al Nahkel v. Lowe [1985] 1 Q.B. 235 where the writ was granted in support of a mareva injunction.

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In the former case, Megarry J. identified the four requirements under Section 6 of the Debtors Act 1869 (U.K. which had to be satisfied before the Writ could be issued. These were at p.211 (ibid):

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> "(1) the action is one where the defendant would formerly have been liable to arrest at law. (2) A good cause of action for at least £50 is established. (3) There is probable cause for believing that the defendant is about to quit England unless he is arrested. (4) the absence of the defendant from England

> will materially prejudice the plaintiff in the prosecution of his action."

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I pause here to point out that the local counterpart of the above Section appears to require the Court to be satisfied of only the second and third requirements enumerated by Megarry J. before a warrant may be issued for the arrest of the defendant in this country.

In Al Nahkel's case Tudor Price J in granting the writ in conjunction with a
B mareva injunction in that case concluded at pp. 239/240:

> " (the writ) is available in support of the modern Mareva injunction to prevent a defendant fleeing the jurisdiction with assets in order to frustrate a lawful claim before the Court."

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More recently however in Allied Arab Bank v. Hajjar (1988) 2 W.L.R. 942 also a decision at first instance and which was not referred to in the decision of W.B.C. v. Satish Chandra (op. cit) Leggatt J. disagreed with the above conclusion when he said at p. 946 : " ... if it was intended to go further and to suggest that the writ may be ordered for the purpose of enforcing a Mareva injunction, I disagree : for that purpose the appropriate remedy is an injunction to restrain the defendant from leaving the jurisdiction."

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More particularly and perhaps of more relevance to the present case Leggatt J. observed at p. 948 (ibid):

> "But in every case the question must be asked, `For what purpose is the issue of the writ required?' Here the primary
E purpose suggested is to require the first defendant to identify assets in relation to which the mareva injunction would operate. That is not part of the `prosecution' of the action ..." (Being a reference to Megarry J's. 4th condition)

and then by way of obiter he added:

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> " ... in so far as the issue of the writ was sought to be justified in aid of discovery ... I do not consider that, if the point had been determinative, the need for this discovery would have been of such importance as would have justified the issue of the writ."

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In so far as this Court is concerned I would respectfully adopt the decision of Scott J, as correctly stating the purpose and approach that the Courts in this country should take in granting the writ ne exeat civitate.

I am also persuaded that the writ may only be issued in support of a mareva injunction in order to prevent a defendant removing his assets from the Court's jurisdiction and may not be extended to the enforcement of ancilliary orders

that may be made in support of the mareva injunction such as, an order for discovery. That is not to say however that the Court is rendered helpless in enforcing its order for discovery. All it means is that the writ ne exeat civitate is an inappropriate procedure.

Indeed there can be no doubting that where necessary this Court has the power by positive injunction to restrain the defendant from leaving the Court's jurisdiction without first complying with an order for discovery of his assets.

A recent example of the issuance of such an injunction may be found in the decision of the Court of Appeal (U.K.) in Bayer A.G. v. Winter [1986] 1 W.L.R. 499 in which the Court referred to the dictum of Cumming-Bruce L.J. in House of Spring Gardens v. Waite (1985) F.S.R. 173 where his lordship said of the powers of the Court in respect of an order for discovery made in support of a mareva injunction, at p. 1183:

> "The Court has the power (and, I would add, the duty) to take such steps as are practicable upon an application of the plaintiff to procure that where an order has been made that the defendants identity their assets and disclose their whereabouts, such steps are taken as will enable the order to have effect as completely as the powers of the Court can procure."

Accordingly the writ ne exeat civitate is hereby discharged and in place thereof the following restraining order is imposed:

> (3) Until such time as the said Girdhar Lal Raniga shall fully comply with order (1) above or until further order in the meantime he is hereby restrained from leaving Fiji and that he do forthwith deliver into the custody of this Court his passport and all travel tickets held by him.

Subject to the foregoing amendments to the Court's ex parte orders the application is dismissed.

(Application dismissed)