

17.10.83

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN
BEFORE THE HON. SIR JOHN SUMMERFIELD CBE QC JP
CHIEF JUSTICE

CAUSE NO 335 of 1983

BETWEEN	KILDERKIN INVESTMENTS LIMITED	PLAINTIFF
AND	1. WILLIAM PLAYER	
	2. BANK INTERCONTINENTAL LIMITED)	
	3. INVESTMENT CONSULTANTS LIMITED)	
	4. UNIVERSAL CONSULTANTS LIMITED)	
	5. GORDON HILL AITON)	DEFENDANTS
	6. ROBERT OWEN MOYLE)	
	7. CANADIAN ARAB VINANCIAL CORP.)	

Hoffman Esq. Q.C. (with him A. Foster Esq.) for Plaintiff

Pattern Esq. (with him Boni Esq. and Vouden Esq.) for 1,4,6 & 7
defendants

R. N. A. Henriques Esq. Q.C. (with him McField Esq.) for 2, 3 and
5 defendants

JUDGMENT

It may be convenient to deal with the application by the first and seventh defendants to strike out, in whole or in part, the writ of summons.

As to paragraph 1 (a) of that summons the general endorsement on the writ clearly formulates and alleges well recognised causes of action and seeks well recognised relief therefor. One would have expected that an application under this head would have awaited the service of the statement of claim. The statement of claim could then be examined to determine whether the whole or any part of it failed to disclose a reasonable cause of action.

As to subparagraphs (b) and (c) of paragraph 1 one would have

expected an affidavit in support of an application in those terms. There is no such affidavit. As it is the applicants have not even begun to establish the allegations under those sub paragraphs.

As to paragraph 2, seeking an order striking out paragraphs 3 and 5 A for lack of authority, part of the submissions were directed to an issue which will no doubt be an issue in the trial, namely, to whom the Green Door Fund Moneys belonged and whether the plaintiff herein can lay claim to them. That must be left to the trial. I am satisfied that the orders of the Supreme Court of Ontario, in particular the order set out in Ex JC4 of Mr. Cringan's affidavit, cloak the Receiver and Manager with authority to launch this suit in the name of the company, Kilderkin Investments Ltd (Kilderkin), on all aspects of the claims made and relief sought, including the interlocutory relief now under consideration, whether the assets in question are here or abroad. The Receiver and Manager have a duty to get in and preserve all Kilderkin's assets wherever they are. However, the powers of this court are circumscribed so far as assets outside its jurisdiction are concerned. Circumscribed though they may be I am satisfied that this court is empowered to direct orders to persons within the jurisdiction inhibiting their dealing with certain assets situated abroad, if they are, e.g. the Trust Funds (as defined in the summons of the plaintiff) or the proceeds thereof, and to disclose the disposition and location of any of the Trust Funds transferred abroad.

I might say, in passing, that I do not think that the decision in PCW (Underwriting Agencies) Ltd. v. Dixon and Anor. 1983 2 All E.R. 158 detracts in any way from any of the foregoing.

I can now turn to the plaintiff's application which seeks disclosure of "the standard particulars"(as defined in the summons) in relation to one or other of the Trust Funds by certain defendants (paragraph 2) and Mareva injunctions in relation to certain defendants (paragraphs 3 & 4).

With regard to paragraph 2 of the plaintiff's summons I find

no difficulty. On the material before me I am satisfied that a more than ample case has been made out for making an order in terms of that paragraph save for one modification. As the evidence now before me indicates that the fourth defendant was not the recipient of any part of the Green Door Fund as alleged the fourth defendant should be omitted from paragraph 3 (c).

Bankers Trust Co v Shapira and Ors 1980 W.L.R. 1274 sets out the principles which should guide a court on such an application - see p 1280 B - p 1281 B.

Where a prima facie case of fraud or breach of trust is made out it behoves a court to assist the victim in every way recognised by law to recover, trace or preserve the asset in dispute. It matters not that some of the parties may not be party to that fraud. Disclosure may still be ordered in a proper case - see p 1281 F - 1282 F. I recognise that care must be taken in exercising this new jurisdiction. I have no doubt that this is a proper case for its exercise as sought, with the modification adverted to.

The Confidential Relationships (Preservation) Law does not inhibit the making of such an order in relation to confidential information. However, nothing in the order derogates from the provisions of that Law. It is a direction to the person concerned to "give in evidence" (as defined) the information (here in an affidavit) subject to that Law. That means that if the consent of the principal is not obtained an application must be made under section 3 A of that Law and an order pursuant to section 3 A (3) takes precedence over the order herein. The decision under section 3A(2) will be the ultimate determinant on whether the confidential information sought can be released. That can only be determined on an application under section 3 A. Who should be served with notice thereof can only be decided when the application is made. It would appear to be undesirable that the plaintiff should be served, despite the difficulties that might arise, as that would defeat the whole object of the exercise.



I can now turn to paragraph 3 of the summons. This is couched in very wide terms. It would require modification if an injunction were granted.

So far as the first defendant is concerned an order in terms of paragraph 3 is academic. A Mareva injunction obtained in another action (cause No. 132 of 1983) freezes all ^{his} assets in this jurisdiction including those which are the subject matter of this application. Learned counsel for the first defendant has given an undertaking to give the plaintiff notice of any application to discharge or vary that injunction. What follows is of primary concern to the remaining defendants.

In granting Mareva injunctions this Court has been guided in the past by the guidelines laid down by Lord Denning in *Third Chandris Shipping Corporation v. Unimarine S A*. 1979 1 QB 645 (at pp668 - 669).

It may be helpful if I say, without elaboration, that every one of the points in those guidelines has been satisfied in this case save one, namely, number (iv) - grounds for belief that there is a risk of the assets being removed from the jurisdiction before judgment is satisfied

To deal with the two main aspects argued.

A good arguable case of conspiracy to defraud has been put forward. The evidence adduced on affidavit (Mr. Cringan's affidavit which must be read with the reports exhibited) could, if unrebutted or unexplained, justify a court in inferring the conspiracies to defraud alleged, particularly in the light of the counter affidavits which appear to leave out much of what one might have expected to have found in them.

I am of the view that adequate particulars of the plaintiff's

claim against the defendants, the grounds therefor and amount thereof, have been fairly presented in the writ and supporting affidavit. The defendants can have no doubt about what is alleged against them, the amounts involved in the claims and the basis for the claims. Point 2 of the guidelines is satisfied.

One is left with point 4 - risk of removal. Nothing in the supporting affidavits specifically alleges grounds for belief that there is a risk of removal of the assets before satisfaction of the judgment. The fact that the summons was brought inter partes suggests that there was no fear of such a risk. If there had been a real danger of the removal of the assets from the jurisdiction they would by now, no doubt, have been removed and an injunction would be pointless. If they have not been removed by now then there never was a real danger of premature removal. Clearly this point of the guidelines has not been established. In the Third Chandris case considerable weight was attached to this aspect. It may well be that this Court will have to give further consideration to the application of this point in applications for a Mareva Injunction in this jurisdiction. Different considerations arise. Where considerable sums of money are involved and the persons concerned have no strong ties to the Islands, or a company is involved which can easily fold or be stripped of its assets, the temptation to remove the assets from the jurisdiction to escape the effects of a judgment of this court must be great. That temptation gives rise to a risk. Risk may be inferred from circumstances here which might not give rise to the same inference in England. This is particularly so where a person is using this jurisdiction to conceal or harbour the proceeds of a fraud or other misfeasance. However, that possibility was not the subject of argument and I was left to decide the matter on the principles set out in the Third Chandris case.

Having regard to the failure to fulfill the requirements of point (iv) of the guidelines the application under paragraph 3 of the summons must fail. It remains open to the plaintiff to move for

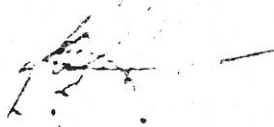
a Mareva injunction if assets are discovered in these Islands and all the points in the guidelines can be satisfied. The order in terms of paragraph 2 will disclose what, if any, assets are here.

Having said that it may seem contradictory to take a different view in relation to paragraph 4 of the summons. In my view an order in terms of that paragraph is appropriate. It merely freezes such assets of the Trust Funds, if any, that may remain with the Bank, the second defendant. It cannot in any way inconvenience the Bank. It does not freeze any of its own assets for the purposes of satisfying any judgment against it. In so far as it is effective at all, the order would prevent the further disposition or removal of assets of the Trust Funds presently in the possession of the Bank. Several features in the evidence justify an order in those terms.

Accordingly, there will be an order in terms of paragraphs 2 and 4 of the summons, omitting ^{the} fourth defendant from the order in terms of paragraph 2 (c). The order in terms of paragraph 2 will be subject to the Confidential Relationships (Preservation) Law.

There will be no order in terms of paragraph 3.

Costs remain for argument.



HON. SIR JOHN SUMMERFIELD.

17th October 1983