IN THE SUPREME COURT OF BELIZE A.D. 2007

CLAIM NO. 26 of 2007

BETWEEN

DMV LTD **CLAIMANT**

AND

TOM L. VDRINE **DEFENDANT**

CORAM: HON JUSTICE SIR JOHN MURIA

Advocates:
Mr. F. Lumor S.C. for the Claimant
Mrs. Magali Marin Young for the Defendant

JUDGMENT

Delivered the 4th day of May 2007

MURIA J: The **c**laimant's substantive claim in this case is for specific performance of the agreement dated 31 August 2006, in particular, the sale and transfer of title to the claimant of a parcel of land described in the agreement as "Track 2." Alternatively, the claimant seeks damages for breach of contract.

In aid of its substantive claim, the claimant had applied, *ex parte*, for and was granted a Worldwide Freezing and an Interim Injunction order on 23 March 2007 against the defendant. For the purpose of these proceedings, I will set out the main portions of the order. Under the terms of the freezing order, the defendant is ordered not -

a) to remove from Belize any of his assets which are in Belize up to the value of US$5,000.00;
b) in any way dispose of, deal with or diminish the value of any of his assets whether they are in or outside Belize up to the same value.

The order includes a prohibition upon the defendant from dealing with any of his accounts in financial institutions, both locally and overseas. In particular, the prohibition covers –

a) Any money in the Account numbered 0835; 3/40494106; 3/434; 3/4780 or 1100008 at Provident Bank & Trust of Belize Limited, 35 Barrack Road, Belize City, Belize in the name of Thomas Lucieu Vidrine or Svenco Ltd.
b) Account numbered 08350494106347 at Credit Suisse Uetliberggstrasse 231, 8045 Zurich Switzerland in the name of Thomas Lucien Vidrine
c) Account numbered 30725956 at First Tennessee Bank, USA in the name of Thomas Lucien Vidrine.

Under the terms of the interim injunction, the defendant is restrained whether by himself, his employees, agents, contractors or in any other way from dealing with the land in dispute, in particular from –

a) Selling, leasing, charging or otherwise dealing with or disposing of in any manner whatsoever ALL THAT two parcels of land being Parcels 4181 and 5020 San Pedro Registration Section.
b) Interfering with the Claimant's possession of ALL THAT two parcels of land being Parcels 4181 and 5020 San Pedro registration Section, including but not limited to the Claimant's access or use of all access roads or walkways.
c) Removing any property, chattel, fence or structure or anything placed upon the land.
d) Causing any damage to the land or anything placed upon the said land, including fences and gates.
e) Attempting to construct or erect or build any structure or works on the said property.

Exceptions, however, were made in the order allowing the defendant to spend US$2,000.00 per week plus a reasonable sum to meet legal expenses incurred on his behalf. Should his spending exceeds US $10,000.00, he must inform the Claimant's Attorneys as to where the such fund is coming from. By its nature the above order has a severe effect on the defendant, especially, financially.

The Claimant is now seeking to have the *ex parte* freezing order and interim injunction continued until trial of the case. The defendant, on the other hand seeks to have the order discharged.

Until our Civil Procedure Rules 2005 came into force, a freezing order or freezing injunction was known as a *Mareva* injunction following the case of *Mareva Compania Naviera SA –v- International Bulkcarriers SA* [1980] 1 All ER 213. The new Rules now define a Mareva order as a "freezing" order, which many common law jurisdictions have recognized.

Arguments

The case put forward by Mr. Lumor S.C. for the continuation of the order is that there is an arguable case to be heard and determined in this matter. Secondly, Counsel submitted, the dispute over Tract 2 as demonstrated in paragraph 22 of the defendant's affidavit of 12 April 2007, is an additional reason for the continuation of the order. Thirdly, Counsel also submitted that the sum of US $1.6 million was paid into foreign accounts designated by the defendant and the continuation of the freezing and injunction order is necessary to preserve the money from dissipation.

Mrs. Marin Young strenuously urged the Court to discharge the Worldwide Freezing Order over the defendant's bank Accounts and the interim injunction over the land in question. In support of her case, Counsel submitted that the Claimant failed to make full and frank disclosure of material facts at the time of seeking the *ex parte* orders on 23 March 2007. In particular, Counsel says that

the claimant misled the Court when it relied on paragraph 30 of the affidavit of its director, Vernon Wilson, sworn to on 20 March 2007. Contrary to what that paragraph states, Counsel submitted that the defendant never instructed the Claimant to pay the money ($1.4 million USD) into the defendant's Foreign Account in the United States. Mr. Lumor S.C of Counsel for Claimant acknowledged the error in the affidavit but said that the correct information was given to the Court on 23 March 2007 when the Court was informed that the money was paid into Court. Counsel stated that the Certificate to the effect was exhibited to Vernon Wilson's second affidavit. I accept the position as explained by Mr. Lumor S.C on this point. However, I need to say that had the correct information not been put before the Court at the time of the hearing, the Court would be justified in regarding the information contained in paragraph 30 of the affidavit of Vernon Wilson of 20 March 2007, not only as an error or a misstatement of facts but might well have amounted to a breach of attorney's duty to the Court: *Memory Corporation plc v Sidhu (No.2)* [2000] 1 WLR 1443.

Counsel for the defendant's next submission for the discharge of the order is that there was no evidence of any risk that the assets ($1.4 million USD) concerned will be dissipated nor is there any evidence that the tracks (1, 3, 4 and 9) of land concerned are at risk of any adverse disposition. The defendant, Counsel says, is ready and willing to transfer the said tracks of land. It is only Track 2 that is disputed. In any case, a Caution had been registered against the whole of the two Parcels of Land Nos. 4181 and 5020 Block 7 San Pedro, thereby prohibiting

the defendant from dealing with the land in any way. In those circumstances, Counsel urged the Court to discharge the "draconian" order imposed against the defendant on 23 March 2007.

Issues

In a case such as this, the claimant will have to satisfy the Court that there is justification for the continuation of the *ex parte* injunctive order until trial. To do this the claimant must show that it has a "good arguable case" and that there is a real risk that the assets concerned will be dissipated by removal or in some other way dealt with so as to make a judgment in favour of the claimant unsatisfied. Thus the issues here are fairly straight forward: first, whether there is a good arguable case; second, whether there is a real risk of dissipation of assets by the defendant to frustrate any judgment in favour of the claimant, and third, whether the order should be discharged.

Whether the Worldwide Freezing Order and Interim Injunction granted on 23 March 2007 should continue.

I start off by reminding myself of the need for caution in this area of the law, as Sykes J (Ag) did, in the Jamaican case of *Rudolph Shoucair –v- Kevin Tucker-Brown and Carmen Tucker-Brown* (May 4, 2004) Supreme Court of Judicature of

Jamaica, HCV 01032/2004, where after referring to the *Jamaica Citizens Bank Limited –v- Dalton Yap* [1994] 31 JLR 42, he said:

> "The authorities in my view have established that the freezing of a defendant's assets must be approached with great caution. One of the reasons for this is that in many cases, and this is one of them, the application is *ex parte*. The consequences to a defendant may be devastating. It is not unknown that seemingly iron clad cases turn out to be as solid as vapour when contested"

To justify the continuation of the order made on 23 March 2007, it is clear from the case law authorities that the claimant must demonstrate that it has a "good arguable case" and that there is a real risk of dissipation by the defendant of the assets in this case: *Ninemia Maritime Corp. –v- Trave Schiffahrtgesellschaft* [1984] 1 All ER 398; *Jamaica Citizens Bank Limited –v- Dalton Yap* [1994] 31 JLR 42; *Jackson v Sterling industries Ltd.* (1987) 162 CLR 612;71 ALR 457; *National Commercial Bank Jamaica Limited v Garth Scott & Ors* (21 November 2000) Supreme Court of Judicature of Jamaica, Suit No. CL 2000/N-152; *Britannia Holdings Limited –v- Deloitte and Touche Corporate Services Limited (As Trustee of the Rainbow Trust & Ors* (13 January 2004) Supreme Court of Belize, Action No. 526 of 2003; *Rudolph Shoucair –v- Kevin Tucker-Brown and Carmen Tucker-Brown* (May 4, 2004) Supreme Court of Judicature of Jamaica, HCV 01032/2004. On the other hand, the Court has discretion to discharge the

freezing order and the interim injunction if the defendant can show that one of the requirements for the freezing injunctive order has not been made out. For example, in *Cheltenham and Gloucester Building Society –v- Riketts* [1993] 1 WLR 1545 the freezing injunction was discharged because the claimant did not have a good arguable case; and in *Capital Cameras Ltd –v- Harold Lines Ltd* [1991] 1 WLR 54, a freezing injunction was discharged because there was no risk of dissipation of assets. The fact of non-disclosure of material facts as contained in the affidavit in support of the *ex parte* application may also be a ground for discharging the freezing injunction (see *National Bank of Sharjah –v- Dellborg* (1992) The Times 24 December,1992).

Turning to the first test, it seems clear that on the materials before the Court and upon hearing Counsel for both parties, there is a "good and arguable case" here. In fact both Counsel agreed that there is a good and arguable case in this action stemming from the Agreement entered into between the parties on 31 August 2006, more particularly in relation to "Track 2" of the land in question. To put it more succinctly, the real dispute is that over "Track 2," as Counsel for the Claimant acknowledged. The affidavit filed in support of the *ex parte* order and subsequent one filed by Vernon Wilson reiterated that the dispute between the parties centres on "Track 2". One of the issues to be determined at the trial is whether the claimant has a "first option" under the Agreement to purchase "Track 2." The claimant says that there is, while the defendant maintains that there is no such option. With regard to the other Tracks, the defendant agrees that the

claimant has rights in Tracks 1, 3, 4 and 9. Having got over the first test, the claimant must go on to satisfy the second test.

Is there a real risk of the defendant dissipating his assets so as to frustrate a judgment of the Court that may be made in favour of the Claimant in this case? In so far as Tracks 1, 3, 4, & 9 are concerned, the defendant accepts that he had been paid for those Tracks and that he is ready to transfer them to the claimant. The amount paid was $1.3 million USD. A further $800,000.00 USD had also been paid but the defendant says that, that amount is for Tracks 3 & 9, while the $1.3 million USD is for Tracks 1 & 4. According to the claimant, the $800,000.00 USD is part payment for Track 2.

The affidavit evidence filed by the claimant also show that a further $1.4 million (USD) was paid. According to the claimant that was payment for Track 2. In the affidavit filed in support of the *ex parte* freezing order and interim injunction, the claimant asserted that on instruction from the defendant, the amount of $1.4 million (USD) was paid into defendant's Account in Florida, USA on 19 December 2006. This information was clearly not correct and so at the hearing on 23 March 2007, Counsel informed the Court that the money ($1.4 million USD) was paid into Court. A Certificate to this effect was later filed and exhibited to the Vernon Wilson's second affidavit.

It would seem to the Court that in so far as the funds are concerned, there is no dispute over the $1.3 million USD and that it is for the payments of Tracks of land which the defendant is willing to transfer. Equally, there is clearly no risk of the $1.4 million USD being dissipated, as it had been paid into the Trust Account of the Attorneys for the claimant on 19 December 2006 and later paid into Court on 20 March 2007. The amount of $1.4 million USD has never reached the defendant since he refused to accept it.

The status of Tracks 1, 3, 4 & 9 are not in any real dispute, saved perhaps on the status of the $800,000.00. That, of course, will be determined at the trial. Thus the main dispute is over Track 2. Is there any risk that the defendant will dispose of Track 2 ? I agree with Counsel for the defendant that in view of the Caution registered against the whole of Parcel Nos. 4181 and 5020, it is highly unlikely that the defendant would dispose of the land without the claimant knowing about it, as the Caution requires the consent of the Cautioner before the defendant can deal with the land.

In sum, on the evidence before the Court, despite the clear dispute remaining between the parties over Track 2, it cannot be confidently established that there is a real risk of the defendant dissipating the assets concerned in this case. The land concerned is secured by the registered Caution and the $1.4 million USD is secured in the hands of the Court. Those measures are adequate security to alleviate any risk that may arise in this case. In the circumstances, any order of a

draconian nature imposed against the defendant and his assets cannot be justified nor can his assets be used as a security: *Sterling Industries Ltd v Jackson* [1989] LRC (Comm) 668. There is no evidence to show that the defendant has taken any steps to dissipate the assets concerned. There is nothing to show that the defendant would not satisfy any judgment granted in favour of the claimant. In those circumstances, the Worldwide Freezing Order and Interim Injunction granted against the defendant on 23 March 2007 must be discharged.

Order: 1. Application for continuation of the *ex parte* Freezing and an Interim Injunction Order dated 23 March 2007 against the defendant is refused.

2. Application to discharge the said Order dated 23 March 2007 is granted.
3. File to return to Registrar for the usual Case Management process.
4. I will hear Counsel on Costs on a later date.

Hon Justice Sir John Muria