

BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

No. 148 of 2000

BETWEEN:

NEVAL GREENIDGE

*Claimant*

AND

CLICO HOLDINGS BARBADOS LIMITED

*First Defendant*

CLICO INTERNATIONAL LIFE

INSURANCE LIMITED

*Second Defendant*

Before the Honourable Mr. Justice William Chandler, Judge of the High Court.

2010: June 21, 22, 28.

Mr. Errol E. Niles attorney-at-law for the Claimant

**DECISION**

**Introduction**

[1] This matter involves an interlocutory application filed 17<sup>th</sup> June 2010, made without notice for the following orders:

1. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or either of them be restrained, whether by themselves, their servants or agents or howsoever otherwise from removing from the jurisdiction, pledging as security, disposing of and/or dealing with their assets within the jurisdiction [insofar as the same does not exceed \$650,000.00] and in particular the property situate at Whitepark Road, St. Michael, formerly known as Courtesy Garage Building, until judgment herein or further Order.

2. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants do pay the costs of this application.

The grounds of the application as set out by the Claimant are:

1. The Defendants are reported to be having financial and other difficulties in relation to the servicing of their Flexible Premium Annuity policies as they become due and are unlikely to be able to satisfy any judgment in favour of the Claimant.
2. It has been reported in the press and not denied by the Defendants that the Supervisor of Insurance has stopped the 1<sup>st</sup> Defendant from issuing policies from on or about August 2009.
3. That on May 10, 2010 this matter was set down for trial in the Supreme Court of Barbados, and Leslie Haynes, Q.C., Attorney-at-law on record for the Defendants informed the Court that he was no longer acting on behalf of the Defendants. He requested and was granted leave by the Court to withdraw from the case.
4. To date the Defendants have not responded to the letter dated May 21, 2010, from Errol E. Niles, Attorney-at-law for the Claimant (a copy of which is attached and marked Exhibit **NG#1**) requesting the name of their new attorney-at-law so that this matter may proceed for trial in July 2010 as suggested by the learned Judge Madam Justice Jacqueline Cornelius.
5. The Claimant verily believes that if this Freezing Order is not granted, there is a very strong likelihood that should his action against the Defendants succeed, which is very likely, there may be little chance of his recovering the fruits of his judgment if the 2<sup>nd</sup> Defendant is wound up or alternatively put under judicial management.
6. Further, given the length of time this matter has been outstanding, it would be a manifest injustice for the status quo to remain, given the uncertainty surrounding the future and financial viability of the 2<sup>nd</sup> Defendant in particular.

[2] It is supported by an affidavit filed by Counsel for the Claimant on the 17<sup>th</sup> day of June 2010 and the Claimant himself on the 21<sup>st</sup> June 2010. In the affidavit of the Claimant he deposes, inter alia, that:

1. I am the Claimant in this matter. The facts and matters deposed to herein are known to me and the same are true to the best of my knowledge, information and belief.
2. This matter was filed in the Supreme Court on the 20<sup>th</sup> day of January 2000 and involves issues of wrongful dismissal and/or breach of contract, interest, costs and an account of all other commissions due by the 1<sup>st</sup> and/or 2<sup>nd</sup> Defendant to the Claimant. I believe that I have a strongly arguable case as I was employed by the 2<sup>nd</sup> Defendant from the 1<sup>st</sup> day of April 1984 and was summarily dismissed by letter dated August 16, 1999 addressed to Insurance and Investments Consultants Inc., c/o the Claimant, at 46 Greenpoint Estates in the parish of St. Philip purporting to dismiss the Claimant effective the 1<sup>st</sup> day of August 1999.
3. Based on the pleadings, and the length of time it has taken to have this matter heard my claim is likely to exceed \$650,000.00 including interest, legal fees and costs.
4. The Defendants' defence is that they jointly and/or severally terminated the agreement with the Claimant in accordance with the terms of the said agreement which provided that the purported agreement was terminable by either party on 30 days written notice.

5. The notice of termination by letter dated August 16, 1999 was in breach of the said agreement on which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants purport to rely as the basis of their defence.
6. From my own knowledge and I verily believe that the Defendants either jointly and/or severally own property within the jurisdiction of this Island, more specifically the property situate at Whitepark Road, in the parish of Saint Michael, previously known as the Courtesy Garage Building.
7. Based on published reports in the DAILY NATION newspaper of June 03, 2010, quoting Winston Layne, outgoing chairman of the Government Oversight Committee, that there is a real risk of the assets being concealed, disposed of, pledged as security or dissipated as there is a distinct possibility of the 2<sup>nd</sup> Defendant being put under judicial management or at worst being wound up, before this matter is heard thereby defeating or rendering useless any judgment the Claimant may be granted.
8. This matter was last set down for hearing on May 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> 2010. At that time Mr. Leslie Haynes, QC, Attorney-at-law on record for the Defendants requested leave to withdraw from the case and was granted leave to withdraw by Madam Justice Jacqueline Cornelius on May 10, 2010.
9. The matter was previously set down for hearing on June 4, 5 and 6 2008 before Madam Justice Kaye Goodridge but had to be adjourned because Attorney-at-law Freundel Stuart, QC, was the appointed Attorney-General.
10. Based on the uncertainty surrounding the future of the 2<sup>nd</sup> Defendant and the fact that it has been reportedly prevented from selling insurance policies of any sort by the Supervisor of Insurance. I verily believe that unless granted the Order by this Honourable Court I will not easily be able to recover any judgment granted in my favour against the Defendants inasmuch as my claim relates to already earned and accrued commissions, both personal and override, between 1984 and 1999 during my employment with the Defendants.
11. I am informed by my Attorneys-at-law that there may be issues of legal costs associated with this matter and I am prepared to give an undertaking to abide by any Order this Honourable Court may take as to damages in the case that the Court shall be of the opinion that the 1<sup>st</sup> and/or 2<sup>nd</sup> Defendants or either of them shall have sustained any loss or damage by reason of this Order which I ought to pay though that my current financial situation is due in large measure to the action of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in refusing to settle my claim.

[3] The affidavit filed by Counsel for the Claimant in support of the application was in similar terms to that of the Claimant. The court asked the Claimant to file an affidavit to support his own case since he was available to do so.

#### **Brief Background**

- [4] The Claimant was employed by the Defendants as an agency manager. His services were terminated on the 8<sup>th</sup> day of February 1999 by letter dated 7<sup>th</sup> December 1998.
- [5] By Writ of Summons dated 19<sup>th</sup> January 2000 and filed on 20<sup>th</sup> January 2000 the Claimant sued for wrongful dismissal. The matter has remained unheard for quite a long period of time. The Defendants are resisting the Claimant's claim.
- [6] The Claimant claimed the relief outlined in paragraph [1] of this decision by virtue of the without notice application filed on the 17<sup>th</sup> June 2010.

#### **Issues**

- [7] The sole issue before the court is whether it ought, in the circumstances as outlined, to grant the Claimant the relief sought.

#### **Submissions**

[8] The Claimant's counsel submits that jurisdiction to grant a Mareva Injunction is given by section 40 (1) of the **Supreme Court of Judicature Act Cap 117 of the Laws of Barbados** which provides:

"The High Court may grant a mandamus or an injunction or appoint a receiver by an interlocutory order. In all cases in which it appears to the court to be just or convenient to do so."

[9] He refers also to section 40 (2) which provides that such order may be made either unconditionally or on such terms and conditions as the court thinks just and submits that the only restriction on the court making the order is that it must be just and convenient so to do.

[10] Counsel further submitted that the Mareva Injunction was merely an attempt to ensure that, if and when there is judgment in the Claimant's favour there would be some fund on which he could levy execution. He relied upon **Buckley LJ's** judgement in **Cretanor Maritime Co. Ltd v Irish Marine Management Ltd. (1978) 3 All ER SR 164 at 171**

[11] He also referred to **Lord Denning's** judgment in **Z Ltd. v A et al [1982] 1 All ER 556 at 565** where he said

"It (the injunction) enables the seizure of assets so as to preserve them for the benefit of the creditor, but not to give a charge in favour of any particular creditor."

[12] It was further submitted that, as the proceedings were interlocutory, it was not necessary for the Claimant to show that he was likely to succeed in establishing a cause of action (**Walsh v Deloitte 59 W1R 30**) Counsel also relied on **Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH & Co KG [1983] 1 WLR 1412** for the proposition that, for the purposes of the threshold requirement, it is sufficient, if upon the material before the court, the Claimant has a good arguable case.

### **The Law**

[13] It is well established that the High Court of Barbados has the jurisdiction to grant a Mareva Injunction. Whether the jurisdiction is founded in section 40 of the **Supreme Court of Judicature Act** or in the inherent jurisdiction of this court is irrelevant for the purposes of this decision. Suffice it to say that in **Nippon Yusen Kaisha v Karageorgis and Another [1975] 3 All.E.R 282**, **Lord Denning** expressed the view that section 45 of the **Supreme Court of Judicature (Consolidation) Act 1925** (which is in pari materia with our section 40 of the **Supreme Court of Judicature Act**), gives the court jurisdiction.

[14] In **Walsh v Deloitte and Touche Inc. 59 WIR 30** it was noted that:

"The jurisdiction of the courts of the Bahamas to grant mareva injunctions is based upon s. 2(1) of the Supreme Court Act 1996, which provides that the court may grant an interlocutory injunction in all cases in which it appears to the court to be just and convenient to do so."

The language of this section is the same as that of section 45 of the **Supreme Court of Judicature (Consolidation) Act 1925** which formed the basis of the creation of the mareva jurisdiction in England before that section was replaced and amplified by section 37 of the **Supreme Court Act 1981** (England). These sections are mirrored in section 40 of the **Barbados Act**, so that there is no doubt as to the basis and existence of the jurisdiction.

### **Basis of the Application**

[15] The Claimant relies on the article in the Nation Newspaper of 31<sup>st</sup> January 2010, in which the writer quotes Mr. William Layne, Permanent

Secretary, Ministry of Finance, who is Chairman of the Government's Oversight Committee, as saying that under the Insurance Act CLICO International Life would have to be wound up or put under judicial management. The article reads as follows:

"CLICO LIFE'S WAY

**BY: GERALYN EDWARD**

**Put CLICO International Life Insurance Company under judicial management.**

That will be the recommendation of the Government-established Oversight Committee, said chairman William Layne.

In an interview yesterday with the DAILY NATION, Layne, who is also permanent Secretary in the Ministry of Finance, said there were only two options left for the beleaguered company following several failed attempts to find a buyer.

He said that under the Insurance Act, CLICO International Life would have to be wound up or put under judicial management.

The permanent secretary said winding up the operations of CLICO Life would mean “you bring in an undertaker [receiver] and he sells off the assets at whatever he can realise. And in this market, with a lot of real estate holders, can’t say what they would get on the dollar.

However, Layne said: “The best option is to restructure CLICO Life under judicial management and sell [it] to a strong company.”

The Oversight Committee’s life comes to an end on June 12, said Layne, after being extended by Prime Minister and Minister of Finance David Thompson.

“At the end of that period ... we will have our recommendation for the minister as to what we feel is an option. I can speak frankly and tell you that we are saying that the life insurance company will have to be put under judicial management.

“That is the only way that you can achieve a proper restructuring,” the top Government official said.”

## The Law

[16] The purpose of the Mareva Injunction is to restrain defendants or prospective defendants who have assets within the jurisdiction, from removing these assets from within the jurisdiction so as to defeat the legitimate claims of the Claimant.

[17] In **Mareva Cia Naviera SA v International Bulk Carriers, The Mareva [1980] 1 All ER 213n, [1975] 2 Lloyds’s Rep. 509, CA Lord Denning** said -

“If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before

judgment the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets...”

[18] In section 20 of **Atkins Court forms Vol. 23(1) 2009** the learned authors state:

“The freezing injunction, known before the CPR as a ‘Mareva injunction’, will be granted where it appears likely that the Claimant will recover judgment against the defendant for a certain or an approximate sum, and there are reasons to believe that the defendant has assets within the jurisdiction with which to meet the judgment wholly or in part, but that he may deal with those assets, whether by removal out of the jurisdiction or disposing of them within the jurisdiction, so that they will not be available or traceable when judgment is given against him. The jurisdiction to grant a freezing injunction extends not only to a debt or liquidated demand, and commercial claims, but to claims for damages for breach or repudiation of contract or for tort.”

Not to be used as security for judgment

[19] English law from which our Law has been derived never provided security for judgment. There has been much discussion on this. In **Z Ltd v. A-Z And AA – LL [1982] QB 558** Kerr L.J. said:

“The original justification for the new procedure was that foreign defendants should not be able to deprive a Claimant of the fruits of a judgment in his favour, when it appears to the court that the Claimant is likely to succeed in his claim, by removing their assets out of the jurisdiction... However, the danger of assets being removed from the jurisdiction is only one facet of the ‘ploy’ of a defendant to make himself ‘judgment-proof’ by taking steps to ensure that there are no available or traceable assets on the day of judgment; not as the result of using his assets in the ordinary course of his business or for living expenses, but to avoid execution by spiriting his assets away in the interim. It does not seem to me that this was the kind of situation considered by this court in the old cases, such as *Lister & Co v Stubbs (1890)* 45 Ch D 1, [1886-90] All ER Rep 797; nor does the grant of a Mareva injunction have the effect, as was then feared, of a preference of the Claimant as against other creditors of the defendant: see *Iraqi Ministry of Defence v Arcepey Shipping Co SA* [1980] 1 All ER 480 at 485-486, [1981] QB 65 at 71-72. It is therefore logical to extend the scope of this jurisdiction whenever there is a risk of a judgment which a Claimant seems likely to obtain being defeated in this way...

However, the jurisdiction must not be abused. In particular, I would regard two types of situations as an abuse of it. First, the increasingly common one, as I believe, of a Mareva injunction being applied for and granted in circumstances in which there may be no real danger of the defendant dissipating his assets to make himself ‘judgment-proof’; where it may be invoked, almost as a matter of course, by the Claimant in order to obtain security in advance for any judgment which he may obtain; and where its real effect is to exert pressure on the defendant to settle the action...

It follows that 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 Claimant will recover judgment against the defendant for a certain or approximate sum. Second, 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 well take steps designed to ensure that these are no longer available or traceable when judgment is given against him.

On this basis it is clear that the jurisdiction may be properly exercisable in many cases which are not limited to situations where the defendant is foreign or only has some tenuous connection with this country by reason of having assets here. On the other hand, it would not be properly exercisable against the majority of defendants who are sued in our courts. In non-international cases, and also in many international cases, the defendants are generally persons or concerns who are established within the jurisdiction in the sense of having assets here which they could not, or would not wish to, dissipate merely in order to avoid some judgment which seems likely to be given against them; either because they have property here, such as a house or a flat on which their ordinary way of life depends, or because they have an established business or other assets which they would be unlikely to liquidate simply in order to avoid a judgment. It is impossible to categorise such situations. In each case the court will have to form a view, when the application is made, on which side of the line each particular case falls, but bearing in mind that the great value of this jurisdiction must not be debased by allowing it to become something which is invoked simply to obtain security for a judgment in advance, and still less as a means of pressurising defendants into settlements.

- [20] There has been no decided case in which it has been judicially decided that security for a judgment as distinct from security for costs may be obtained prior to a matter being adjudicated by the courts.

#### Discussion

- [21] The article relied upon does not reveal that the defendants intended or were seeking to remove assets from the jurisdiction or dissipate these assets so as to defeat the claim of the Claimant.
- [22] The proper interpretation to be placed on it is that winding up of the second defendant or placing it under judicial management are two options available to deal with the second defendant. These are two options permissible by law. It cannot be said that a proper interpretation of the article is that there is a real risk of assets being concealed, disposed of or pledged as security or dissipated as alleged in the proceedings or the affidavit of counsel, and in the affidavit of the Claimant filed in support of the application. There is therefore no basis in fact or in law for the application for a mareva injunction.
- [23] The court is of the opinion that the whole thrust of the Claimant’s case is to seek to obtain a security for any judgment he may obtain in the future. This is revealed in para. 7 of the Claimant’s affidavit where he deposes:

“There is a distinct possibility of the second defendant being put under judicial management or at worst being wound up before this matter is heard thereby defeating or rendering useless any judgment the Claimant may be granted.”

- [24] The fear of assets not being available is not based on removal or disposal but the fact that these assets may be apportioned by the receiver otherwise than to satisfy any judgment the Claimant may obtain or by operation of the law if the company is put under judicial management.
- [25] The other side to this application is, therefore, that the Claimant is seeking to obtain priority over the other creditors of the second defendant by obtaining the freezing order.
- [26] This he can only do if he obtains a judgment in the matter and he follows the provisions of the **Registration of Judgments Act Cap 210 of the Laws of Barbados**.

**Assets within the jurisdiction/Third party interests.**

- [27] The pleadings in this matter did not refer to the interest of the defendant in the property in respect of which the freezing order was sought. The assumption was that the defendants were the absolute owners of the fee simple in the property situate at Whitepark Road, free from encumbrances.
- [28] At the court's request, the Claimant's counsel provided a copy of the conveyance in respect of the property after conducting a search since he was not in possession of the conveyance at the date of filing. The conveyance was dated the 27<sup>th</sup> day of January 1985 and made between Joseph Coleridge Armstrong, Frederick St.Clair Hutchinson and Allen St.Clair Watson of the one part and Colonial Life Insurance Company (Trinidad) Limited of the other part and recorded in the Registration Office of Barbados on the 3<sup>rd</sup> day of March 1985 in Volume 19.6 of Deeds at page 557.
- [29] This conveyance shows that the property is not owned by either the first or second defendants but by a limited liability company of a different name.
- [30] The court could not issue a mareva injunction in respect of property owned by a third party which was not before the court and which was not a party to the proceedings. This is the case even more so when the application is made without notice. It must clearly be demonstrated that the property is owned by the defendants.

Disposal

- [31] In the premises and for the reasons outlined in this judgment the court dismisses the Claimant's application. The Claimant will bear his own costs of the application.

**William J. Chandler**

Judge of the High Court