

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2020**

CLAIM NO. AXAHCV 2020/0039

BETWEEN:

**PETERSON CONNOR
Dba PETE'S TRUCKING & EQUIPMENT RENTALS
Claimant/Respondent**

and

**DESMOND PAUL
dba UNIQUE LANDSCAPES
Defendant/Applicant**

Appearances:

Ms. Jean Dyer, Jean Dyer & Associates of Counsel for the Applicant
Mr. Thomas W.R. Astaphan, QC with him Mrs. Tona Simpson-Whyte of Counsel
for the Respondent

2020: August 26; 28.

DECISION

- [1] **INNOCENT, J:** This matter came on for hearing on an application by the applicant, Mr. Desmond Paul ('Mr. Paul'), to set aside an order of the court dated 6th August 2020 wherein the court stayed the execution of a Writ of Fieri Facias ('Writ of fifa') issued on 23rd August 2019 and extended on 29th July 2020. This application is opposed by the respondent.
- [2] The execution of the Writ of fifa was stayed pending the determination of the court on the question of whether the freezing injunction obtained by Mr. Connor on 28th January 2019 and extended by the court at various times thereafter by consent, and

lately as of 17th July 2020, prohibited the execution of the Writ of fifa against the property that is the subject of the freezing order (the 'Stay Order').

- [3] The following issues arose for determination on the present application:
- (1) Whether the court failed to exercise its discretion in accordance with CPR 17.4 when it granted the Stay Order ex parte.
 - (2) Whether the ex parte Stay Order should be set aside for noncompliance with CPR 17.4.
 - (3) Whether the freezing order prohibits the execution of the writ of fifa.
 - (4) Whether the applicant is bound by the freezing order.
- [4] The application to set aside the ex parte Stay Order with respect to the execution of the writ of fifa was premised on the following grounds:
- (1) That the respondent failed to state any reasons for proceeding ex parte with the stay application and not giving prior notice to the applicant contrary to CPR 17.3(3).
 - (2) The respondent failed to comply with CPR 17.4 which is mandatory; and that the stay order did not comply with CPR 17.4(4) as it was not limited in duration.
 - (3) The stay order did not fix a return date in accordance with CPR 17.4(5) (a); 17.4(5) (b); 17.2(5).
 - (4) The grant of the stay order was defective to the extent that:
 - (a) there was no basis for the grant of an ex parte order staying execution of the writ of fifa;
 - (b) the grant of a stay of execution ex parte was an exceptional step, and therefore irregular for the following reasons:
 - (i) an interim freezing order does not prevent enforcement of a judgment;
 - (ii) the freezing order gave the respondent no proprietary right in respect of the property and did not confer on the applicant the status of a preferred creditor;

- (iii) the interim freezing order does not provide the respondent with security for his claim, that is, it does not make him a secured creditor;
- (iv) that none of the circumstances, contemplated by CPR 46.2 exists.

- (5) The respondent failed to make full and frank disclosure with respect to the value of his claim and the value of the property subject to the freezing order. In addition, that the freezing order is unlimited in scope and ought to have been limited to a particular sum.
- (6) An interim freezing order is not a form of pretrial attachment.
- (7) The interim freezing order did not create a charge against the property in favour of the respondent.

[5] Ms. Jean Dyer ('Ms. Dyer'), counsel for the applicant, submitted that an interim freezing order operates in personam and creates no rights in rem. Therefore, the respondent could not obtain security in the frozen property as opposed to preserving the property, and making them available at a time when the respondent obtains a judgment and seeks to enforce it. The freezing order did not create a charge over the property in favour of the respondent. Therefore, existing creditors may still enforce their judgment against the property.

[6] In response to Ms. Dyer's submissions, Mr. Thomas Astaphan, QC ('Mr. Astaphan QC') presented the following arguments. Mr. Astaphan, QC submitted that a stay of execution is distinct from an injunction and accordingly, different considerations would apply. According to Mr. Astaphan, QC, the court's power to grant a stay is discretionary. In a nutshell, Mr. Astaphan, QC's argument was that, contrary to Ms. Dyer's assertions in relation to the exercise of the court's discretion under CPR 17 in granting the interim relief, the court had properly exercised that discretion on the basis of the evidence presented on the application for the stay of execution.

- [7] The essence distilled from Ms. Dyer's argument was not that the court was not empowered to grant a stay of execution, but rather, that the respondent did not advance his application in conformity with CPR 17 and that the court had exercised its discretion improperly when granting the stay.
- [8] The second limb of Mr. Astaphan, QC's submissions was that the applicant's application for a writ of *fifa*, notwithstanding the existence of the interim freezing order, of which it is alleged the applicant had actual notice, was procedurally incorrect. According to Mr. Astaphan, QC, an interim freezing order places the property that is the subject of the freezing order under the control of the court. Therefore, the proper procedural step that the applicant ought to have followed was to apply to the court as an intervener to vary or set aside the freezing order.
- [9] In the present case, the respondent obtained the interim freezing order on 28th 2019 and filed his claim on 22nd May 2020. The applicant filed its claim on 22nd February 2019 and obtained judgment in default on 1st April 2019.
- [10] The answer to the specific questions raised on the present application lies in the nature of an interim freezing injunction itself. An interim freezing injunction is not a form of pretrial enforcement or attachment. The court is fortified in this view by ample authorities on the point.
- [11] In **Mercedes-Benz AG v Leiduck**¹ it was held that a claim for Mareva relief was not 'brought to enforce' a 'judgment' but merely prepared the ground for enforcement by different means in the future and was intended to hold the position until a judgment came into existence. A Mareva injunction was *sui generis* in that, unlike other forms of injunction, it did not decide any substantive rights, and did not call into existence any process by which such rights would be decided but merely ensured that once the mechanisms of enforcement were set in motion there was something physically available upon which they could work.²

¹ [1995] 2 All ER 929

² *Infra* at p. 941 a-b

[12] In **Cretanor Maritime Co. Ltd. v Irish Marine Mangement Ltd.**³, the appellants, the owners of a vessel, chartered the vessel to the respondent. The appellants executed a debenture in favour of a bank which created a floating charge in respect of all monies due or to become due to them. The debenture holder was given the right to appoint a receiver with power to take possession and collect any property charged by the debenture. The guarantor of the debenture was called upon to honour his obligations under the debenture, and he having done so the debenture was assigned to him. The guarantor subsequently appointed a receiver. Disputes arose under the charterparty which were referred to arbitration in London. Thereafter, the appellant applied ex parte to Mocatta J. for a *Mareva* injunction and an order was made restraining the charterers from “removing or disposing out of the jurisdiction any assets up to the sum of U.S. \$700,000” until 14 days after the publication of the award or further order. The arbitration was subsequently compromised and the charterers agreed to pay the owners the sum of \$375,000 by instalments. The charterers only paid \$93,000. Thereafter the appellants began an action against the respondents for the recovery of the monies owed and recovered judgment for the amount, but the judgment was unsatisfied. The receiver applied for an order discharging the injunction and, if necessary, for an order appointing him receiver for the purposes of recovering any assets or debts due to the appellants. The respondents’ only asset in England was a bank deposit of £70,494. On December 2 Donaldson J. discharged the injunction and ordered that the certificate of deposit be released to the respondents at the expiration of 21 days from the date of the order unless the appellants appealed.

[13] On appeal, it was held, dismissing the appeal, that a *Mareva* injunction, unlike a pre-trial attachment order which was in the nature of an order in rem and could give rise to rights similar to a lien, was relief in personam which prohibited certain acts in relation to the asset and, accordingly, in the instant case the owners acquired no rights against the deposited fund under the injunction.⁴

³ [1978] 1WLR 966

⁴ *Infra* at pp. 974A–D, 976F–G).

- [14] It was also held that the injunction did not prevail as against the debenture holder where the foreign floating charge crystallised after the injunction had been granted as the rights of the debenture holder over the deposited fund stemmed from the creation of the debenture, and not from the appointment of the receiver which merely crystallised the existing equitable charge and removed the right of the charterers to continue to deal with their assets in the course of their business.⁵
- [15] The court reasoned, that although the receiver as agent of the charterers could not obtain the discharge of the injunction, it was open to the debenture holder as equitable assignee under Irish law of the deposited fund in England to apply for such discharge, although he was not a party to the action and that as, there was no prospect of any surplus being available for unsecured creditors in the liquidation of the charterers after satisfaction of the claims of the debenture holder and of preferential creditors and as the injunction did not give the owners present rights against the deposited fund but was made in order to retain the fund in the jurisdiction in the event of the owners becoming able to levy execution upon it, which rights, if they attempted such execution, would have to give way to prior rights in the fund including the debenture holder's rights, the certificate of deposit should be released to the receiver, the application should be treated as if made by the debenture holder and the injunction discharged.⁶
- [16] In **BCS Corporate Acceptances and others v Terry**⁷ it was held that a freezing injunction and a third party debt order were different in nature. Regardless of the terms of a freezing injunction, once a judgment had been entered, the judgment creditor was entitled to take steps to enforce that judgment.⁸ It was also held that a freezing injunction operates “in personam” – it is an order directed to a defendant not to dissipate assets, for the purpose of preserving assets in aid of enforcement.

⁵ At pp. 978F–G, 979A–C

⁶ At pp. 978F–G, 979A–C).

⁷ [2018] EWHC 2349

⁸ *Infra* at paras [82] and [83]

It does not give the claimant any proprietary security rights over the defendant's assets or any special status as a preferred creditor of the defendant.⁹

[17] In **Ashtrom Anguilla Ltd. v Flag Luxury Properties (Anguilla) LLC and another**¹⁰ the applicant sought interim relief on a similar basis as the present respondent, although the application was made *inter partes*, unlike the present case. In *Ashtrom* the Applicant ("Ashtrom") has made an application for interim relief which was heard *inter partes* on an urgent basis. Ashtrom seeks an order restraining the First Respondent ("Flag") from disposing of any of its assets within the jurisdiction unless at fair market value and the proceeds are paid into court. The grounds on which the application is made are that: (a) the Flag is indebted to the Applicant ("Ashtrom") to the tune of US\$6,651,899.90 for completed construction works, (b) the Second Defendant is indebted to Ashtrom in the sum of US\$24,780,666 for completed construction works, (c) Flag is the registered proprietor of various parcels of land ("the land") which forms part of the Flag Temenos Hotel Development Project and is likely to enter into an agreement to transfer all the land to the Government of Anguilla for US\$1, and (d) if the transfer takes place Ashtrom will be deprived of assets which it can realize to satisfy any judgment that it obtains against the Defendants. The application is made on an urgent basis because it is said that the transfer is likely to take place shortly.

[18] In *Ashtrom, Small-Davis J. (Ag.)*, dismissing the application for an interim freezing order, applied the reasoning in **Cretanor Maritime Co. Ltd.** and said:

"On the evidence in the present case, even if a freezing order is granted and Flag is restrained from dealing with its assets except for full market value, the evidence is that Credit Suisse is a secured creditor for US\$180 million. It appears unlikely that Ashtrom would gain any, or any significant benefit to enforcing against the land when in all likelihood, the proceeds of any disposition of its interest in the land would go first to satisfy Credit Suisse's debt, with, on the face of it, no surplus to satisfy the unsecured creditors. The court was also informed of two judgment charges registered already against the land.

⁹ *Infra* at para [47]

¹⁰ [2009] ECSCJ No. 245

In *Cretanor Maritime Co. Ltd. v Irish Maritime Management Ltd.* the plaintiff owner of a vessel chartered her to the defendant. Thereafter the defendant executed a debenture in favour of a US bank creating a first floating charge for all moneys due or to become due, and conferring on the debenture holder a right to appoint a receiver with powers to collect property charged by the debenture if the floating charge became crystallized. The plaintiff sought and obtained a Mareva injunction against the defendant. A receiver was appointed by the debenture holder who successfully applied to have the injunction discharged. It was held, *inter alia*, that there being no prospect of any surplus being available for unsecured creditors after satisfaction of the claims of the debenture holder and the injunction being relief *in personam* meant that the plaintiff had to give way to prior rights to the assets and the asset was released to the debenture holder's receiver. The point that a freezing order creates no proprietary interest in the frozen asset in favour of the claimant was reinforced and the superiority of the claim of preexisting creditors, particularly the right of a secured creditor in a specific asset was respected."¹¹

[19] In **Grenada Technical and Allied Workers Union v Liberty Club Limited (Trading as La Source)**,¹² a decision of the Court of Appeal of the Eastern Caribbean Supreme ('Court of Appeal'), it was held, applying the case of **Halifax Plc v Rupert Sydney Chandler**,¹³ that a claimant who obtains a freezing injunction is not in a position of a secured creditor and has no proprietary claim to the assets subject to the injunction; thus there can be no objection in principle to the defendant's dealing in the ordinary way with his business and with his other creditors, even if the effect of such dealings is to render the injunction of no practical value. In that regard, the freezing injunction of \$1.1 million operated oppressively and prevented the appellant from paying its creditors. The appellant is entitled to operate its ordinary business dealings and a freezing order should not operate to hamper it from so doing.

[20] In the course of oral submissions, Mr. Astaphan QC sought to distinguish the case of **Iraqi Ministry of Defence and others v Arcepey Shipping Co. S.A. and another**¹⁴ from the present case. Mr. Astaphan submitted that the proper procedural

¹¹ *Infra* at paras 32-33

¹² [2014] ECSCJ No. 106

¹³ [2001] EWCA Civ. 1750

¹⁴ [1981] Q.B. 65

step that the applicant ought to have pursued was to intervene and seek the court's permission to set aside or vary the interim freezing order as was done in **Iraqi Ministry of Defence v Arcepey Shipping Co.** and in **Ashtrom**.

[21] Mr. Astaphan, QC submitted, that the applicant's application for writ of *fifa*, in light of the existing freezing order of which he had actual notice, was procedurally improper. According to Mr. Astaphan, QC, the proper procedural step that the applicant ought to have pursued, where there is in existence a freezing order, should have been an application to the court, as intervener, to vary or set aside the freezing order. Mr. Astaphan, QC submitted, given that the freezing order was extant, the property which was the subject matter of the freezing order was under the control of the court. Therefore, it was not open to the applicant to simply seek to enforce his judgment by execution of the writ of *fifa*.

[22] In **Iraqi Ministry of Defence v Arcepey Shipping Co.**,¹⁵ the plaintiffs, who claimed damages against the defendants, a Panamanian company, for the loss of cargo on board the defendants' ship when she sank, obtained a *Mareva* injunction restraining the defendants from dealing with the defendants' assets situated within the jurisdiction and removing the assets therefrom. The defendants' creditors who claimed repayment of a loan obtained leave from Donaldson J. to intervene in the action. The only assets were the proceeds of the ship's insurance policies held by brokers and they were insufficient to meet the claims of both the plaintiffs and the interveners.

[23] On an issue between the plaintiffs and the interveners concerning the disposition of the insurance monies, the judge held that the interveners were equitable mortgagees of the ship and assignees of the policies with title to sue on them. The plaintiffs having raised the question whether the interveners ought to have been registered as moneylenders, the judge ordered the trial of a further issue as to the legality of the loan.

¹⁵ [1981] Q.B. 65

- [24] Subsequently, however, the interveners applied for a variation of the injunction to permit the brokers to repay the amount of the loan from the insurance monies, contending that the payment would be a payment made in good faith in the ordinary course of business and that *Mareva* injunctions were not designed to prevent transactions of that kind.
- [25] On the application to vary the *Mareva* injunction, it was held, granting the application, that the purpose of the *Mareva* jurisdiction was not to improve the position of any claimants to the property of an insolvent debtor but rather to prevent the injustice of a foreign defendant in English proceedings causing assets to be removed from the jurisdiction in order to avoid the risk of having to satisfy a judgment in pending proceedings in this country; that, therefore, as the plaintiffs had not yet proceeded to judgment but were merely claimants for an unliquidated sum, the defendants should not be prevented from using their assets to pay their debts as they fell due; that it was immaterial whether or not the loan was illegal as the interveners, in applying for a variation of the injunction so that the defendants' insurance brokers would be free to repay the loan, were not seeking to enforce the loan, and that, in the circumstances, to permit the variation of the terms of the injunction would not be inconsistent with the policy underlying the *Mareva* jurisdiction.¹⁶
- [26] In **Campbell Mussells and another v Thompson and another**,¹⁷ an appeal from a decision made by a judge whereby he made certain orders modifying a *Mareva* injunction governing the assets of the first defendant, the situation with which the judge was confronted, was that it was said that there was a desperate need for funds to enable legal representation to continue. There was affidavit evidence that the two Mrs. Thompsons and their 19 children were in dire straits in London because all the funds available to them were drying up. The learned judge allowed certain relaxations of the *Mareva* injunction. The whole appeal turned on whether the decision in *A v C* (No. 2) [1981] QB 961 [1951] 2 All ER 126 is to be regarded as

¹⁶ *Infra* at pp. 71H - 72B, C, D-F, G - 73C

¹⁷ 135 NLJ 1012

holy writ which limits the discretion of judges administering the *Mareva* jurisdiction. The Seventh Cumulative Supplement to the Annual Practice under the heading 29/1/11F claims to summarise that decision as follows:

"Although the Court had power to qualify a *Mareva* injunction in relation to assets which were subject to the injunction but which were required for a purpose which did not conflict with the underlying policy of the injunction such as qualification will not be made unless the defendant satisfied the Court not merely that he owed money to someone but also that he did not have any other assets available out of which that debt would be paid. In the absence of such evidence, the Court would not permit the defendants to pay out of the assets subject to the injunction the legal costs likely to be incurred by them in the proceedings."

The court of appeal held, that it did not regard this decision as laying down a principle of universal application and, if it did so decide, it considered that it was wrong. Every case has to be dealt with on its own merits. The fundamental purpose of the *Mareva* injunction is re-stated in *A v C*, quoting *Iraqi Ministry of Defence v Arcepey Shipping Co SA* [1981] QB 65, [1979] 2 Lloyd's Rep 491 as being:

"The fundamental purpose of the *Mareva* jurisdiction is to prevent foreign parties from causing assets to be removed from the jurisdiction in order to avoid the risk of having to satisfy any judgment which may be entered against them in pending proceedings in this country."

The court went on further to hold, that the *Mareva* jurisdiction has never been intended to allow a plaintiff to put himself not only in the position of a secured creditor, but a secured creditor who is, on the basis of a contingent claim, entitled to priority over people who are dealing in the ordinary course of business with the defendant at that time. and that judges should have a very healthy scepticism when they are dealing with parties to whom *Mareva* injunctions apply - and they do. As there is no point of law here, it suffices to say that the learned judge applied his discretion to the situation when he made the order that he did.

- [27] One of Mr. Astaphan, QC's primary grounds of opposition to the present application was premised on the court's exercise of discretion in granting a stay of execution. Mr. Astaphan, QC argued that contrary to the applicant's assertions, the stay order ought not to be set aside on the basis of an improper exercise of the court's discretion in granting the same. According to Mr. Astaphan, QC, the stay order,

having been properly granted, ought not to be set aside on the bases advanced by the applicant. In support of this argument he cited the case of **Courtesy Taxi Cooperative Society Limited v Lucien Joseph and Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies and Another**.¹⁸

- [28] In **Minister of Foreign Affairs v Vehicles and Supplies**¹⁹ Section 564B(4) of the Judicature (Civil Procedure Code) Law provided that the grant of leave to apply for an order of prohibition or certiorari should, if the judge so directed, operate as “a stay of the proceedings in question” until the determination of the application or until otherwise ordered and section 686 provided that in the absence of express provision the practice of the English Supreme Court should be followed.
- [29] In the exercise of statutory powers the minister instructed the sole specified importer of approved motor vehicles to order certain vehicles for importation into Jamaica and to distribute them to motor dealers in accordance with the minister's allocation. After having been notified of their allocations of vehicles for the year 1988–89, which were for substantially fewer vehicles than in the previous year, the applicants, who were dealers, applied ex parte pursuant to section 564B of the Judicature (Civil Procedure Code) Law for leave to apply for an order of certiorari to quash the minister's allocation, or an order of prohibition prohibiting him from implementing it, or an order of mandamus directing him to make a fair allocation. Clarke J. in chambers granted leave and ordered that all allocations of quotas and proceedings consequent on the allocations be stayed pending a final determination of the matter.
- [30] The minister applied for the order to be set aside, the summons being supported by an affidavit stating that the allocation had already been made and instructions given to the importer, and that irreparable damage would be caused to the economy if the importation were delayed. Clarke J. was unavailable, and so the application was heard by Ellis J., who set aside the stay. The Court of Appeal allowed the applicants' appeal and restored the stay.

¹⁸ [1991] 1 WLR 550 at p. 556 E-G

¹⁹ [1991] 1 WLR 550

- [31] On the minister's appeal to the Judicial Committee, it was held, allowing the appeal, that, in the absence of express provision in Jamaica in relation to the discharge of ex parte orders, R.S.C., Ord. 32, r. 6 applied by virtue of section 686 of the Judicature (Civil Procedure Code) Law so that Ellis J. had jurisdiction to set aside the stay on the basis of new material before him, and no ground had been shown for interfering with his exercise of discretion; but that, in any event, the minister's executive decision as to allocation which had already been made did not constitute "proceedings" capable of being stayed under section 564B(4) of the Judicature (Civil Procedure Code) Law, nor under that subsection could the importer, which was not a party to the action, be prohibited from implementing the minister's determination; and that, accordingly, the stay had properly been set aside²⁰.
- [32] Mr. Astaphan, QC also relied on the decision in **Attorney General of Jamaica v The Jamaica Bar Association and another**²¹ to buttress his argument that the court had properly exercised its discretion when the stay order was granted.
- [33] The court has formed the view, that inasmuch as **Attorney General of Jamaica v Jamaica Bar Association** laid down guiding principles for the grant of injunctive relief operating as a stay, it does not advance the respondent's case any further. It was made to appear to the court that Ms. Dyer, in her oral arguments, conceded that the court was competent to make an order granting a stay in the normal course of things. However, Ms. Dyer's contention was that this was not an appropriate case where the court was empowered to grant a stay of proceedings.
- [34] The decision in that case concerned issues far removed from the present case. In **Attorney General of Jamaica v Jamaica Bar Association**, the Jamaica Court of Appeal had to decide the issue of whether the court could grant an interim injunction operating as a stay against the Crown pending the determination of an issue arising in an administrative claim.

²⁰ At pp. 556A, A–B, C, H–557A, C, D

²¹ [2020] JMCA Civ. 31

- [35] The Jamaica Court of Appeal held, in coming to a decision whether to grant any such injunction, the court should be guided by and apply the three-stage test enunciated in the case of *RJR Macdonald Inc. v The Attorney General of Canada and others*, reaffirming the Canadian Supreme Court's position on the grant of interim or interlocutory relief in constitutional claims in the case of *Attorney General of Manitoba v Metropolitan Stores (MTS) Ltd.* [1987] 1 SCR 110, to wit: (i) conduct a preliminary assessment as to whether there is a serious question to be tried; (ii) come to a determination as to whether the applicant would suffer irreparable harm if the application were refused; and (iii) assess which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.²²
- [36] It appears that Mr. Astaphan, QC's argument interrogated the court's exercise of discretion in granting the stay order as opposed to the question of whether the stay order ought to be set aside or alternatively, whether the stay order should remain in force. Ms. Dyer's position appeared to be that had certain matters been placed before the court, then the court would not have made the stay order. In addition, it can be gleaned from Ms. Dyer's submissions that the applicant's position is that the stay order, having been made *ex parte*, it was open to the applicant to challenge the stay on the *inter partes* hearing.
- [37] Mr. Astaphan, Q.C. relied on the decision in **Attorney General of Grenada and another v Sebastien Isaac and another**²³, a decision of the Court of Appeal, where the Court of Appeal was called upon to decide issues related to whether the judge in the court below erred in law in granting an interim injunction upon an *ex parte* application; whether the judge erred in law in not ordering that Attorney General be served with the application for interim injunction; whether learned judge erred in principle in concluding that the requirements of the CPR 17.4 were satisfied; and whether learned judge erred by continuing the injunction without affording Attorney

²² *Infra* at para [65]

²³ GDAHCVAP 2015/0028 (20th June 2016)

General a hearing on the merits of the application or on the continuation of the interim injunction.

[38] The Court of Appeal held, dismissing the appeal and applying the decision in **National Commercial Bank Limited v Olinat Corp. Ltd.**,²⁴ that:

“There is no principle of law neither is there any authority for the proposition that if an application is made for an injunctive order against a public official the judge must order that the application should be served on the public official. If such a principle were to exist, its effect would be to improperly fetter the exercise of the discretion of the judge who is seized of the ex parte application. It is for the judge to determine whether or not the application for the interim injunction was one which satisfies the threshold of being one of exceptional urgency and whether the other prerequisites have been met to warrant hearing the application on an ex parte basis. *National Commercial Bank Limited v Olinat Corp. Ltd.* [2009] UKPC 16 applied.

In relation to the appellate court's interference with the exercise of the judge's discretion, the law is very well settled. The appellate court will rarely interfere with the exercise of discretion by the trial judge save and except where it is satisfied that (1) the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into or being influenced by irrelevant factors and considerations and (2) as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. In the present case, the onus falls on the Attorney General and Chief Immigration Officer to prove that the learned judge improperly exercised her discretion in granting the ex parte injunction. Since they been unable to point to any error of principle that has been committed by the judge, there is no basis for this Court to interfere with the judge's exercise of discretion. *Michel Dufour and Other v Helenair Corporation Ltd* (1996) 52 WIR 188, pp. 190-191 applied; *American Cyanamid Co. v Ethicon Ltd.* [1975] AC 396 applied; *Bates v Lord Hailsham of St. Marylebone* [1972] 1 WLR 1373 applied.

It is the law that CPR 26.1 clothes the judge with very wide case management powers. It is entirely open the judge to determine whether the prerequisites of the CPR have been satisfied or the threshold has been met. In so doing, the judge must act judicially. There has been no evidential basis provided for the contention that the learned judge erred in principle by concluding that the requirements of CPR 17.4 were satisfied. The learned

²⁴ [2009] UKPC 16

judge's exercise of her discretion on this ground is unassailable as the evidence that was provided to her was sufficient to persuade her to exercise her discretion in the manner that she did; the urgency of the matter necessitated a hearing on an expedited basis and she acted judicially in the order she made and the discretions that were given."

Conclusions

- [39] When the court granted the stay order it was intended to preserve the status quo pending the determination of the issues raised by the respondent on its ex parte application. The court is empowered to set aside an order on its own motion or on the application of any party to the proceedings.
- [40] The court accepts Mr. Astaphan, QC's argument that it was open to the applicant to apply to set aside or vary the freezing order prior to the issuance and execution of the writ of *fifa*. However, the court is of the view that it was also open to the applicant, who obviously was affected by the stay application, to apply to set aside the ex parte stay order. The applicant clearly had two alternatives at his disposal. He chose to exercise his option to set aside the stay order. That being the case, the question that immediately arises is whether, assuming the stay order is set aside, is the applicant still required to apply to set aside or vary the freezing order as an intervener?
- [41] In the court's view, even if the court were to set aside the stay order, the applicant may very well, on the basis of the case law discussed in this judgment, have good grounds for varying or setting aside the freezing order.
- [42] In any event, the court is of the view that in all the circumstances of the case, the stay order ought to be set aside. The court has arrived at this decision by first conducting a preliminary assessment as to whether there is a serious question to be tried. Clearly, when the stay application was granted ex parte, the court did not have before it all the law related to the question of whether the freezing injunction prevented execution of the writ of execution. The court is satisfied on the basis of the authorities relied on in this decision, that an interim freezing order does not prevent enforcement of a judgment; the freezing order gave the respondent no

proprietary right in respect of the property and did not confer on the applicant the status of a preferred creditor; and, the interim freezing order does not provide the respondent with security for his claim, that is, it does not make him a secured creditor. In addition, an interim freezing order is not a form of pretrial attachment and the interim freezing order did not create a charge against the property in favour of the respondent.

[43] In the court's view, having come to the aforementioned conclusions, there appears to be no reason to stay the writ of execution pending the determination of the legal issues raised by the respondent on the ex parte application for a stay on their merits. Essentially, these issues have already been determined on the present application in the applicant's favour.

[44] The court has also arrived at its decision to set aside the stay order after determining the question of whether the applicant would suffer irreparable harm if the application were refused; and an assessment of which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[45] In the court's view, the applicant is clearly entitled to the fruits of his judgment. Ms. Dyer took the view that the respondent has essentially slept on his rights by not seeking to obtain a judgment in his favour, but instead, seeking a continuation of the interim freezing order, albeit by consent, for a period in excess of one year and seven months. This was clearly a choice made by the respondent. In the course of argument, the court echoed the observations of Jack J. (Ag.) in **VB Bank (Public Joint Stock Company) v Miccos Group Ltd. and Another**²⁵ where he said:

"There seems to be developing a culture in this Territory of parties obtaining interim relief and then doing nothing to obtain final substantive relief. That is not the purpose of granting interim remedies. If parties do nothing once they have obtained interim relief, they can expect the Court to discharge the interim relief on that ground alone. In the current case, VTB have done nothing to enforce the BVI judgment debt: they have simply sat on their protective equitable receivership for eighteen months from its grant ex parte in May 2018..."²⁶

²⁵ BVIHC (COM) 2018/0067

²⁶ Infra at para [9]

It must be noted that the court's observations aforesaid, are merely orbiter and in no way affects the court's decision on the merits of the present application.

- [46] Therefore, given the nature of the interim freezing order, the court is of the considered view that the applicant ought not to be prejudiced in the enforcement of his judgment by the existence of the interim freezing order. The respondent on the other hand, has urged the court that should the stay order be lifted that there is the likelihood that the respondent would suffer irreparable harm to the extent that there is the likelihood that he would be unable to recover the fruits of any judgment subsequently obtained because the execution of the writ of *fifa* may result in the total or substantial liquidation of the property preserved by the interim freezing order.
- [47] The court has considered the arguments of both parties in this regard and finds, to put it bluntly, that the respondent willingly, by his contumelious conduct, has failed to pursue his claim and obtained judgment, and has only himself to blame should that eventuality arise. In any case, the court has not been provided with a value of the property that is the subject of the interim freezing order; and the respondent has not satisfied the court that in light of any judgment that he is likely to obtain that the residuary of the property preserved by the interim freezing order, would be insufficient to satisfy any judgment that he is likely to obtain after execution of the writ of *fifa*.
- [48] Having arrived at the aforementioned conclusions, the court is of the view that the need to consider the question of whether the *ex parte* stay order was properly granted in conformity with CPR 17, does not immediately arise. Suffice to say that, in making the interim order for a stay, the court was guided by the principles set out in the case of **Attorney General v Isaac**. Therefore, the grounds advanced by the applicant in relation to CPR 17 would not have necessarily disposed of the present application, and may very well be deemed otiose in light of the basis upon which the court has decided to set aside the stay order.

- [49] It has come to the court's attention that the respondent has filed a fixed date claim seeking the court's determination of the substantive issues arising in the present set aside application. This claim has not come up for hearing before the court. Given the findings made by the court on the present application, the court does not see the necessity of proceeding with this claim. However, it's entirely a matter for the respondent how he proceeds henceforth. The court also notes that the respondent chose not to proceed by way of interpleader in accordance with the provisions of CPR 46.14 and CPR 54. In any event, for the reasons already set out in this judgment, it does not appear that the respondent could have successfully availed himself of this procedure.
- [50] Mr. Astaphan, QC has suggested that in order for the applicant to enforce the writ of execution against the property, which is the subject of the freezing order, it was necessary to obtain permission from the court since the property which is the subject of the freezing order is under the control of the court. Ms. Dyer, in response to this submission, argued that the applicant would not be obligated to seek the leave of the court to execute the writ because, in the first instance, the respondent had no proprietary or equitable claim to the property by virtue of the interim freezing order. In addition, Ms. Dyer submitted, that none of the matters contemplated by CPR 46.2 and 46.3 exist in the present case.
- [51] However, as Mr. Astaphan, QC rightly pointed out, the case law cited in the present proceedings shows that the usual practice was to apply to the court to vary or set aside the interim freezing order. The applicant has not done so in the present case. It appears, that there is wisdom in adopting this course. This procedure would ensure that the freezing order is not rendered nugatory by execution of the writ or enforcement proceedings as it were, by a third party. The court accepts that in the case of the interim freezing order and the writ of *fifa*, the unliquidated sum secured and the amount for which the writ is to be levied upon the subject property, are not quantified. Therefore, it may very well be opened to both parties to apply to vary the terms of the interim freezing order.

Order

[52] In the circumstances, and for the reasons stated in this judgment, the court's order is as follows:

1. The order dated the 6th day of August, 2020 granting a stay of the Writ of Execution (Fieri Facias) issued on 23rd August 2019 and extended on 29th July 2020, pending the outcome of the respondent's application for the court to determine whether the freezing order granted to Peterson Connor dba Pete's Trucking and Equipment Rental on the 28th January, 2019, and extended latterly on 17th July 2020, prevents the applicant from selling the property of DCK in Anguilla, which is subject to the freezing order, in furtherance of the said Writ of Execution (Fieri Facias), and whether the applicant, and any other person, is bound by the terms thereof; and, a stay of the auction of the property of DCK International LLC, located in Anguilla, which is the subject-matter of the said freezing order, is set aside.
2. The applicant and the respondent are both at liberty to apply to the court to vary or set aside the freezing order granted to the claimant in Claim No. AXAHCV 2019/0008.
3. Costs to the applicant to be assessed in accordance with CPR 65.11 if not agreed within 21 days of this order.

Shawn Innocent
High Court Judge

By the Court

Registrar