BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2007/0291

BETWEEN:

PETROVAL SA

Claimant

and

(1) STAINBY OVERSEAS LIMITED
(2) NORREYS WORLDWIDE LIMITED
(3) JOHN LUSH
(4) FRANCOIS OSTINELLI

Defendants/Respondents

(5) CARIBBEAN CORPORATE SERVICES LIMITED
(6) MORGAN & MORGAN TRUST CORPORATION LIMITED
(7) OFFSHORE INCORPORATION LIMITED

Discovery Defendants

(8) ARTEM ZAKHAROV
(9) ALEXANDER NOVOSELOV
(10)EURO PACIFIC TRADE DEVLOPMENT LIMITED
(11)EVERON ASSOCIATES LIMITED
(12)BOYCE OVERSEAS LIMITED
(13)WEALE INVESTMENT HOLDINGS LIMITED
(14)MAJOR OIL & PROPERTY SERVICES LIMITED
(15)INNES OVERSEAS COMPANY LIMITED
(16)ODEY INTERNATIONAL HOLDINGS LIMITED
(17) FIORTINO INVESTMENTS LTD

DEFENDANTS

Appearances:

Mr. Michael Fay and Mr. Robert Foote of Ogier for Fiortino Investments Ltd
Mr. Mark Forte and Mr. Richard Evans of Conyers Dill & Pearman for the Claimant

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2008: 12th, 20th and 26th February

JUDGMENT IN CHAMBERS

(Practice and procedure – worldwide freezing injunction – material non-disclosure – order granted over larger sum than claimant appeared entitled to – whether court should take account of circumstances existing on return date – whether court has jurisdiction to discharge injunction or modify it
Receivership order – ex parte order granted for an unlimited period on its face – whether order should be for 28 days in first instance – court's jurisdiction to grant order – whether

CPR 2000 Part 17 limiting ex parte interim orders to 28 days in the first instance applies to receivership order)

[1] **Joseph-Olivetti, J.**:- On 23 January 2008 I granted an application ex parte for a freezing injunction against Fiortino Investments Ltd, the 17th Defendant, ("Fiortino") and a receivership order over specified assets. On the adjourned return date inter partes Mr. Fay, learned counsel on behalf of Fiortino, appeared and submitted in essence that the court should **re-consider** the grant of the orders and set them aside.[1] He made it clear, for what this may be worth, that this was without prejudice to his client's right to challenge the jurisdiction and/or to make an application to set aside the injunction in the event that his submissions against the continuation of the orders were unsuccessful.

[2] Mr. Fay challenged the continuation of the freezing order under 3 heads neatly categorised by Mr. Forte for the Claimant, ("Petroval") as:- lack of evidence, overvalue and the doubling-up grounds. In addition, he questioned the grant of the receivership order on the basis that it was not limited to 28 days as is required by CPR r. 17.4(4) and submitted that it should be vacated as the court had no jurisdiction to make it.

[3] I shall consider first, as it appears to be the most logical way to proceed, the "lack of evidence" ground. However, it is useful to put the matter in context. In short, this is a claim by Petroval to recover its shares in Petroval Singapore a company which allegedly earns over US$40M a year. Petroval alleges that the first four Defendants, for short, "Stainby", "Norreys", "Lush" and "Ostinelli" **fraudulently** deprived it of its 100% share holding in Petroval Singapore and this is an effort to trace and recover its property and all proceeds derived therefrom. This case has multi-jurisdictional elements and the matter is still evolving as is clear from Petroval's mammoth discovery efforts to date. This necessitated joining defendants and amending the statement of claim. The claim originally

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[1] For completeness, it is noted that the original return date was 8th January but both judges were out of the jurisdiction on that day and therefore the Registrar by letter of same date gave notice that the return date was adjourned to the 12th January. Mr. Fay submitted on the 12th January by way of preliminary point that the injunction had expired. The court ruled that the effect of the Registrar's letter was to continue the injunction as there would have been no point in setting a new return date if the order had expired. The fact that this was done by way of letter rather than by way of formal order was of little consequence as the Registrar had the powers of a Judge in Chambers and must be taken to have exercised those powers in fixing a new return date. It cannot be that a claimant's right can be jeopardized by situations affecting the court's administration which are outside its control. Mr. Fay also took issue with the short service of the application to continue the injunction and the court adjourned the matter after hearing his submissions to give him a full opportunity to take instructions and to make further submissions if he wished.

began with 5 defendants and has now reached 17. As at the date of this hearing the statement of claim has been amended twice. The claim as against Fiortino was first put as a case in knowing receipt and tracing relief was sought to recover some US$20,830,618.40 which Petroval alleged it was entitled to as it was funds derived from Petroval Singapore.

[4] On the "lack of evidence" ground, Mr. Fay submitted, and it cannot be and is not disputed that Petroval obtained the orders against Fiortino based on its Re-Amended Statement of Claim and the supporting affidavits. Mr. Fay argued that there was no evidence on the 23rd January to warrant the making of the order and therefore the order should be discharged.

[5] First, he contended that there were material inconsistencies between Petroval's pleaded case and the evidence in support. The argument centered around para. 3-4D, 4E and 33B, 33C and 33D of the Re-amended statement of claim and the affidavits of Bernard O'Sullivan relied on by Petroval to obtain the ex parte relief. Counsel urged that having regard to the Re- amended statement of claim the only basis on which it was alleged that Everon and Fiortino are to be imputed with knowledge of Petroval's alleged beneficial interest in the monies received by Everon by way of dividend from Stainby part of which was passed on to Fiortino by way of loan is as a consequence of Messrs. Lush, Ostinelli, Zakharov and Novoselov being alleged to be the ultimate owners and/or controllers of Everon and Fiortino and their knowledge being imputed to the companies.

[6] However, Mr. Fay says this pleading is not supported by the evidence. The 2nd affidavit of Mr. O'Sullivan contains inconsistencies as to when the Stainby shares were transferred to Everon. (Stainby is the registered holder of the shares in Petroval Singapore.) Mr. O'Sullivan puts forward two dates for this transfer - 8th June 2005 (see para. 20 of his 2nd affidavit and para. 31 of his 4th affidavit) and 7th January 2005 (see para. 38 of his 4th affidavit) and does not explain that inconsistency neither was it drawn to the court's attention.

[7] Further, that Mr. O'Sullivan in his 2nd Affidavit (paras. 21and 22) and 4th affidavit (para. 32) seems to suggest that someone other than Messrs. Lush, Ostinelli and Novoselov were the owners of Stainby on 2nd November 2005 and when the transfer of shares in Stainby were made to Everon. In addition, that Petroval has adduced no evidence from which it can be inferred that Mr. Zakharov, the 8th Defendant and another alleged wrong-do

is or was the owner or controller of Everon and Fiortino. Accordingly, Petroval has not shown any connection between Everon and Fiortino on the one part and Messrs. Lush, Ostinelli, Zakharov and /or Novoselov on the other part and thus there is no basis for imputing to Everon or Fiortino any knowledge of any beneficial interest in the assets transferred to Everon and eventually to Fiortino as alleged.

[8] Mr. Forte contended that Petroval has made out a good prima facie case against Fiortino. He referred to the pleadings contained in the Re–amended Statement of Claim, in particular para. 4E and 33C and the affidavits of Mr. O'Sullivan and Ms Carlyon relied on. He emphasized that Ms. Carlyon in para. 11 explained why the evidence suggested that Everon and the people behind Everon were parties to the conspiracy to defraud Petroval and the evidence that suggested that Fiortino was in common ownership with Everon and had received Everon's proceeds of the fraud. He drew specific attention to paras. 15-18 of Ms. Carlyon's affidavit in which she explained Fiortino's role.

[9] To my mind having regard to the Re-amended Statement of Claim and to the evidence relied on in support of the ex parte orders, Petroval has made out a strong prima facie case against Everon and Fiortino in knowing receipt and in fraud as now pleaded in the Re-Re-amended Statement of Claim but I will put aside the latter for this purpose. On the evidence in brief it is Petroval's case that Petroval caused Petroval Singapore to be incorporated for it by Messrs. Lush and Ostinelli who held the shares on trust for Petroval. In breach of trust Messrs. Lush and Ostinelli transferred the shares to Stainby and Norreys. On 22nd December 2004 one share each in Stainby was allocated to Messrs. Lush, Ostinelli and Novoselov. On 7th January 2005 four shares were allocated to Main Street Nominees Ltd. On 8th June 2005 Main Street transferred its four shares to Everon. There is no evidence of the consideration if any Everon paid. Clearly then Everon was a shareholder in Stainby at the same time as Messrs. Lush, Ostinelli and Novoselov, contrary to the submission made by Mr. Fay. Subsequently, Petroval Singapore paid substantial dividends to Stainby. Stainby in turn paid three dividends to Everon totaling US$20.5M on 4th May, 2006, 3rd July, 2006 and 2nd October 2006. On 5th May 2006 Everon transferred two shares in Stainby to Mr. Novoselov and one share each to Mr. Ostinelli and Mr. Lush for a consideration of US$9,214,286. On a date unknown but prior to 31st December 2007 Everon made an interest free loan to Fiortino. The loan balance

according to Ms. Carlyon was US$12,387,095.46. Ms. Carlyon deposes that Petroval believes that a loan of such a large sum is referable to and was sourced from the dividends Everon received from Stainby and as such represents the traceable proceeds of capital to which Petroval asserts proprietary claim.

[10] The applicable principles for the grant of an ex parte injunction are the well established American Cyanamid[2] principles. And this evidence to my mind, against the backdrop of an alleged substantial international fraud is sufficient evidence to establish that Petroval has made out a good arguable case against both Fiortino and Everon. I am of the view that the paragraphs in the O'Sullivan affidavit relied on by Fiortino when taken in conjunction with Ms. Carlyon's affidavit do not support the construction given to it by Mr. Fay that Everon was not a shareholder in Stainby at the same time as Messrs. Lush, Ostinelli and Novoselov.

[11] Further, the fact of the loan being an interest free one in these circumstances is enough for the court to draw the inference in the absence of any explanation from Fiortino that Fiortino was not an innocent purchaser for value as in the commercial world no one makes what amounts to a gift of such a substantial sum.

[12] In my judgment the inconsistency in the dates in the O'Sullivan affidavits can readily be resolved by reference to Ms. Carlyon's affidavit and the extract from Stainby's share register that she exhibited. Therefore, the failure to bring this inconsistency specifically to the court's attention is not material.

[13] In the circumstances, subject to my ruling on the other objections raised on behalf of Fiortino the court will continue the injunction until judgment or further order on the same terms.

The over-value ground and the double-recovery ground

[14] Mr. Fay submitted that on the Re-amended statement of claim and the evidence before the court on the 23rd January Petroval believes that it is entitled to trace US$20,830.618.40 being the balance of the interest free loan from Everon referred to above. Yet, Petroval obtained a freezing order in excess of that sum and failed to disclose that it had obtained a

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[2] American Cyanamid Co. v. Ethicon Ltd ([1975] AC 396

freezing order against Everon as well for the same amount of US$50,500,000. This he argues was clearly wrong and indicated that Petroval had not complied with its duty of full and frank disclosure to the court at the ex parte hearing. Furthermore, that from the disclosure made by Everon on the 17th January the actual amount of the loan was US$12,387,095. 46 and not US$20,830.618.40. (Here it must be remarked that Mr. Fay acts for Everon as well although this application is only made on behalf of Fiortino).

[15] Counsel submits that these matters are sufficiently serious to warrant a discharge of both orders or alternatively that the terms of the freezing order be amended and that Petroval be ordered to pay all the costs occasioned by the application and the amendments.

[16] Mr. Forte in response accepted on the pleaded case before the court on 23rd January against Fiortino the amount it was seeking to recover was US$12,387,095.46 and not US$20,830.618.40 which was clearly a mistake. However, Fiortino has not shown that it suffered any prejudice by the fact that a greater sum was frozen and that in any event an injunction freezing US$12M remains wholly warranted.

[17] Further, that on the Re-Re-Amended statement of claim there is no question of double recovery. On the Re-Re-Amended statement of claim (which at the date of the hearing on Friday Mr. Fay had not seen but which omission was rectified prior to the resumed hearing) the pleaded case is for dishonest assistance or conspiracy. (See para. 33F – H). Accordingly, each of the defendants referred to in those paragraphs including Fiortino and Everon are constructive trustees and/or liable to pay equitable damages for their acts of dishonest assistance. Alternatively, they have conspired with each other and the other named individual defendants with the predominant intention of harming Petroval and that as a result they are **jointly and severally liable** to Petroval for **all losses naturally flowing** from the alleged fraudulent acts relied on by Petroval.

[18] Further, that there is an application before the court to continue the injunction for $50.5 million on the basis of the present pleadings which is supported by the evidence and that the court should consider this also.

[19] I have considered the submissions advanced. On the case against Fiortino as pleaded on the Re-amended Statement of Claim the relief sought was primarily a tracing remedy in respect of the interest-free loan Fiortino had allegedly wrongly and knowingly received from Everon. At the time the ex parte injunction was granted Petroval had made out a

case for a freezing order in the amount of the loan which is by any reckoning a significant sum. In my judgment the failure to bring to the court's attention that the part of the property to which Petroval lays claim which is alleged to be in the hands of Fiortino was US$12,387,095.46 and not US$20,830.618.40 was a careless and not a deliberate non-disclosure. This is also true of the failure to specifically draw to the court's attention that there was a like order against Everon for US$50.5M. In any event that was patent even on a cursory perusal of the court file itself and the court could be taken to have been aware of this.

[20] What is the effect of this failure to make full and frank disclosure which has resulted in an order freezing a greater sum than a claimant is entitled to? Does this mean that the order cannot be modified and must be vacated? Or, can the court consider all the circumstances including the new pleadings and evidence now before it and make an appropriate order?

[21] On the authorities the court has a discretion in this matter. It must consider all material before it on the return day and assess the effect of the non-disclosure and so determine whether it is so serious a breach of the claimant's duty that the order should be discharged.

[22] The learning in **Gee Commercial Injunctions 5th Edn. Chapter 9** is instructive. In particular para. 9.018: - "Where the non-disclosure was innocent in the sense used above, the court will take into account the degree of culpability of the applicant and his advisers. Hence it is considered that if the court concludes on the evidence that the applicant had genuinely forgotten the relevant information this would be a factor against setting aside the order. It will be relevant to take into account whether the non-disclosure was of matters which were important or only of peripheral importance on the application. The discretion to maintain the order or to allow a new application for relief in the same terms is to be exercised "sparingly". On the other hand, where there is a clear prima facie case of a substantial fraud, innocent albeit careless non-disclosure may not result in the discharge of the ex parte relief. Whilst a penal jurisdiction is necessary in order to deter non-disclosure, when there is non-deliberate material non-disclosure which is not of central importance in a serious fraud case, courts have, in the exercise of their discretion, often been willing to continue the relief on the ground that the need to do substantive justice outweighs that

consideration. In such cases once the first instant judge exercises the discretion the Court of Appeal will only interfere with it when it was not legitimately open to the judge to take that view. There are still occasions on which breach of the disclosure duty is so serious that the court will refuse freezing relief to the claimant even though this may result in an alleged fraudster against whom a prima facie case has been made out not been held to account."

[23] In my judgment the non-disclosure although material is not so serious as to warrant the order been discharged as it was not of central importance on the ex parte application and Fiortino has not shown that it was prejudiced by the incorrect amount being frozen.

[24] In the light of the Re-Re-Amended Statement of Claim which seeks to attribute joint and several liability to all the alleged conspirators including Everon and Fiortino the fact that Petroval has freezing orders against others and in particular Everon in the like sum in this suit does not amount to double recovery as Petroval if it can make good its allegations will be entitled to judgment against each alleged conspirator jointly and severally for all damages suffered. And doubtless, if Petroval recovers judgment against every one of the alleged conspirators, it will make its election as to whom to pursue for the fruits of its judgment and will give credit for all sums received. Accordingly, the freezing order must remain in place until judgment or further order.

The Receivership order

[25] Finally, Mr. Fay contended that the court did not have jurisdiction to make an open-ended receivership order as that order being ex parte ought to have been limited to 28 days in the first instance in accordance with CPR 17.4(4) and that as this was not done the order should be discharged. Counsel relied on **Fursey Management Ltd. v. Gefio General Finance Corporation Inc & Anr. BVI Suit No. 87/2003 at paras.41 and 42**.

[26] Mr. Forte in response argued that CPR 17.4 does not apply to receivership orders and therefore there was no constraint on the court to limit the order in the first instance to 28 days. He submitted that the court's jurisdiction to grant a receivership order is given by the West Indies Associated States Supreme Court (Virgin Islands) Act Cap. 80 section 24 and that this has no stipulations as to the period of order in the first instance.

[27] It cannot be disputed that the court's jurisdiction to make a receivership order stems from the West Indies Associated States Supreme Court Act section 24 which provides:

> "**24.** (1) A mandamus or an injunction may be granted **or a receiver appointed by an interlocutory order** of the High Court or a judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court or judge thinks just." (Emphasis added)

[28] Clearly there is no stipulation as to timeframes so the issue is whether CPR17.4 applies to curtail the time for which a receivership order can be granted on an ex parte application. I have considered Part 17 in its entirety. It deals generally with the procedure for obtaining interim remedies. Rule 17.1(1) lists the types of interim remedies the court may grant but it is clear that the list is not exclusive by the use of the word "including." And, Rule 17.1(3) states that the fact that a particular type of remedy is not listed in para. 1 does not affect any power the court may have to grant that remedy. If we are to give a purposive interpretation to this Part as we are required to do it must mean that the omission to list a specific remedy does not signify that a different procedural regime would apply. That would make a nonsense of Part 17 if we were to do so. It follows then that a receivership order is included in the types of interim remedies adverted to under Rule 17.1(1) although it is not specifically listed. However, Rule 17.4(1) speaks to applications for specific orders only:- namely a freezing order, a search order, an interim injunction, an order authorizing a person to enter any land or building for the purpose of a detention, custody or preservation order and an order for the detention, custody or preservation of property.[3] Notably, a receivership order is not included. And Rule 17.4(4) provides – "the court may grant an interim order under **this rule** on an application made without notice for a period of not more than 28 days unless any of these rules permit a longer period." (Emphasis added)

[29] It is patent on the face of rule 17.4 that it has no application to receivership orders. **Fursey** does not assist Fiortino as in that case the order under consideration was not a receivership order but an injunction. It follows therefore that the argument that the court

[3] Admittedly, it may be argued that an order for the preservation of property indirectly includes an order for the appointment of a receiver. It was not and therefore the question remains moot to be answered on full arguments when the issue is taken.

had no jurisdiction to grant the receivership order in the terms that it did is without merit. By way of completeness I note Part 11.16 which provides that a respondent to whom notice of an application was not given may apply to the court to set it aside or vary any order made within 14 days of service upon him. Thus a respondent against whom a receivership order was made without notice is not without remedy.

Conclusion

[30] For the foregoing reasons the application to continue the injunction is granted. The injunction is to continue on the same terms until judgment or further other order subject to the date for initial disclosure as provided for in the order shall be Friday 29th February at 4 p.m. Costs reserved.

Rita Joseph-Olivetti
High Court Judge
British Virgin Islands