SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. SLUHCV2004/0133

BETWEEN:

CASTRIES CARPARK FACILITY LIMITED

Claimant/ Applicant

And

GLADYS TAYLOR

Defendant/
Respondent

Appearances:

Ms. A. Cadie Bruney for the Claimant/ Applicant
Mr. Peter I. Foster with him Ms. Renée St. Rose for the Defendant/ Respondent

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2004: August 17
October 15

Freezing Order...Principles applicable in discharging injunction...duty to make full and frank disclosure... is there a real risk of disposal of assets before judgment is satisfied?... Does the claimant have a good arguable case....status quo maintained until trial date

JUDGMENT

1. HARIPRASHAD-CHARLES J: By lease agreement executed on 24th November 2000 between the Applicant, Castries Carpark Facility Limited and the Respondent, Gladys Taylor, the Carpark leased its premises comprising 1,359 square feet situate on the ground floor of the Conway Business Center to Ms. Taylor for a term of 3 years from 14th February 2001 at a monthly rental of $6,795.00.

2. The lease expired on 13th February 2004 by effluxion of time but Ms. Taylor continues to occupy the premises. The Carpark brought this claim against Ms. Taylor alleging that she is now a trespasser and seeks, among other things, possession of the premises and arrears of

rent amounting to $85,522.50. To protect their position pending the trial of the claim, the Carpark applied for interlocutory relief in the form of a mareva injunction without notice stating in an affidavit in support deposed to by Ms. Emma Hippolyte, its Director and Acting Chief Executive Officer that any judgment against Ms. Taylor might remain unsatisfied as she is in the process of effecting a sale of Parcel 1457B 29 and may shortly also be disposing of Parcel 1255B 453 and that there is a very real danger of her dissipating all of her assets by the time the claim is determined.

3. On 27th July 2004, I granted the injunction restraining Ms. Taylor whether by herself, her servants or agents or howsoever otherwise from disposing, selling or in any way dealing with the immovable property registered in the Land Registry as Parcels 1255B 453 and Parcel 1457B 29 in the Registration Quarter of Gros Islet until further hearing of this matter. The injunction was made returnable on 10th August 2004.

4. On the returnable date, the Carpark made an oral application for the continuation of the injunction. Mr. Peter Foster appearing as Counsel for Ms. Taylor challenged the application on the basis that it did not conform with Part 17.4 (7) of the Rules. The injunction was thereby discharged. Hours after its discharge, Ms. Taylor disposed of Parcel 1457B 29 at an incredibly low price which she alleged was a mistake. See Deed of Sale by Gladys Taylor to Maintenance Free Buildings Products Inc. registered on 10th August 2004 (Exhibit "EH3").

5. The following day, the Carpark filed another application. This application sought to restrain Ms. Taylor from disposing of Parcel 1255B 453 which it alleged, is the only remaining property in her name. On 13th August 2004, in the presence of both parties, I granted the application for an interim injunction until 17th August 2004. Other directions were given to facilitate a full hearing.

6. When the application came up for hearing on 17th August, Ms. Taylor, a British born Saint Lucian citizen was out of the state on vacation. Cornelius Daniel, the legal clerk in the Law Firm of Peter I. Foster & Associates deposed in an affidavit that he had been authorized by Ms. Taylor to oppose the application for the injunction by the Carpark. I heard the application on the basis of legal submissions.

7. The jurisdiction of the courts of Saint Lucia to grant mareva injunctions is based upon Part 17.1 (j) of CPR 2000 which provides that the court may grant interim remedies including a 'freezing order' restraining a party from dealing with any asset whether located within the jurisdiction or not or from removing from the jurisdiction assets located there. The jurisdiction to grant such relief in respect of assets within or without the jurisdiction and against residents or foreigners was well established in England before the Supreme Court Act of 1981 was passed: see *Third Chandris Shipping Corporation v Unimarine S.A.*[1] and *Barclay-Johnson v Yuill*[2] (jurisdiction against residents) and *Derby & Co. Ltd v Weldon*[3] (world-wide restraints).

8. In the *Third Chandris case,* Lord Denning MR outlined the guidelines which applicants for a mareva injunction should be required to observe as follows (at pages 984,985):

> "These are the points which those who apply for it should bear in mind. (i) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know. (ii) The plaintiff should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant. (iii) The plaintiff should give grounds for believing that the defendants have assets here… (iv) The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied…(v) The plaintiff must of course give an undertaking in damages, in case they fail in their claim or the injunction turns out to be unjustified."

9. In *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H. und Co .K.G.*[4]*,* it was held that the jurisdiction to grant mareva injunctions was exercisable in cases where it appeared just and convenient to the court to grant the injunction, and the plaintiff had, inter alia, to show on the evidence as a whole, that there was at least a good arguable case that he would succeed at the trial, and that a refusal of the injunction would involve a real risk that a judgment or award in his favour would remain unsatisfied."

[1] [1979] QB 645
[2] [1980]1 WLR 1259
[3] [1990]Ch. 48
[4] [1983]1 WLR 1412

10. It seems to me that the above two cases provide the background against which I approach the question whether it is just and convenient to grant the mareva injunction in this case.

(i) The first question: the duty to make full and frank disclosure

11. Mr. Foster submitted that the Carpark has a duty to make full and frank disclosure of the material facts of the case and they have failed to do so. In his comprehensive skeletal submissions, he identified numerous undisclosed facts which he alleged were known to the Carpark and which should have been disclosed to the court. He cited the case of *Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac*[5] to support his point that the applicant has a duty to make 'a full and fair disclosure of all the material facts.'

12. Learned Counsel next submitted that the Applicant must also make proper inquiries before making the application: *Bank Mellat v Nikpour.*[6]

13. The duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application and (b) the order for which application is made and the probable effect of the order on the defendant.

14. The rule that an injunction without notice will be discharged if it was obtained without full disclosure has a dual purpose. It will deprive the wrongdoer of an advantage improperly obtained: *Kensington's case.* It also serves as a deterrent to ensure that persons who make applications without notice realize that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless this judge-made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be discretion in the court to continue the injunction or to grant a fresh

[5] [1917] 1 K.B. 486, 514, per Scrutton L.J.
[6] [1985] F.S.R. 87

injunction in its place notwithstanding that there may have been non-disclosure when the original injunction without notice was obtained.

15. Those being the principles involved, it remains only to apply them to the facts of the present case. On 27th July 2004, Ms. Hippolyte swore to an affidavit stating that the Carpark had commenced legal proceedings against Ms. Taylor for possession of the premises and arrears of rent and that Ms. Taylor has assets within the jurisdiction; one of which she is in the process of disposing and there is a very real danger that she would dispose of the only other asset standing in her name. Mr. Foster argued that Ms. Hippolyte should have disclosed, among other things, the fact that Ms. Taylor has filed a defence and counterclaim. That may be so but, as Mrs. Bruney rightly stated, the court's record is available to the judge. Indeed the application for the injunction is part and parcel of the record. It would be tedious and burdensome for any applicant to go into a repetitive exercise to detail all facts which are already available to the court. At the end of the day, I am satisfied that the Carpark made full and frank disclosure of the material facts.

The second question: is there a real risk of disposal of assets before judgment is satisfied?

16. In her many affidavits to support this application, Ms. Hippolyte deposed that "there is a very real danger of the Respondent dissipating all of her assets by the time the claim is determined unless she is restrained by the court. Mr. Foster submitted that the Carpark has failed to state that Ms. Taylor is doing so in order to make herself judgment proof or to prevent the Carpark from enforcing judgment if it wins at the trial.

17. Mr. Foster next submitted that Ms. Taylor is a Saint Lucian citizen who has been residing here for in excess of 18 years. She is a businesswoman and has operated businesses out of the premises situate on Parcel 1255B 453 for years. She now runs a successful restaurant, nightclub and clothing store and she has no intention of closing down the businesses. In addition, she has no intention of fleeing the state to avoid a judgment for $85,522.00 and in any event, she will win at the trial of this matter.

18. The pith of the case for the Carpark is that Ms. Taylor had two properties when the claim as well as this application was filed. Hours after an interim injunction was discharged for procedural irregularity, she sold one of the properties comprising 35,007.60 square feet of land together with her house at Cap Estate for an incredibly low price of $61,000.00. She has since deposed that the selling price of $61,000.00 on the Deed of Sale was a mistake. The correct price should have been $610,000.00. Suffice it to say, this whole transaction worries me immensely.

19. In my view, there is obviously the risk that Ms. Taylor may take steps designed to dispose of the only property standing in her name.

The third question: Does the claimant have a good arguable case?

20. The Carpark seemed to have followed the guidelines listed in the *Third Chandris case.* I turn now to see whether it has a good arguable case and, if it has, whether in all the circumstances it is just and convenient to grant the relief sought. The case for the Carpark against Ms. Taylor is that the lease having expired by effluxion of time, Ms. Taylor is now a trespasser. It is seeking possession of its premises and arrears of rent amounting to $85,522.50.

21. In paragraph 4 of her defence, Ms. Taylor admitted that she is in arrears of rent in the sum of $85,522.50 but denies the particulars stated. She also admitted at paragraph 3 that the lease expired by effluxion of time and she still remains in occupation of the premises. She however denies that she is a trespasser and has filed a counterclaim to that effect. At paragraph 10 of her counterclaim, she alleged that the agreement between herself and the Carpark was made partly orally and partly in writing. In so far as the agreement was made orally, it involved meetings and discussions between herself and Mr. Matthew Sarjusingh, the General Manager of the Carpark. It is alleged that Mr. Sargusingh made several representations to Ms. Taylor which never materialized. The Carpark filed a Reply and Defence to the Counterclaim. In a nutshell, the Carpark denied that Mr. Sarjusingh made any such representations.

22. As the proceedings are interlocutory, it is not necessary for the Carpark to show that it is likely to succeed in establishing such a cause of action. A “good arguable case” is the minimum

which it must show in order to cross what is described as the "threshold" for the exercise of the jurisdiction: *The Ninemia case.* But at the end of the day the court must consider the evidence as a whole in deciding whether or not to exercise this jurisdiction.

23. At the trial, the learned trial judge will have to resolve a factual issue on the basis of the counterclaim. It is therefore unnecessary to say anything more about this. But, the question which still remains unanswered is: "Has the Carpark shown that it has a good arguable case?" Simply put, the Carpark alleges that Ms. Taylor owes arrears of rent of $85,522.50 and that she is now a trespasser since the lease has expired. What does Ms. Taylor say about this allegation? She says: "yes, I am owing $85,522.50. Yes, the lease has expired but I am not a trespasser. See my counterclaim." In my judgment, the Carpark has a good arguable case.

Conclusion

24. Kerr L.J. in the case of *Z Ltd v A.Z.*[7] had this to say:

> "It follows in my view mareva injunctions should be granted, but granted only, when it appears to the court that there is a combination of two circumstances. First, when it appears likely that the plaintiff will recover judgment against the defendant for a certain or appropriate sum. Secondly, when there are also reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, in whole or in part, but may take steps designed to ensure that these are no longer available or traceable when judgment is given against him."

25. In exercising my discretion, I am worried that if I discharge the injunction which I granted on 17th August 2004, Ms. Taylor may take steps designed to ensure that the property is no longer available when judgment is given against her. The substantiate claim comes up for trial in less than two weeks. No exceptional hardship would be created if the injunction continues until the date of the trial. Thereafter, the trial judge would be better placed to rule on whether or not this injunction should continue.

26. In my premises, my Order will read as follows:

> "UPON THE APPLICANT giving an undertaking to abide by any Order that the Court may make as to damages in case the Court shall hereafter be of the opinion that THE

[7] [1982]2 W.L.R. 288 at 307

RESPONDENT shall have sustained by reason of this Order which THE APPLICANT ought to pay

IT IS HEREBY ORDERED AS FOLLOWS:

(i) That the Respondent, Gladys Taylor whether by herself, her servants or agents or howsoever otherwise be restrained from disposing, selling, or in any other way dealing with the immovable property registered in the Land Registry as Parcel 1255B 453 in the Registration Quarter of Gros Islet until the hearing of this claim.

(ii) Thereafter the trial judge will determine whether or not the injunction will continue.

(iii) Costs to the Applicant in the sum of $2,500.00.

27. Lastly, I am indebted to Counsel for the able and thorough manner in which they presented their arguments.

Indra Hariprashad-Charles
High Court Judge