

**RESOLUTION TRUST CORPORATION**

v

**1. LEINANI K. BORTLES  
2. LARRY LYNEL BORTLES**

[HIGH COURT, 1994 (Fatiaki J), 14 September]

Civil Jurisdiction

*Practice (civil)-oral examination of deponents-mareva injunction-relevance of assets said to belong to third party.*

On application by the Defendants to vary a Mareva Injunction the High Court considered the relevance of alleged ownership by a third party and also discussed its discretion to order cross examination of deponents.

Cases cited:

*Bayer v Winter* (No. 2) [1986] 2 All ER 43

*Carnley v Hoff* [1942] 1 Ch 298

*Comet Products U.K. Ltd v Hawkex Plastics Ltd* [1971] 2 Q.B. 67

*Galaxia Maritime S.A. v Mineralimportexport* [1982] All ER 798

*Narain Shipping Co. Ltd v Government of American Samoa* (1979) 25 F.L.R. 153

*Oceanica Castelana v Mineralimporexport* [1983] 2 All ER 65

*S.C.F. Finance Co. Ltd v Masri* [1985] W.L.R. 876

Interlocutory application in the High Court

*A. Daubney* for Plaintiff

*R. Smith* for Defendants

**Fatiaki J:**

On the 25th August 1994 this court granted on the ex-parte application of the plaintiff corporation a mareva injunction :

“... restraining ... (the defendants) ... from dealing with, charging, mortgaging, assigning, disposing of ... or removing from the jurisdiction any ... property or monies or assets including property held by third party entities over which the defendants ... have ownership and/or control within the jurisdiction of this Honourable Court including but not limited to the properties being described as Certificate of Title 6684 and Native Lease 8720.”

A The defendants were also required to file affidavits disclosing the nature and value of their assets within the court's jurisdiction. This they have done in terms of separate affidavits sworn and filed on the 7th of October 1994.

B In addition to the above the second defendant specifically deposed in his affidavit:  
 “(that) although I am registered as the proprietor of C.T. 6684 comprising vacant land at Deuba and have been so registered since September 1984 I merely hold this property in trust as the General Partner of the Fiji Marina Partners Partnership which is a limited partnership and I will continue to so hold it until such time as the property is sold.”

He further volunteered :

C “I am the purchaser named in a contract for the purchase from Pacific Hotels and Development Limited of 10 housing lots at Pacific Harbour being Certificates of Title 14932, 14933, 14934, 15051, 15052, 15056, 15066, 15067, 15068 and 15069. I have no personal interest in these properties either, merely holding them also in trust as General Partner of the Fiji Pacific Partners Partnership, a further limited partnership which is about to trade such properties for an industrial building on Crown Lease 5245 at Wailada Estate.”

D

E Six (6) months later on 13th April 1994 the defendants issued a summons seeking a declaration and a variation of the mareva injunction designed specifically to exclude C.T. 6684 and the above-mentioned 10 Pacific Harbour lots from the ambit of the injunction on the sole ground that both sets of properties are held in trust by the second defendant for the benefit of two limited partnerships registered in Hawaii under the names ‘Fiji Marina Partners’ and ‘Fiji Pacific Partners’, respectively.

F The primary affidavit sworn by the 2nd defendant on the 13th of April 1994 and filed in support of the summons sets out in some detail together with annexures the history and purpose of the formation of the two above-mentioned limited partnerships, the acquisition of C.T. 6684 and the 10 Pacific Harbour lots and the reason(s) why the transfer of C.T. 6684 and the purchase agreements of the 10 Pacific Harbour lots were transacted in the name of the second defendant namely, “... the laws of Fiji did not recognise a Hawaii limited partnership as a legal entity ...”

G The plaintiff corporation in opposing the defendants’ application has filed 2 affidavits one from a Rex Malott and the other from Gopal Krishna annexing 10 Certificates of Title relating to the 10 Pacific Harbour lots which indicates that none of the lots has been transferred to anyone nor are they subject to any caveat lodged to protect any agreement entered into with anyone to buy the said lots as might be expected.

There is also annexed to Krishna's affidavit C.T. 6684 and Transfer No. 215869 which collectively indicate that C.T. 6684 was sold and transferred to the second defendant on 13th September 1984 for the sum of \$1,021,250. No mention is made in the recitals in the transfer of any fiduciary capacity of the second defendant in the purchase of the land comprised in C.T. 6684 nor does the entry on the C.T. disclose that the transfer was made to the second defendant as Trustee.

A

Even the written Sale and Purchase Agreements referred to in the transfer nowhere mentions the limited partnership on whose behalf the land was being acquired other than the deletion of the partnership's name and the insertion of the second defendant's name as the purchaser. In this regard para.3 of the letter explaining the alteration to the second defendant is significant where it reads:

B

“(The alteration) is made possible in light of the fact that you signed each of the contracts personally and not with the partnership signature.”

C

There are also 5 unexplained judgments in favour of B.N.Z. entered on C.T.6684 during a time when the limited partnership has effectively lain dormant and therefore presumably was not trading.

D

Quite simply on the face of the Transfer and C.T. 6684 the second defendant is the sole registered proprietor of an indefeasible estate in fee simple of the land comprised in the title.

The affidavit from Rex Mallot on the other hand sets out an intriguing series of assignments of the second defendant's interests as a general partner of both Fiji Marina and Fiji Pacific which learned counsel for the plaintiff corporation describes as having the effect of “round-robbing” his interests and formed the subject matter of a fraudulent conveyance claim against the second defendant in U.S. proceedings which was subsequently resolved.

E

In this latter regard the written argument of the defendants' attorney placed before the U.S. District Court in support of a motion seeking a stay of an order compelling the testimony of the defendants amongst others contains the rather revealing concession at p.9 where he says :

F

“... the transfer of properties from the Trust to Larry L. Bortles eliminates the need to seek a factual basis to conclude that the transfers were made with the intent to place the assets beyond the reach of the creditors or that the plaintiff's (including Larry L. Bortles) harbored a wrongful intent at the time they sought estate planning advice.”

G

- A There are also annexed to the affidavit several Personal Financial Statements of the defendants for the years 1985 and 1988 in which the defendants value their interest in the 2 limited partnerships far in excess of the amount for which they were sold in 1989. As for the second defendant's interest in the Fiji Pacific Partners an amendment of the limited partners filed in March 1973 indicates that certainly since that date the second defendant besides being the sole General Partner had subscribed for no less than 16.5 of the 22 units then issued out of a grand total of 25 limited units offered in the partnership.
- B Given the above, learned counsel for the plaintiff corporation made an oral application to cross-examine the second defendant on his affidavits filed in support of the summons to vary the injunction. Needless to say counsel strongly disputed that the second defendant was a trustee in any capacity as he claimed.
- C In considering the application I bear in mind the observations of Lord Greene M.R. when he said in Carnley v. Hoff [1942] 1 Ch 298 at p.308 :
- D “Speaking for myself, I strongly dislike being asked on affidavit evidence alone to draw inferences as to the bona fides or mala fides of the actors. If it is desired to charge a deponent with having given an account of his motives and his reasons which is not the true account, then the person on whom the burden of proof lies should take the ordinary and obvious course of requiring the deponent to submit himself to cross-examination.”
- E The oral application is vigorously opposed by learned defence counsel on the basis that, given the undeniable fact that the 2 limited partnerships exist and were formed 20 years ago, and given the clear terms and conditions of the limited partnership agreements and the clear purpose for their formation as convenient vehicles for speculative investment in real estate in Fiji, insufficient cause had been shown by counsel for the plaintiff to warrant the “fishing expedition” which he proposed to undertake in cross-examination of the second defendant which was likely to canvass not only substantive trial issues but also the credibility of the second defendant.
- F That the Court has a discretion to exercise in the matter is beyond argument. Or.38 r.2(3) of the High Court Rules 1988 provides :
- G “... on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such ... application the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making the affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.”

This was clearly the view of the Court of Appeal (U.K.) in Comet Products U.K. Ltd. v. Hawkex Plastics Ltd. [1971] 2 Q.B. 67 where Megaw L.J. said at p.76 :

“In general I think that in interlocutory proceedings, where there is a bona fide application to cross-examine a deponent on his affidavit, that application should normally be granted.”

and Cross L.J. at p.77 where he said :

“It is I think, only in a very exceptional case that a judge ought to refuse an application to cross-examine a deponent on his affidavit.”

The application to cross-examine however was refused in that case because in the words of Denning M.R. at p.75 :

“It seems to me that such a claim to cross-examine does mean that he will be investigating the whole circumstances of the defendant, including the circumstances leading to the original action. However much he may disclaim it, it seems to me plain that Mr. Sparrow, if he were to cross-examine, would claim to investigate the defendant’s state of mind from the beginning, and to cross-examine as to credit, as to character and so forth all the way along the line.”

For somewhat similar reasons although in a quite different context, Scott J. rejected an application to cross-examine the defendant in Bayer v. Winter (No.2) [1986] 2 All ER 43 where it was :

“Held : In civil litigation the proper function of a judge was to decide issues between the parties and not to preside in a supervisory capacity over an interrogation of one party by the other. While the court had an in personam jurisdiction to subject a citizen to interrogatory process for the purpose of enforcing an order of the court, it would not be often, if at all, that the court would exercise its discretion to do so.”

In this case having carefully reviewed the countervailing submissions of both counsel and noted the non-specific nature of the cross-examination sought, I too would exercise my discretion in refusing the application.

I turn next to deal with the defendants substantive application to vary the mareva injunction which in learned defence counsel’s written submission is taken on the sole basis :

“... that none of the titles set out in the application are the beneficial property of the defendants and ought not to be

affected by an injunction against the defendants.”

A In this latter regard as earlier noted the second defendant has consistently deposed in his various affidavits that “... he holds the titles concerned as a trustee for others”.

In support of his arguments defence counsel advances two legal principles with authorities as follows :

B “a. That Mareva orders can never attach to property in which a Defendant has no beneficial interest (see Oceanica Castelana v. Mineralimportexport [1983] 2 All ER 65).

C b. That it is an abuse of the Mareva jurisdiction to use it where a third party can be seriously and adversely affected (see Galaxia Maritime S.A. v. Mineralimportexport [1982] All ER 798).

With all due regard to the submission, having myself read the authorities cited therein I cannot accept that they support the very wide propositions advanced by counsel.

D In the Oceanica Castelana case Barclays Bank International Ltd. (as intervener) successfully sought a variation of a Mareva Injunction so as to enable it to exercise a right of set-off it had acquired in connection with banking facilities granted by it before receiving notification of the injunction, and in the Galaxia Maritime case the Court of Appeal on the application of an innocent third party (the shipowner) discharged a mareva injunction which prevented the shipowner’s vessel from sailing out of the Court’s jurisdiction with cargo allegedly owned or belonging to the defendant on board.

E In neither case was the applicant for the variation or discharge of the injunction the defendant itself as is the case before me, nor has it been clearly demonstrated how and to what extent the rights of innocent third parties (if any) was or is being prejudicially or adversely affected (if at all) by the grant or continuation of the injunction as was graphically demonstrated by the intervener in the above authorities.

F What is more the distinction (as to the applicant for variation) was specifically noted by Lloyd L.J. when he delivered the judgment of the Court of Appeal in S.C.F. Finance Co. Ltd. v. Masri [1985] W.L.R. 876 in which the bank accounts of the defendant’s wife were effectively frozen by the Court’s injunction and which the Court of Appeal refused to vary on the wife’s application.

G In specifically rejecting an argument of defence counsel in the case (in similar terms to proposition (a) above):

“(Where) it appears that there is an issue whether assets truly belong to the defendant, or whether a third party has a good claim to an interest in those assets, the defendant should not be enjoined from acknowledging or giving effect to the third party claim or interest, despite the fact that the validity of the third party claim remains untried ...”

A

the Court of Appeal :

B

“Held : ... that where the Court granted the injunction it was not obliged to accept without inquiry an assertion by the defendant, ... that the assets belonged to a third party; that in deciding to accept such an assertion without further inquiry, the Court will be guided by considerations of justice and convenience between all the parties concerned.”

C

In this latter regard learned counsel for the plaintiff corporation vigorously disputes the second defendant’s claim and points to the various C.T.’s and documented manocuvrings by the second defendant of his general partner interest in the limited partnerships as raising a good arguable case against the second defendant’s claimed trusteeship of the properties.

D

Furthermore having regard to the plaintiff corporation’s claim which might be described as a suit on a post-judgment debt (see e.g. : Narain Shipping Co. Ltd. v. Government of American Samoa (1979) 25 F.L.R. 153) and the relative novelty of the concept of a limited partnership and the nature of the rights and liabilities of the partners thereunder (upon which no specific submissions were made), this Court is unable to decide the matter on affidavit evidence alone.

E

The defendants’ application to vary the injunction is accordingly dismissed with costs to the plaintiff corporation to be taxed if not agreed.

*(Application dismissed.)*

F

G