IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN,GRAND CAYMAN
CAUSE NO:499/93

27-09-94

BETWEEN : LAWRENCE DONALD SUTTLE AND
FLEET SERVICE CORPORATION INC.

AND :
(1) BERT A. STEVENSON
(2) THE METRO GROUP INC.
(3) CELESTE GRAHAM
(4) JERRY HOLLANDER
(5) NEVADA STATES INCORPORATORS INC.
(6) LAS VEGAS BUSINESS CENTER INC.
(7) HIGH ROLLERS INC.
(8) AMERICAN CONSOLIDATED MANAGEMENT GROUP INC.
(9) PRIME CORPORATION
(10) IDEAL FABRIC & SUPPLY INC.
(11) BASELINE INC.
(12) RLO INC.
(13) GUARDIAN BANK & TRUST (CAYMAN) LIMITED

ORDERS

Mr. Andrew Jones for the applicants, the 1st,2nd,10th,11th and 12th defendants.

Mr. Pierre Lamontagne Q.C. with Mr. Michael Parkinson for the respondents/plaintiffs.

Lawrence Donald Suttle is the sole shareholder of Fleet Service Corporation Inc. ("Fleet") which is a company incorporated in the State of Delaware, United States of America. Suttle and Bert A. Stevenson, the first defendant, were the promoters, directors and equal shareholders in Fleet, the business of which is the upholstering of motor vehicles. Suttle operated the Eastern Division of Fleet out of Florida and Stevenson the Western Division of Fleet out of Las

Vegas,Nevada. Metro Group Inc. (" Metro" ) was incorporated on 1st September 1989. There is dispute between the partes over whether it was incorporated by both Suttle and Stevenson,or just by Stevenson. This dispute need not be resolved at this hearing.

Following a settlement agreement to which I shall return ,Metro acquired the Western Division of Fleet. Prior to that agreement, Suttle alleges, Stevenson fraudulently transferred to Metro certain assets of Fleet. He also alleges that between the 20th July 1990 and July 1991, Stevenson, with the assistance of the other defendants to this suit, fraudulently appropriated and converted assets of Fleet by diverting funds in excess of US1m to accounts held in Grand Cayman with Guardian Bank and Trust (Cayman) Ltd. ("the Bank").

In December 1990, Fleet filed a voluntary petition in bankruptcy in the United States Bankruptcy Court for the Middle District of Florida. Thereafter Fleet commenced proceedings against Stevenson to set aside the alleged transfer of funds. These proceedings were settled between the partes in a Court approved settlement agreement ("the settlement agreement") recorded on the 23rd December 1991. In brief the relevant terms of such agreement were:

(a) That Metro equally divide the net income of Metro for the period 28th July 1990 to the 31st December 1991 and pay 50% of same to Fleet, which income was to be calculated in accordance with generally accepted accounting principles with provision for disclosure of all financial records and audit thereof to determine the net income should the partes fail to agree same.

(b) That Metro pay over all income and accounts receivable for the Eastern region after the 31st December 1991 to Fleet.

(c) That Metro deliver to Fleet by Bill of Sale all assets and the right to use the business locations

in the Eastern Region.

(d) That Metro transfer to Fleet all uncollected accounts receivable as of the 31st December 1991 for the Eastern Region.

(e) That Suttle be the sole shareholder of Fleet and Stevenson be the sole shareholder of Metro - Fleet to have the Eastern Region of the United States and Metro to have the Western Region without competing or interfering with each other.

It is alleged by Suttle that Stevenson and Metro frustrated and prevented all attempts to agree a division of Metro's net income for the relevant period and refused to allow any of its financial records to be examined by Suttle or Fleet.

As a consequence Suttle and Fleet commenced further proceedings against Stevenson and Metro in the Circuit Court of the 13th Judicial Circuit in Hillsboro County, Florida. Furthermore Suttle and Fleet commenced proceedings against the 3rd to the 12th defendants to this action in the United States District Court for the District of Nevada seeking an account and damages and other equitable relief. On the 25th June 1993 a default judgment was entered into against those defendants, but such judgment was set aside in respect of the 10th, 11th and 12th defendants, who are among the applicants in this summons.
The default judgment still stands as against the 3rd to 9th defendants.

These proceedings in the Cayman Islands are satellite proceedings of those in the United States of America. The plaintiffs seek to preserve such funds as are in these Islands and to recover them if the actions in the United States are successful. In furtherance of that endeavour the plaintiffs sought, and were granted ex parte,Mareva

injunctions as against all the defendants and, as against the Bank, orders for pre-trial discovery. Orders for service out of the jurisdiction were also made in respect of Stevenson,Metro, defendants 3 and 8 and defendants 10 and 12. In this summons the applicants seek for those orders to be set aside.

It is claimed that this Court did not have the jurisdiction to order service out of the jurisdiction. In the alternative it is prayed that the action be stayed on the ground of forum non conveniens. It is further argued that if the leave to serve out of the jurisdiction is not set aside the Mareva injunctions as against the applicants should be discharged on the ground of material non-disclosure by Suttle at the ex parte application. The applicants' contention that the statement of claim does not give rise to a cause of action in this jurisdiction appears to be accepted by the plaintiff. As framed the statement of claim alleges a breach of the settlement agreement which was an agreement made in Florida and approved by the Florida Court. None of the partes to the agreement is resident in these Islands and by clause 29 of the agreement it is expressed to be governed by Florida law and the venue selected by the partes was expressed as the Florida State Court or the United States District Court for the Middle District of Florida. Furthermore any alleged breach was committed outside these Islands. Any hint in the statement of claim of a proprietary tracing claim relates to events which occurred before the settlement agreement was entered into and cannot be relitigated particularly in the light of release clauses contained in the agreement itself.

The plaintiffs have however,by the affidavit evidence of their Nevada attorney Craig Stone, set up a new cause of action. This is not contained in the statement of claim and there was no application before me to amend the statement of claim. I would add here that the plaintiffs had, by order dated the 10th August 1994, until the 24th August to file their affidavits. The new cause of action was raised in the affidavits of Craig Stone, the first one being filed the 14th September 1994 and the second being tendered, with leave, at the hearing of this application.

The allegations of the plaintiffs are that during the period when the net income of Metro was, under the terms of the settlement agreement, to be divided equally between Metro and Fleet Suttle and Metro, fraudulently and in breach of their agreement, caused monies to be improperly syphoned off, sometimes through other companies and sometimes directly to secret bank accounts amounts in the Cayman Islands. The second affidavit of Mr. Stone gives examples of such transactions.

Before going further I should also note that the discovery properly made by the Bank reveals it has no knowledge of and no documents in relation to Metro, defendants 3 to 7 and defendants 11 and 12. The 9th defendant, Prime Corporations was set up at the Bank by Suttle and Stevenson jointly. Following the terms of the settlement agreement its funds were divided equally between the partes. This much, of course, was within the plaintiffs' knowledge at the time the Mareva injunctions were applied for,but was not divulged to the Court when the applications were made. In failing to inform the Court

that the plaintiffs as well as Stevenson were utilizing the banking facilities provided by these Islands, leaving the Court with the impression that only the defendants did so, the plaintiffs were guilty of concealing material relevant to the grant of the injunction. Furthermore they sought discovery in relation to bank accounts which were within the control of Suttle. I shall return to this aspect of the case later.

Ideal Fabric and Supply Inc. (the 10th defendant) never did have an account with the Bank. Stevenson depones that he set up a personal account under the title "Ideal Fabric and Supply" in a similar way to Suttle setting up a personal account in the name of "Tradewind Textiles." The funds from Prime Corporation's account were divided equally between those two named accounts.

As a result of all those revelations the plaintiffs concede that the Mareva injunction must be discharged so far as it affects defendants 2 to 12. Their Counsel has also indicated that the action against those defendants will be discontinued. However they seek the order for service out of the jurisdiction to remain in force in relation to Stevenson and further argue that if I am persuaded to discharge the Mareva injunction as against him then because of the revelations contained in Mr. Stone's affidavits I should regrant it.

Let me deal with the question of leave to serve out of jurisdiction first. Of course Counsel for the plaintiffs acknowledges that the statement of claim as presently drafted does not give rise to a cause of action in this jurisdiction. However he argues that we should look to the new affidavits when deciding whether or not to allow my

orders to stand for, he says, an opportunity to amend the pleadings ought subsequently to be granted in their light even though the formulation of such amendment is not before the Court now. In support he cites note 18/19/5 of the Supreme Court Practice which is a note on striking out pleadings,arguably applicable to the situation presently before the Court. Assuming that argument to be correct and assuming that I can proceed to allow these orders for service out of the jurisdiction to lie in the face of a statement of claim which presently discloses no cause of action within the jurisdiction, the plaintiffs still have to satisfy me that on the other material before me this Court ought to exercise jurisdiction over the action. Order 11 rule 1 of the English Rules of the Supreme Court does not apply to these Islands but the Court will look to it for guidance in determining whether to grant leave outside the jurisdiction. The first test is whether the subject matter of the action and/or one or more of the parties have a sufficient nexus with these Islands to warrant to Court exercising its jurisdiction (See Rawson Trust Co. Ltd. v G.C.T.C. Ltd 1980-83 CILR 214, 221-2). I should also add that I would follow the principles laid down in the House of Lords in Siskina and others v Distos Compania Naviera SA [1979] A.C. 210, that before leave to serve out of jurisdiction is granted the Court must be satisfied that there is some substantive relief to which the plaintiff's cause of action entitles him and the Court will not grant leave where the only remedy sought is an interlocutory injunction pending judgment in a foreign jurisdiction. Of course the Court will permit a foreign judgment to be pursued, but I have been referred to no case in which this Court has entertained jurisdiction based only on

the pendency of a foreign suit.

If the plaintiffs claims damages for fraud it is a fraud committed outside this jurisdiction by foreign nationals. Merely because the alleged tortfeasors have funds in these Islands would not provide a sufficient nexus for this Court to entertain jurisdiction. Of course the Court will exercise jurisdiction in a proprietary tracing claim, where the plaintiff alleges that his funds have been misappropriated by the defendant and can be traced to these Islands. Such cases come up regularly in our Courts and the nexus between the subject matter of the action and these Islands is accepted. But could this be a proprietary tracing claim? Fraud gives rise to a trust so, says the plaintiff's Counsel, any funds which Stevenson holds in these Islands which were obtained by means of fraud on the plaintiffs are held in trust for them. Be that as it may,that does not detract from the fact that this is really an action on an alleged breach of the settlement agreement. There may be an element of fraud in that breach but basically we are dealing with an allegation that funds which should have been shared between Metro and Fleet have not been properly accounted for and Fleet may be entitled to some of those funds after proper accounting has been done. The agreement which provided for that accounting is declared to be governed by the law of Florida and justiciable in Florida Courts. It is a matter of speculation whether Fleet will be entitled to anything once those accounts have been done; it is a matter of speculation whether any funds to which Fleet may be so entitled are lodged in these Islands. To my mind there is insufficient nexus between the subject matter and these Islands to warrant this Court giving leave to serve out of

jurisdiction.

If I am wrong on that I would in any event discharge the Mareva injunction as against Stevenson. There are serious allegations of material non-disclosure by the plaintiffs in their application for such injunctions. Not only was Suttle's involvement in Prime Corporation and his investment in these Islands kept from the Court and the Court put to the embarrassment of granting orders for discovery in relation to an account over which he had control, but other information was kept from the Court. In his affidavit in support of the application of injunction Suttle stated that his auditors were denied access to Metro's books and record. What he failed to tell the Court was that such access was denied in January 1992 only and that subsequently the auditors were given such access and they prepared a report which was sent to him . There is also evidence that he lied about his knowledge of Prime Corporation in a deposition to the Florida Court. These material non-disclosures have emerged from Stevenson's affidavit subsequently filed and have not been contradicted by Suttle . He has had full opportunity to explain his position, and even attended on the first of the hearing of this application. No affidavit in this connection has been filed; no explanation has been given; no apology tendered either personally or through counsel. Suttle is and continues to be in contempt of this Court. I need merely refer to Smellie J's full analysis of the legal consequences of such contempt as set out in Cuproquim Corporation v Plato and Others (CC.482 of 1993) to provide authority for discharging the injunctions.

Would I have ordered a regrant had the action stood? The exercise

of such a discretion would have been open to me (see, for example, Lloyds Bowmaker Ltd v Britannia Arrow Holdings PLC [1988] All ER 178). This discretion was acknowledged by Smellie J. in Cuproquim (supra). He said:

> "This residual discretion, recognized as continuing notwithstanding the basic hardline principles, must therefore be exercised according to the circumstances of the case. Where, as in this case, the transgression is not one of material non-disclosure, but instead what appears to be deliberate misstatement of fact on oath by means of affidavit evidence, the Court must naturally be inclined to be even more vigilant against abuse of its powers".

The non-disclosures of Suttle must have been deliberate and must have been made with the intention of gaining advantage over the defendants. Suttle has not made the slightest move towards purging his contempt. Until he does so every step he takes in these proceedings is tainted by that contempt. This is not a proper case for the Court to exercise its discretion in his favour.

The upshot is that I grant the orders prayed in paragraphs (1),(2),(4) and (7) of the summons filed. The Mareva injunction granted by me on the 16th September 1994 to secure the damages to which the applicants are entitled on the discharge of the injunctions against them is to remain in force until such damages have been assessed and paid.

DATED 27th Sept, 94

D. Schofield

Judge