BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.2 OF 2005

BETWEEN:

EDY GAY ADDARI

Appellant

and

ENZO ADDARI

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC — Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Denys Barrow, SC — Justice of Appeal [Ag.]

Appearances:

Mr. John Carrington for the Appellant
Mr. Clyde Williams with Mr. Rickie Davis for the Respondent

2005: April, 26;
June, 27.

JUDGMENT

[1] GORDON, J.A.: This is an appeal from an order of the trial Judge to continue a freezing order obtained ex parte after an inter partes hearing. The ex parte order was granted in December 2003 in favour of the Respondent and restrained the Appellant and the HSBC Guyerzeller Bank (BVI) Limited ("the HSBC Bank BVI") from disposing or dealing with any property that the HSBC Bank BVI or its parent bank held on account for or on behalf of the Appellant. There were certain ancillary orders, but this was the principal one. In the December order leave was also granted to serve the Claim Form, Statement of Claim, the amended Notice of

Application and related documents on the Appellant out of the jurisdiction in France.[1] At the inter partes hearing the trial Judge confirmed that order.

[2] The Appellant is dissatisfied with the judgment of the learned trial Judge and has appealed to this Court on a number of grounds. The first ground to be disposed of is that the learned Judge erred in law in finding that in the light of the evidence the Appellant could be considered a constructive trustee and thereby in the exercise of his discretion could grant leave to serve the Claim Form on the Appellant out of the jurisdiction. This ground was not argued before us nor was any argument advanced in the written submissions on this point.

[3] The parties to this appeal were married in August 1967. There was one child of the marriage, Manuel who was born in 1968. The parties obtained a legal separation from an Italian court in 1977 and ancillary thereto was a separation agreement which provided, among other things, for the transfer of the matrimonial home to the Appellant and that the parties would each be responsible for their own maintenance. Notwithstanding the separation order, the learned trial Judge, based on the evidence before him, found that they continued a personal and business relationship until 2002.

[4] The Respondent husband gave affidavit evidence of the fact that he was a successful businessman who made substantial monies both from his various entrepreneurial ventures and from investments in various markets such as the stock market. A crucial allegation of the Respondent was that based on advice he received from his lawyers and tax planners ownership of his real and personal properties were registered in the names of third parties to minimise his exposure to tax. He stated that he registered some of his assets in the names of his mother-in-law, his wife, his son, his attorneys and others including holding and off-shore companies, and in that practice is the genesis of these proceedings.

[1] The December Order also gave permission to serve the same documents "out of the jurisdiction in Antigua". However, as the trial Judge pointed out, Antigua is within the Jurisdiction (See CPR 2000 Part 2.4.) No quarrel was made with this observation of the trial Judge, with which I agree.

[5] According to the Respondent, among his assets are Russian bonds being held in an account in the HSBC Bank BVI amounting to some US$40,000,000.00 which account is in the name of the Appellant wife. In this judgment I shall refer to the bonds variously as bonds or monies. The Respondent claims that he is the beneficial owner of that money and that the Appellant is trying to defraud or otherwise deprive him of it. It is that account specifically that the Respondent sought to have, and the Court ordered, frozen.

[6] The Appellant's case, on the other hand is quite simply that she acquired the bonds in 1998 from her own resources and that the Respondent has absolutely no interest, equitable or legal, in them.

[7] The first ground of appeal put forward by the Appellant was that the learned trial Judge failed to give appropriate weight to facts that the Respondent in his application for the interlocutory relief failed to disclose or misrepresented. This argument was canvassed before the trial Judge. In Brink's Mat Ltd v Elcombe et al[2] Ralph Gibson LJ set out the principles by which a court should be guided. This was a decision of the Court of Appeal in England and I gratefully adopt the learning.

> "In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see *Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 514, per Scrutton L.J.
> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v Kensington Income Tax Commissioners, per* Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v Jarvie* (1850) 2 Mac. & G 231, 238 and Browne-Wilkinson J. in *Thermax Ltd. v Schott Industrial Glass Ltd.* [1981] F.S.R. 289, 295.

[2] [1988] 1 W.L.R. 1350

(3) The applicant must make proper inquiries before making the application: see *Bank Mellat v Nikpour* [1985] F.S.R. 87. The duty of disclosure therefore 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.

(4) 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: see, for example, the examination by Scott J. of the possible effect of an *Anton Pillar* order in *Columbia Picture Industries Inc. v Robinson,.* [1987] Ch. 38 ; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *per* Slade L.J. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 92-93.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction], without full disclosure…is deprived of any advantage he may have derived by that breach of duty:" see *per* Donaldson L.J. in *Bank Mellat v. Nikpour*, at p. 91, citing Warrington L.J. in the *Kensington Income Tax Commissioners'* case [1917] 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:" *per* Lord Denning M.R. *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 90. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.

> "when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant…a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" *per* Glidewell L.J. in *Lloyds Bownmaker Ltd. v. Britannia Arrow Holdings Plc*., ante..."

[8] In exercising his discretion the trial Judge directed himself faithfully along the above quoted guidelines. I, therefore, can find no reason to say that the learned trial judge misdirected himself on the law.

[9] The trial Judge analysed the evidence that had been provided by the Respondent and the facts that the Appellant alleged were either concealed or misrepresented. Though the list of such facts referred to in his judgment was not exhaustive of those facts raised before us, I have no reason to doubt that all of the same facts were in fact raised before him. He concluded as follows:

> "It is important to keep in mind that, essentially, the pivotal issue that arises on the claim in this case is whether Mrs. Addari holds the assets in the frozen account in trust for Mr. Addari who is the beneficial owner. With this in mind, I do not think that the non-disclosure and alleged misrepresentations that Mr. Carrington raised are material. Some of these matters are peripheral to the claim. Others are contestable issues that are to be canvassed at the trial of the claim. They cannot be resolved on Affidavit evidence untested by cross-examination. They cannot be decided on legal opinions that are accepted without question simply because they are uncontroverted."

[10] In DuFour v Helenair Corporation Ltd[3] Sir Vincent Floissac C.J. articulated the basis on which an appellate court would interfere with the exercise of a judicial discretion by a trial judge. He said:

> We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.
> The first condition was explained by Viscount Simon LC in *Charles Osenton & Co v Johnson* [1941] 2 ALL ER 245 page 250. There, the Lord Chancellor said:
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> > "The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the

[3] 52 WIR 188

> judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."

The second condition was explained by Asquith LJ in Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 ALL ER 343 in language which was approved and adopted by the House of Lords in G v G [1985] 2 ALL ER 225 and which I have gratefully adopted in this judgment. Asquith LJ said ([1948] 1 ALL ER at page 345):

> "…We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact plainly wrong, that an appellate body is entitled to interfere."

[11] I can find no error in principle of which it could be said the learned trial Judge was guilty. This Ground of appeal fails.

[12] The next ground of appeal argued by learned Counsel for the Appellant was that the learned trial Judge failed to apply properly the test for the establishment of a good arguable case. The trial Judge referred to two cases, The Niedersachsen[4] and Seaconsar Far East Limited v Bank Markazi Jomhouri Islami Iran[5] from which he sought guidance on this point. In The Niedersachsen Mustill J., as he then was, speaking of the burden on an applicant for a Mareva injunction said the following:

> "[The courts] use a variety of terms to express the same concept: 'satisfied', 'a proper one to be heard in our courts', 'a good arguable case', 'a strong argument', 'a strong case for argument'. These expressions suggest that the plaintiff has to do substantially more than show the case is merely 'arguable': a word which to my mind at least connotes that although the claim will not be laughed out of court, the plaintiff will not be

[4] [1984] 1 All E.R. 398
[5] [1994] 1 A.C. 438

> justified in feeling any optimism. On the other hand … the plaintiff, need not go so far as to persuade the judge that he is likely to win…
> In these circumstances I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success.
> In conclusion, I should add that it is particularly important in the present instance that the court should not be drawn into a premature trial of the action, rather than a preliminary appraisal of the plaintiff's case…"

[13] The trial Judge, in his judgment, made a preliminary analysis of some of the various affidavits filed on behalf of both parties and also the submissions of counsel. One such submission made by Counsel for the Appellant, with which I will deal separately, was that the Respondent failed to set up a plausible case to displace the presumption of advancement. Learned Counsel for the Respondent drew the Court's attention to the case of Shephard et al v Cartwright et al[6]. In that House of Lords case Viscount Simonds adopted the statement in Snell's Equity, 24th edition regarding the presumption of advancement to the following effect:

> "The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration… But subsequent declarations are admissible as evidence only against the party who made them, and not in his favour"

Learned Counsel then advanced the following chronology of the movement of the Bonds which he argued showed that neither the Respondent nor the Appellant treated the fact that the frozen account was placed in the name of the Appellant as an advancement:

- The notes when purchased were placed in an account in the Appellant's name and remained there for a few months;
- The notes were then transferred to the Respondent's account at another bank where they remained for some 16 days;

[6] [1955] A.C. 431

- The notes were then transferred to the Respondent's account at credit Suisse where they remained for 18 months;
- The notes were then transferred in January 2000 to an account of which the Appellant was the ostensible beneficial owner, but over which the Respondent had an unlimited power of attorney until that power was cancelled in 2001

After his analysis of the affidavits and submissions the learned trial Judge concluded as follows:

> "It seems to me that there are serious issues of law and fact that are to be tried in this case. The Affidavits leave the question of whether Mr. Addari is the beneficial owner of the frozen account as a serious issue to be tried."

For myself, having waded through the affidavits filed on both sides, and heard the arguments of Counsel, I can only come to the same conclusion as the learned trial Judge. This ground of appeal also fails.

[14] The final ground of appeal was that the learned trial Judge erred in holding that there was a risk of dissipation of the assets merely by relying on the nature of the assets rather than on any evidence adduced by the Respondent. In The "Niedersachsen"[7] the Court of Appeal in England had this to say on the subject:

> "In our view the test is whether, on the assumption that the plaintiffs have shown at least 'a good arguable case', the Court concludes, on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied."

The freezing order in this case is not about securing funds to satisfy a possible money judgment. Its purpose is to ensure that particular monies, concerning which the ownership is disputed, remains within the control of the Court pending determination of that issue. Dissipation in its ordinary sense of spending would merely be one of the methods by which a possible court order might be frustrated.

[7] Supra

Another, and perhaps in this case more likely, method might be the movement of the funds out of the jurisdiction. The trial judge held as follows:

> "It is my view, however, that the very fact that the assets have been highly mobile and have been moved to and from various accounts and from one country to another quite frequently, is sufficient to indicate that there is a real risk of their dissipation."

Again I can see no reason to disagree with the trial Judge. This ground, too, fails.

[15] In the result, the appeal is dismissed. The costs occasioned by this appeal shall be the Respondent's costs.

Michael Gordon, QC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Denys Barrow, SC
Justice of Appeal [Ag.]