

ANGUILLA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. AXAHCV2009/0091

BETWEEN:

ASHTROM ANGUILLA LTD.

Applicant/Claimant

AND

FLAG LUXURY PROPERTIES (ANGUILLA) LLC

Respondent/First Defendant

AND

TEMENOS DEVELOPMENT INC.

Second Defendant

Appearances:

Mr. Thomas Astaphan and Mr. Collin Meade of Astaphan's Chambers for the
Applicant/Claimant

Mr. Ravi Bahadursingh of Chancery Lane Chambers for the Respondent/First Defendant

2009: August 28, September 21

JUDGMENT

- [1] **SMALL DAVIS, J (Ag):** 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.

The Claim

- [2] The Applicant was engaged by the Defendants to construct three phases of the Temenos Resort and Golf Course Project, a luxury resort hotel and residences and a signature golf course. The first contract related to the construction of the St. Regis Manor & Related Buildings and Facilities ("the Manor Contract") signed between Ashtrom and Flag. The second was for the construction of 29 Villas ("29 Villas Contract") and the third was for the construction of super luxurious villas styled sky villas ("the Sky Villas Contract"). The 29 Villas and the Sky Villas Contracts are made between Ashtrom and the Second Defendant. The contracts for all three phases contained fairly standard clauses pertinent to construction agreements. Each set out the contract price, the completion date, a provision for a 10% retention against completion of the contract and included an arbitration clause to deal with disputes between the parties. Clause 60 provided for the contractor (Ashtrom) to submit monthly statements to the engineer who would approve the amount that he considers to be due and payable and then deliver an interim payment certificate to the employer.
- [3] Ashtrom received payments on the Manor Contract, based on the monthly statements/interim payment certificates up until 27th February 2008. The engineer's interim payment certificate for the period up to 31st August 2008 certifies that as at that date Ashtrom performed works to the value of \$29,751,672.78. Ashtrom says that the amount of US\$5,047,542 (excluding retention money) remains unpaid, despite demands for payment, including a letter before action sent by Ashtrom's lawyers. Ashtrom ceased all works on all three phases on 1st August 2008.

- [4] The application is made seeking interim relief against Flag only, as the holder of a registered interest in the parcels of land. On Ashtrom's evidence the value of the land is US\$100-150 million.
- [5] In order to support its claim for a freezing order over an asset valued at US\$150 million when the registered proprietor is alleged to owe over US\$6 million (including retention money), Ashtrom seeks to include the sum of approximately \$31 million which is owed under its contracts with the Second Defendant. On this aspect, the Applicant seeks to persuade the court that the Second Defendant is a related company, if not a subsidiary of the First Defendant, a fact which the First Defendant denies in its evidence.
- [6] According to Mr. Arava, who swore three affidavits in support of the application, at all times Ashtrom dealt with the very same persons who presented themselves as representing both defendants. Mr. Arava asks the court to accept that the Defendants share the same officers and principals, and also the same business address. Central to this submission on behalf of the Applicant is the fact that the 29 Villas and Sky Villas contracts had originally been signed as between Ashtrom and Flag and that at the request of Flag, the two contracts were re-signed with the Second Defendant as the employer and that all that was done was a substitution of the first page (which identified the parties) and the signature page.
- [7] Ashtrom relied heavily on the fact that payment on some of the interim certificates was made by Flag Luxury Properties LLC, which is alleged to be the parent of both defendant companies. For reasons which will become apparent later in this judgment, it is not necessary for me to deal with this point, which, in any event, is more appropriate for determination at trial and not on an interlocutory application when all the evidence is not likely to be before the court.
- [8] All work ceased on the Temenos Resort and Golf Course Project sometime in June 2008. The impact of the closure of this project has significantly impacted Anguilla's economy through the resultant loss of jobs. The cessation of work has had an impact on the value of the Project itself. The court has been told that the golf course,

which was designed by celebrated golfer Greg Norman, has been poorly or inadequately maintained in the meantime and that this is critical to the viability of the Project, since the golf course was to be the centerpiece of the development.

- [9] In the Notice of application and in the First Affidavit of Ronen Arava, Ashtrom indicated that it has come to their knowledge that there is a deal between the Government of Anguilla and Flag whereby Flag will transfer its interest in the approximately 275 acres of land upon which the Project is taking place to the Government for US\$1 and that the land will then be leased back to Flag and or Mr. Robert Sillerman for the management of the property/project. On Ashtrom's understanding of the contemplated transaction, the Government will give a 30 year tax holiday to the developer who purchases the remainder of the Project. Ashtrom's concern is that the transaction would allow Flag to dispose of a significant portion of its assets in Anguilla for US\$1, thereby depriving it of the ability to enforce any judgment which it may obtain against Flag.
- [10] Spurred into action by this information and the belief that a transaction was shortly to be concluded, Ashtrom's lawyer wrote to Flag seeking confirmation that the land would not be transferred except for full value. The response from Flag's lawyer is instructive: *"it is not the current intention of Flag Luxury Properties Anguilla to transfer the Golf Course to any third party without a restructuring of the project which would take into consideration outstanding obligations to lenders creditors and other parties in interest."*
- [11] Ashtrom is of the firm view that unless an injunction is granted to restrain Flag from transferring or disposing of its interest in the land except for full value, it will have no assets to satisfy any judgment it obtains. On behalf of Ashtrom, Mr. Astaphan stressed the fact that Flag has not denied the debt.
- [12] There are some important features to note. The first is that even though the arrangement that has been made or contemplated between the Government and Flag is not entirely clear, the interest that Flag holds in the land is a leasehold interest in Crown land. It means therefore, that it cannot be transferring its interest to

the Government for US\$1; rather it appears that if this transaction is as described by Ashtrom (and it is not entirely clear that it is) Flag is effectively surrendering its lease of the land.

- [13] The second is that the land is the subject of a charge registered in favour of Credit Suisse, an institutional lender, to secure the sum of US\$180 million. Credit Suisse has also further secured its loan by registering a Caution against the land, which prevents the registration of any dealings without its consent. The effect of this is that even if Ashtrom is successful in its claim, its judgment debt would be subordinate to the Credit Suisse charge, which on Ashtrom's own evidence, would subsume the whole value of the land. I pause here to note that Ashtrom's evidence of the value of the land (at US\$100 to US\$150 million) appears to be based on a valuation of the freehold interest as opposed to the value of a leasehold interest and so to that extent may not be very helpful to the court in any event. On behalf of Flag it is asserted that given that the land has been specifically earmarked by Government for a golf course project, it renders the market value of the land, if it is used for any other purpose, at close to zero. It is said that the real value of the land and the golf course to be built on it, is the value added by the exclusive luxurious residences surrounding the golf course.
- [14] In the affidavit of Mr. William Manning sworn on behalf of Flag, it is asserted that a condition of the charge is that no dealings in the land may be effected without the consent of Credit Suisse and further that any proceeds of a forced sale of the land must first be paid over to Credit Suisse to satisfy the obligations to it as far as possible.
- [15] Flag describes the contemplated transaction as the result of frequent and urgent discussion in seeking to identify a satisfactory solution to the current closure of the Project and the effect on the viability of the Project itself, its obligations to the Government and people of Anguilla and the value of the works completed so far. It is said that the golf course requires constant and consistent maintenance at high cost and that if it is left untended, it will be irredeemable, having no value in a matter of months. What is contemplated is a primary arrangement by which there is mutual

termination of the lease over 188 acres of the 275 acres whereupon the land will revert to the Government for the benefit of the people of Anguilla. The improvements already made to the land would pass with the land at a consideration of US\$1 with further consideration to be delivered later in some form of tax concession on the hotel accommodation taxes which would itself increase the economic viability of the hotel component of the Project.

- [16] Flag urged that the contemplated transaction is advantageous to all the stakeholders, not the least of which is the Government and people of Anguilla, by ensuring the continued maintenance of the golf course, which will make it attractive to a developer. It is said that the arrangement being discussed is a bona fide attempt to protect the financial viability of the Project as well as the economic well being of the community. It has been strongly asserted that the proposed transaction is in no way motivated by any desire to remove assets out of the reach of any creditors.

The Court's Discretion

- [17] Consideration of an application for a freezing order (or Mareva injunction as it was first called) must be undertaken by the court with great seriousness. The foundation of the Mareva jurisdiction is to prevent the court's judgment from being ineffective. As vividly put by Donaldson MR in **Bank Mellat v Nikpour**¹, the Mareva injunction, along with the 'Anton Pillar' order, is one of the court's two "nuclear weapons" and the court is concerned to prevent these weapons being deployed inappropriately.
- [18] An applicant for a freezing order must show a good arguable case and that there is a real risk that the defendant will dissipate its assets so as to defeat a claim against them.
- [19] The test for a good arguable case has been long accepted to be "*one which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent. chance of success.*" See **Nimenia Maritime Corporation v Trave GmbH & Co ("the Neidersachsen")**²

¹[1985] FSR 87

² [1983] 1 W.L.R. 1412

[20] Though Mr. Bahadursingh would not concede it, Ashtrom easily satisfied the test of a good arguable case based on its claim against Flag for US\$6 million.

Risk of Dissipation of Assets

[21] The Mareva injunction traces its history back to **Mareva Compania Naviera S.A. v International Bulk Carriers S.A.**³ from which it derives its common name. The procedure was explained by Lawton LJ in **CBS United Kingdom Ltd. v Lambert**⁴:

“On the facts put before us this was not a case of a plaintiff seeking to freeze a defendant’s assets pending trial in anticipation of getting judgment. It was one in which seemed to us to show that the first defendant was conducting his affairs with intent to deprive anyone who got judgment against him of the fruits of victory. The Mareva injunction was brought into use to make this kind of behavior in commercial cases unprofitable.”

See also the dicta of Lord Donaldson MR in **Derby & Co. Ltd. v Weldon (Nos. 3 & 4)**⁵:

“The fundamental principle underling this jurisdiction is that, within the limits of its powers, no court should permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case. On the other hand, it is not its purpose to prevent a defendant carrying on business in the ordinary way, or, if an individual, living his life normally pending the determination of the dispute, nor to impede him in any way in defending himself against the claim. Nor is it its purpose to place the plaintiff in the position of a secured creditor.”

[22] The editors of **Blackstone’s Civil Practice**⁶ opine that “A real risk of disposal of assets may be established by reference either to previous conduct which tends to show a

³ [1975] 2 Lloyd’s. Rep. 509

⁴ [1983] Ch. 37

⁵ [1989] 2 W.L.R. 412 at 419D

⁶ 2008 edition, para 38.12

want of probity or to a course of dealing suggesting that the defendant will deal with his assets to make himself judgment proof, or by raising the inference that such is the case by other evidence. (Re industrial Services Group Ltd. (No. 2) [2003] BPIR 392) However, being short of money is not to be equated with an intention to dissipate assets.”

- [23] In **Hurrell v Fitness Holdings Europe Ltd.**⁷, a first instance decision of the English High Court, the defendant company was in the process of selling its business and assets. The learned judge refused to grant an order freezing the proceeds of sale or the transaction itself, having accepted that the purpose of the transaction was to pay other creditors on the basis that the dealings with the assets was a legitimate and justifiable transaction to meet its financial obligations. Cooke J observed:

“In assessing the risk of dissipation, the court is concerned with the risk of dissipation which is unjustifiable, not with the use of the assets to pay genuine indebtedness to others.

- [24] Ashtrom bases its allegation of risk of dissipation of assets on the contemplated transaction however it has not led any evidence to suggest that Flag does not intend to honour a potential judgment or that this transaction is intended to ensure that there are no available or traceable assets on the day of judgment. There must be credible evidence upon which the court can arrive at the conclusion that there is a danger of default. See **Barclay-Johnson v Yuill**⁸: *“It must appear that there is a danger of default if the assets are removed from the jurisdiction. Even if the risk of removal is great, no Mareva injunction should be granted unless there is also a danger of default.”*

- [25] Flag opposes the application relying firstly on what was described as a preliminary point by which it raised a challenge to the standard of the evidence relied upon by Ashtrom on the basis that Ashtrom has not established a risk of dissipation. On behalf of Flag it was maintained that Ashtrom has not proved that the transaction by which Flag’s asset would be transferred out of its control, was designed to make

⁷ Unreported, ECWA, 15 March 2002, Cooke J

⁸ [1980] 1 W.L.R. 1259, per Sir Robert Megarry VC at page 1265

itself judgment proof. In other words, that the transaction was being conducted mala fides and not in the ordinary course of business. Counsel for Flag cited an instructive passage from **Bekhor Ltd. v Bilton**⁹:

“The plaintiff, like other creditors of the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets pendent lite merely because he fears that by the time he obtains his judgment in his favour the defendant will have no assets against which the judgment can be enforced. Were the law otherwise, the way would lie open to any claimant to paralyze the activities of any person or firm against whom he makes his claim, by obtaining an injunction freezing their assets.... It is not a form of pre-trial attachment....The courts must be vigilant to ensure that the Mareva defendant is not treated like a judgment debtor.”

- [26] The contemplated transaction was argued by Flag as being one that was fair and balanced in that it would ensure the continued operation of the golf course and enhancing the likelihood of completion of the Project to the long term economic and employment benefit of Anguilla and Anguillians. The proposed term of the order that any proceeds of sale be paid into court was also criticized by Flag, with Mr. Bahadursingh pointing out that the secured creditor, Credit Suisse, maintained a priority over the proceeds of the sale of the land.
- [27] In order to persuade the court that not even Ashtrom itself believed that Flag was acting mala fides in the contemplated transaction, Mr. Bahadursingh pointed to (a) the fact that Ashtrom had not made its application without notice, which is the usual mode of initially obtaining such an order, on the basis that to notify the defendant of the application would result in action designed to render the order fruitless; (b) there is no suggestion on any of the three affidavits filed on behalf of Ashtrom that the proposed transaction is an attempt to avoid execution of any prospective judgment. Flag has concluded that this application is an attempt by Ashtrom to obtain security for a prospective judgment.

⁹ [1981] QB 923

[28] Mr. Astaphan's position was that there was no need to show mala fides and that the transaction spoke for itself – Flag was taking steps which would result in its sole major asset being transferred out of its hands leaving nothing available to Ashtrom as a potential judgment creditor.

[29] In **Z Ltd. v A-Z and AA-LL**¹⁰ Lord Justice Kerr had this to say:

"However, the jurisdiction must not be abused. In particular, I would regard two types of situations as an abuse of it. First, the increasingly common one, as I believe, of a Mareva injunction being applied for and granted in circumstances in which there may be no real danger of the defendant dissipating his assets to make himself "judgment-proof"; where it may be invoked, almost as a matter of course, by a plaintiff in order to obtain security in advance for any judgment which he may obtain; and where its real effect is to exert pressure on the defendant to settle the action.

.....

*It follows that in my view Mareva injunctions should be granted, but granted only, when it appears to the court that there is a combination of two circumstances. First, when it appears likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum. Secondly, when there are also reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, in whole or on part, but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him."*¹¹

[30] There is no evidence before the court that the transaction contemplated by Flag is sinister. It is improbable that the contemplated transaction involving the Government of Anguilla was conceived to evade a debt to Ashtrom. As Lord Justice Kerr stated in **The Niedersachsen** "*something more is required*". In that same case, the issue of whether some nefarious intent is required to be shown in order to obtain a Mareva

¹⁰ [1982] Q.B. 558

¹¹ Per Kerr L.J. at page 585

injunction was considered. the court put it out of question and deplored the pursuit of an inquiry into whether the object and not just the effect of the defendant's dealings with his assets is to put them out of the claimant's reach and decisively stated that the court's consideration must be focused on whether, on the assumption that the claimant has shown a good arguable case, the court concludes on the evidence before it that the refusal of the Mareva injunction would involve a real risk that the judgment or award in favour of the claimant would remain unsatisfied¹². See also **Hurrell v Fitness Holdings Europe Ltd.**

Limits of a Freezing Order - Relief is in personam

[31] Bearing this admonition in mind, it is worth repeating that the purpose of a Mareva injunction is to prevent injustice to a claimant by a defendant salting his assets away to deprive the claimant of the fruits of any judgment that may be obtained. A freezing order operates in personam and does not create any rights in rem, therefore the claimant does not obtain any property or security in the frozen assets. Whilst it would preserve the assets, making them available at a time when a judgment creditor comes to enforce his judgment, it does not give a charge in favour of the successful applicant. This means that pre-existing creditors may still proceed against the assets: see **Iraqi Ministry of Defence v Arcepey Shipping Co. S.A. (The Angel Bell)**¹³ and **Cretanor Maritime Co. Ltd. v Irish Marine Management Ltd.**¹⁴

[32] 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 is 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.

¹² Per Kerr LJ, at page 617

¹³ [1980] 2 W.L.R. 488

¹⁴ [1978] 1 W.L.R. 966

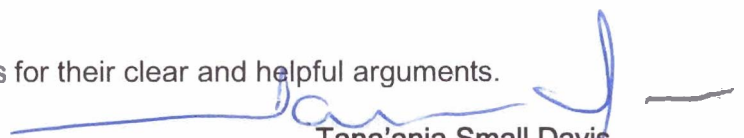
[33] In **Cretanor Maritime Co. Ltd. v Irish Maritime Management Ltd.** the plaintiff owner of a vessel chartered her to the defendant. Thereafter the defendant executed a debenture in favour of a US bank creating a first floating charge for all moneys due or to become due, and conferring on the debenture 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 pre existing creditors, particularly the right of a secured creditor in a specific asset was respected.

[34] Bearing in mind the ultimate test for the grant of interim injunction is as provided by section 24 of the *Eastern Caribbean Supreme Court Act*, that is, whether it is just and convenient to do so, the effect of such an order on the defendant and its business as well as the rights of third parties have to be borne in mind. The interest that the First Defendant has in seeking a seemingly legitimate solution to the current existing financial crisis and the obligations that it has to others, apart from the Claimant, must prevail over Ashtrom's desire to obtain security for a potential judgment.

Conclusion

[35] For these reasons, the court refuses to grant a freezing order on Ashtrom's application on the basis that the court will not act in vain. Accordingly, the application is dismissed. The First Respondent shall have its costs on the application assessed in accordance with CPR 65.11.

[36] I am indebted to Counsel on both sides for their clear and helpful arguments.


Tana'ania Small Davis
High Court Judge (Ag)