

23.3.2004

Civil.

IN CHAMBERS
IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE 146/04

BETWEEN: GRUPPO TORRASS S.A PLAINIFF
AND: LISMONE LTD. ET AL DEFENDANT

BEFORE: Sanderson J

Appearances:

Mr. Alister Walters of Campbells for the plaintiff

Mr. Graham Ritchie of Charles, Adams, Ritchie & Duckworth for the defendant



ORAL RULING

1. The defendant applies to set aside the ex parte order that I granted on March 10th 2004. By that order I directed;
 - (i) that certain bank accounts held by the 1ST defendant in Switzerland be frozen;
 - (ii) that the defendants not disclose these proceedings to any other persons;
 - (iii) that the defendants provide certain information regarding the receipts and disbursements of \$3.5 million US into its Swiss bank account.
2. The defendants apply to set aside these orders on several bases.
3. First, the defendant's argue that the plaintiff failed to provide full and frank disclosure on the ex parte application. Primarily the defendants say that the plaintiff failed to disclose that there was very little chance that the \$2.8 million US which was the subject of a Swiss criminal proceeding freezing order, would be set aside or released without the plaintiff being first notified.

4. The defendant has filed affidavit evidence indicating that it was extremely unlikely that the Criminal court would set aside that order without first giving notice to the plaintiff. The plaintiffs in the ex parte application before me, disclosed in their affidavit; that it would be possible for such an order be set aside without notice to it. That point seems agreed. That is, both parties agree that it was possible the order could be set aside without notice to the plaintiff.
5. The defendants' position is, however, that it was very unlikely to be set aside without notice and that material fact should have been disclosed to me on the ex parte application. The requirement on any ex parte application is that the party bringing it must make full and frank disclosure of all material facts which might influence the judge in coming to the correct conclusion. In this case the plaintiff disclosed that it was possible that the order could be set aside. If the plaintiff had known that it was unlikely this would happen, it would have been better if they had advised me of that fact.
6. However even if that position is correct and the plaintiff knew that it was unlikely that the Swiss freezing order could be set aside without notice to the plaintiff (and I do not make any finding in that regard at this point), I have concluded that, ultimately it was not material enough to affect my decision. Even if I had been told that, on the original ex parte application, I would not have changed my view as to the appropriateness of granting the mareva injunction in respect of the account, considering all of the evidence that was made available.
7. Accordingly, the argument advanced by the defendant that there was not full and frank disclosure (and therefore the ex parte order should be set aside on that basis) is dismissed.

8. Secondly, the defendants argued that the Court could not grant a free standing mareva injunction and relied upon a decision of this Court in Bass v Bass 2001 CILR p. 319. In the present case the claim is for restitution and unjust enrichment against the 1st defendant. It is not disputed that the \$2.8 million US which the 1st defendant currently has in its bank account, is the plaintiff's money and that the defendant will not resist its return to the plaintiff.
9. A constructive trust is a remedy imposed by the Court to facilitate, where appropriate, return of money where restitution and unjust enrichment are established. The equitable claims of restitution and unjust enrichment have been pleaded. Therefore, in my view, there is substantive claim in this jurisdiction against the 1st defendant and this is not a request for a free standing mareva injunction. I have concluded that the plaintiff's claim is sufficiently pleaded to allow the return of the funds should it be prove the basic facts that it has alleged.
10. Thirdly, the defendant argued that the injunction was too broad in scope; namely that it caught money in other accounts which were not properly the subject of a mareva injunction. The plaintiff has properly conceded that and is prepared to amend the order. There is currently in the Swiss account approximately \$2.8 million US. Mr. Ritchie conceded that his client is not entitled to a mareva injunction over any of the other defendant's money in order to preserve or recover the payment by the defendants of approximately \$1,000,000 US to Sheik Fahad's Spanish attorneys. It seems that the only dispute is whether or not the injunction should be broad enough to encompass \$210, 000 US in the 1st defendant's other accounts. That \$210 000 US was taken out of the R account by the 1st Defendant in payment of his consultant or financial advisory fees. I am persuaded that the plaintiff has a good arguable case that it may be entitled to a return of these fees. Obviously this is a preliminary

application and the point was not fully argued and I make no finding in that regard. I simply observe that the receipt of this \$210, 000 US is suspicious.

11. Suspicion is raised for 2 reasons. First, the 2nd defendant is a retired Methodist Minister. No explanation or evidence was offered why he would be paid \$210, 000 US to give investment advice to Shiek Fahad who was the investment minister for the Kuwait government. No qualifications or expertise of the 2nd defendant were offered such as to justify a reasonable conclusion that he was entitled to earn such a fee.
12. The second ground of suspicion is that the 2nd defendant deposed that he was asked to hold certain sums of money for the purpose of purchasing a luxury yacht for Sheik Fahad. Again no commercial or business reason was offered as to why a Methodist Minister was asked to hold \$3, 500, 000 dollars to purchase a yacht for someone else. Again there may be a legitimate and proper business reason but none was offered during this hearing.
13. Having found that the plaintiff has a good arguable case regarding the return of this money I turn next to the question of balance of inconvenience. There was no evidence offered that this \$210 000 would be dissipated or lost. That point was not pressed by Mr. Ritchie in his submission and I am unable to make any legitimate finding that either of the defendants would be unable to pay an award of damages in this amount, should the plaintiffs ultimately prove successful. Accordingly I conclude that it would not be appropriate to grant any injunctive relief in respect of the \$210, 000.
14. The injunction is therefore varied to apply only to the 2.8 million dollars that is in the account which has been referred to as the R account.
15. Fourthly, Mr Walters argued that the non-disclosure order that I imposed should be set aside. He argued that the defendants had known of the claims of the plaintiff for some 5 months and

it is, therefore, inappropriate to issue a gag order at this stage. He submitted that if there was an inadvertent breach of the non-disclosure order, it could render his clients liable for contempt of Court. He submitted that considering the fact that the defendants have known of the plaintiff's claim for some time, it simply didn't make sense to impose a non-disclosure order at this late stage.

16. Mr. Ritchie argued that these are new proceedings and that they are different than the criminal proceedings that had been launched in Switzerland. He is correct in that regard, the proceedings are substantially different. The criminal proceedings in Switzerland are directed against a banker and not against Sheik Fahad or any of the defendants in this case. Even though a freezing order has been issued by the Swiss Magistrate it is not clear what will happen to the proceeds that have been frozen pursuant to that order. I am satisfied that the non-disclosure order will not prejudice the defendant and the lifting of it may cause potential prejudice to the plaintiff. I therefore conclude that the nondisclosure order should remain in force, for a period of 30 days.

17. Finally, Mr. Walters argued that the disclosure requirements of my March 10th 2004 order have been fully met by the defendants in this case. The plaintiff advised, through Mr. Ritchie that they have not had sufficient time to examine in detail all of the documents and information that had been provided. Mr. Ritchie points out two deficiencies in the material but said that he needed more time to study the responses to come to a full conclusion as to whether or not the order had been fully complied with. I am persuaded by Mr. Ritchie's argument that the plaintiff is entitled to the information requested in respect of the \$210,000 payment and the \$81,254 payment. That is the defendant should provide the information that was ordered in respect of those payments and the details surrounding them. It may be that

there is other information which Mr. Ritchie may claim should be provided but that matter has not been raised before me and should there be disagreement between Counsel the parties may reapply to Court.

Costs will be reserved to the trial judge.



Sanderson J
Judge of the Grand Court
Dated this 23rd day of March 2004

