

CIRCULATE

Case 41

12.11.2002

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN



CAUSE NO. 425 OF 2002
CAUSE NO. 616 OF 2002
CAUSE NO. 624 OF 2002
CAUSE NO. 494 OF 2002
CAUSE NO. 595 OF 2002

BETWEEN:

- (1) J.P. MORGAN MULTI-STRATEGY FUND, L.P.
- (2) J.P. MORGAN MULTI-STRATEGY FUND II, L.P.
- (3) J.P. MORGAN MULTI-STRATEGY FUND, LTD.
- (4) J.P. MORGAN MULTI-STRATEGY FUND II, LTD.
- (5) J.P. MORGAN MULTI-MANAGER STRATEGIES FUND
- (6) LOCKHEED MARTIN CORPORATION MASTER RETIREMENT TRUST
- (7) HFI INVESTMENTS, LLC
- (8) DEUTSCHE BANK AG LONDON ("Deutsche Bank")
- (9) SWISS LIFE ABSOLUTE RETURN STRATEGIES LTD. ("Swiss Life")
- (10) RMF GLOBAL MACRO STRATEGIES (MASTER) LTD ("RMF")



Plaintiffs

AND:

- (1) THE MACRO FUND LIMITED
- (2) THE MACRO FUND (U.S.) LIMITED
- (3) IIU CAPITAL LIMITED

Defendants

Before Henderson, J.

Appearances:

Mr. S. Andrew for the Plaintiffs/Applicants

Mr. A. Jones, Q.C. and M. Imrie for the Macro Funds (Defendants/Respondents)

No one appearing for IIU Capital Ltd.

Dates of Hearing: October 21, 22, 2002

REASONS FOR JUDGMENT

This application for a world wide Mareva injunction raises the question of whether a mutual fund can, by redeeming investments in the fund by its members, be held to be dissipating its assets.

The plaintiffs are investment funds of varying types who have invested, directly or indirectly, an aggregate of (US) \$71,100,000 in the defendants, The Macro Fund Ltd. and The Macro Fund (U.S.) Ltd. The defendant IIU Capital Ltd. is the investment manager of the two Macro funds. IIU did not appear on the application as it has reached a settlement with the plaintiffs.

Each of the two Macro funds is in the business of investing money on behalf of others. The investors are issued shares in the funds and become members of the company in question. A member is entitled to redeem his investment thirty days after making a redemption request. Each month, the directors of the funds establish a Net Asset Value for the assets of the company which provides the basis for calculating a redeeming investor's entitlement.

The funds were established to invest in hedge funds. Some key personnel have left the funds and a number of investors have already redeemed their shares. The remaining assets are held, at the moment, in cash but the directors are, of course, at liberty to seek new investors and to pursue their original investment strategies.

The Articles of Association of the two companies provide for a 10% early redemption penalty where an investor redeems within one year of making its investment. The plaintiffs say that the funds (through the agency of IIU) entered into side agreements, both oral and

written, with them to waive the early redemption penalty as an inducement to the plaintiffs to invest. The defendant deny the existence, in two cases, of the alleged side agreement and say, further, that any side agreement was made without authority and is too uncertain to be enforceable.

The plaintiffs have now redeemed their investments. The Macro funds withheld an aggregate amount of (US) \$6,549,177 as an early redemption penalty. The plaintiffs seek to recover the amount of that penalty and, in the alternative, if the side agreements prove to be unenforceable, claim rescission and damages by reason of misrepresentation and negligent misstatement.

So far, the directors of the funds have established a monthly Net Asset Value which makes provision for a contingent liability equal to the amount of the early redemption penalty taken from the plaintiffs. No such provision has been made for the possible liability of the funds arising from the alternative cause of action.

On this application for a worldwide Mareva injunction, the plaintiffs seek an order which would compel the funds to maintain in excess of (US) \$14,500,000 until judgment, and to calculate the Net Asset Value in such a way as to reflect this higher contingent liability. The funds contain about USD 23,000,000 at present. The ultimate result would be, at the very least, a lower return for those members of the funds who decide to redeem their investments between the date of the order and the date of judgment. If all of the present members attempted to redeem, the injunction would prevent at least some from doing so.

A worldwide Mareva injunction is an unusual measure which should “rarely” be granted: *Hampshire Cosmetic Laboratories Ltd. v. Mutschmann and Cayman National Bank* (1999), C.I.L.R. 21 (G.C.) per Smellie, C.J. The remedy is relatively new.

Some elements of what an applicant must demonstrate are well-established. It must be shown that the merits of the claim amount to a good arguable case for a certain or approximate sum, and that the court has jurisdiction in relation to the asserted legal or equitable right. It must be shown that the respondent has assets, which may be inside or outside the jurisdiction. Save in exceptional circumstances, the applicant must provide an undertaking as to damages. For support for these propositions, see, generally: *Goldrein and Kershaw*, “Commercial Litigation: Pre-emptive Remedies”, 3rd ed. pp. 207 ff.; and *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft, GMBH* (“the Niedersachsen”), [1984] 1 All. E.R. 398, [1983] 1 W.L.R. 1412 (C.A.). Because of the decision to which I have come (which was pronounced in Chambers on October 22, 2002), I need not be concerned further with these elements.

An applicant for a Mareva injunction must also show that there is a “real risk of dissipation”. The phrase appears in a number of texts and authorities and was used by Smellie, C.J., in *Hampshire Cosmetic Laboratories, supra*.

There is continuing debate in the authorities as to just what must be shown to establish this element. Need an applicant show that the respondent is intending to run down, or dissipate, its assets, or is it enough to show that it proposes to engage in transactions which will have that effect? In *The Niedersachsen*, the Court of Appeal said it must be established 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”. This formulation has been quoted often in subsequent decisions. It contains no element of subjective intent.

On the other hand, in *Polly Peck International PLC v. Nadir and others (No. 2)*, [1992] 4 All E.R. 769 (C.A.), Lord Donaldson, M.R. (with whom Stocker, L.J. agreed) said that the aim of the injunction is to prevent the course of justice being frustrated by a defendant taking action, “the purpose of which is to render nugatory or less effective any judgment or order which the plaintiff may thereafter obtain” (underlining added). For extended discussions of this issue, see Courtney, “*Mareva Injunctions and Related Interlocutory Orders*”, 1998, pp. 207 ff; and Gee, “*Mareva Injunctions and Anton Pillar Relief*”, 4th ed., pp. 189 ff. This is not a question that needs resolution on the present application; on either view, I am satisfied that the present applicants have not met the test.

Whether a dissipation of assets must be intended or not, the authorities are in general agreement that transactions in the usual and ordinary course of the respondents’ business do not amount to “dissipation” at all. Something more is needed. In *Polly Peck, supra*, Lord Donaldson said:

It is not the purpose of a Mareva injunction to prevent a defendant acting as he would have acted in the absence of a claim against him. Whilst a defendant who is a natural person can and should be enjoined from indulging in a spending spree undertaken with the intention of dissipating or reducing his assets before the day of judgment, he cannot be required to reduce his ordinary standard of living with a view to putting by sums to satisfy a judgment which may or may not be given in the future. Equally, no defendant, whether a natural or a juridical person, can be enjoined in terms which will prevent him from carrying on his business in the ordinary way or from meeting his debts or other obligations as they come due prior to judgment being given in the action.

Lord Justice Stalker agreed with that. Lord Justice Scott added:

As a general principle, a Mareva injunction ought not to interfere with the ordinary course of business of the defendant. It is not intended to give the plaintiff security in advance of judgment but merely to prevent the defendant from defeating the plaintiff's chances of recovery by dissipating or secreting away assets. This principle makes the grant of a Mareva injunction against a bank, at any rate a bank carrying on a normal banking business, very difficult. A Mareva injunction ought never to prevent a defendant from paying his creditors their due debts. A bank must repay its depositors in accordance with the terms on which the deposits are held.

In *Galaxia Maritime S.A. v. Mineral Import Export*, [1982] 1 W.L.R. 539 (C.A.), the plaintiff had obtained a Mareva injunction restraining the defendants from removing from the jurisdiction a certain cargo which had already been loaded onto a ship owned by a third party. In discharging the injunction, the Court of Appeal used strong language to express its disapproval of this interference with the third party's business. Lord Justice Eveleigh regarded the situation as "absolutely intolerable", Lord Justice Kerr said it was "a clear abuse" of the jurisdiction, and Sir George Baker was "appalled by the possible ramification".

In *Customs and Excise Commissioners v. Anchor Foods Ltd.*, [1999] 3 All E.R. 268 (Ch.D.), the court noted that "the Mareva injunction jurisdiction is not to be used so as to impede or interfere with a defendant's ordinary bona fide business transaction".

In *Gee*, 4th Ed., the author said (at p. 194):

A defendant may be faced with insolvency if the plaintiff's claim succeeds. However, regardless of whether this is so, in the meantime the defendant is entitled to carry on business, and it would be contrary to principle for Mareva relief to be granted for the purpose either of preventing the defendant from doing so, or preserving some assets for the plaintiff in case he succeeds at trial. Because Mareva relief prejudgment is not granted for the purpose of interfering with ordinary business transactions, it follows that even if there is some element of speculative risk in such a transaction the court will still not interfere with it ... A defendant may have some pre-existing legal or moral obligation to a third party which it is appropriate for him to satisfy (e.g. repay a loan). Mareva relief should not be granted for the purpose of preventing the

defendant from honouring the obligation even though in consequence the risk of an eventual judgment going unsatisfied is substantially increased.

The Court of Appeal of Ontario said in *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (at pp. 532-533):

The applicant must persuade the court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible, in fact or in law.

Also see: *Iraqi Ministry of Defence v. Arcepey Shipping*, [1981] Q.B. 65.

These authorities demonstrate that there must be a real risk that the respondent will engage in transactions outside the usual and ordinary course of its business which will have the effect of dissipating its assets and making it more likely that a judgment in favour of the plaintiff would go unsatisfied. That is sufficient to enable me to decide the present application.

Whether the applicant must go a step further and demonstrate an intention or purpose on the part of the respondent to dissipate its assets is a question I will leave for resolution in a case where it must be answered.

It is in the usual and ordinary course of the business of each of the two Macro funds to redeem a member's investment upon request. It is true that the investor is not a creditor but a shareholder in the company. I do not think this distinction, in the particular case of a mutual fund like these, makes a difference. From the moment of the inception of a mutual fund, it is expected that it will, in the usual and ordinary course of its business, issue shares in exchange

for investments and redeem those shares. The shares are its stock in trade. It should not be prevented from responding to routine requests for redemption by a Mareva jurisdiction.

It must also be recognized that the other investors are innocent third parties. If a Mareva injunction were to issue, the Net Asset Value of a redeeming investor would decrease proportionately. There is no justification for interfering with the rights of a third party in this manner. The applicants suggest that these third parties could, when necessary, apply to this court for a variation of the injunction. That is an imposition, and not one which can be imposed legitimately for the purpose of securing these plaintiffs against the possibility of an unsatisfied judgment.

In light of my finding that no real risk of dissipation of assets has been established, the application is dismissed.

I award "defendants' costs in the cause" to the two Macro Fund defendants.

AG Henderson (for)

A.G. Henderson
Judge of the Grand Court (Actg.)

November 12th, 2002

