1 pages.

ROYAL COURT
(Samedi Division)

156.

1st August, 1995

Before: P.R. Le Cras, Esq., Lieutenant Bailiff,
and Jurats Bonn and de Veulle

Between:	Baptiste Builders' Supply Limited	Plaintiff
And:	(1) Frederick William Smith (2) Christina Madeleine Smith (also known as Christina Madeline Smith)	Defendants
And:	(1) Midland Bank Fund Managers (Jersey) Limited (2) Midland Bank International Finance Corporation Limited (3) Midland Bank PLC	Parties Cited

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Application by Second Defendant to vary injunction in the Plaintiff's Order of Justice, dated 10th May, 1995.

Advocate A.D. Robinson for the Second Defendant.
Advocate B.H. Lacey for the Plaintiff.

JUDGMENT

THE LIEUTENANT BAILIFF: This is an application by Mrs. Smith, the Second Defendant, to vary the terms of a Mareva injunction, in order to permit the use of funds to meet the costs of defending the action in Jersey. The figure for which counsel asks is £6,000.

By a late application, Mrs. Smith seeks leave to pay $5,000 to counsel in Georgia, U.S.A in order to prosecute proceedings there.

Both applications are contested by the Plaintiff in the action; and, in addition, the Plaintiff objects to the second application on the ground of insufficient notice.

The background to this action is an unusual one. The Defendant's former husband was employed by the Plaintiff and stole money from his employer. He is, we understand, in prison and Mrs. Smith has divorced him. Mrs. Smith has not been charged in Bermuda with any criminal offence.

Proceedings were begun in Bermuda where counsel claims that an unparticularised claim of conspiracy was made against her. These are denied by her.

It is common ground that some at least of the proceeds of the thefts were used to buy property in Georgia and parallel proceedings were begun there in order, it would seem, to enjoin property there.

The affidavit seeking the enjoinment would not, on the face of it, seem to be entirely accurate.

However, on 4th January, 1995, an interlocutory injunction was ordered, the Court record stating that:

> *"This injunction shall remain effective until the 8th day of March at which time the Court shall conduct a further hearing regarding a continuance of the injunctive relief".*

There had been proceedings in the Bermuda Supreme Court on 3rd January, 1995, in the course of which the Defendant's counsel claims that the question of parallel proceedings was raised and assurances given that those in Georgia were merely to preserve assets. This is denied by the Plaintiff's counsel, but we have before us an affidavit of Mr. Baptiste dated 3rd February, 1995, paragraph 10 of which reads:

> *"I say and believe that the purpose of the proceedings in Georgia was to protect the assets which exist there and which are beyond the jurisdiction of this Honourable Court. I say and it is my belief that by doing so would maintain the status quo and will ensure that those assets are protected regardless of whether the Defendants remain in Bermuda or not. I say that since this Honourable Court made the Order on the 3rd day of January, 1995, whereby the Court requested that this Plaintiff make best endeavours to ensure that Judgment was obtained and that any Hearing simply ensured the continuance of the Temporary Restraining Order, I am pleased to confirm to the Court that that is what transpired. I say that in no sense can it be said that my efforts to preserve those assets is vexatious or oppressive and that no harm or loss is being suffered by the Defendants by reason of the Orders obtained in Atlanta".*

On 8th March, 1995, the proceedings in Georgia duly came on. The Defendants did not appear and the Plaintiff took judgment by default.

The Bermuda proceedings have now, we are told, been abandoned.

In pursuance of this judgment the Plaintiff now seeks to pursue the assets of Mrs. Smith elsewhere, and, as we understand, Mareva injunctions have been obtained in England (against a house said to be worth £90,000) and in Jersey against a sum of some £36,000. Mrs. Smith claims to have been in possession of the house and funds prior to her husband's defalcations.

Mrs. Smith now wishes to set aside, if she can, the Georgia Judgment and to contest the Jersey proceedings. To do this she seeks to remit funds to her lawyers here and in Georgia.

The Plaintiff is strongly resisting her application.

The general principle agreed by both parties is that the Mareva injunction should allow for the payment of living expenses and legal costs.

The question before us is how the Court should exercise its discretion.

Counsel for Mrs. Smith put it in this way. First, the Order of Justice provides:

> *1. Nothing in this Order of Justice shall prevent the payment by the Defendants of their ordinary and usual living expenses (including legal advice for the purposes of these proceedings) up to a maximum of £300.00 per week or the payment of such further sums as may be agreed by the Plaintiff's solicitors in writing".*

This follows:

> *10. THAT the Plaintiff fears that unless restrained by Order of this Honourable Court the Defendants or either of them will so deal with their assets in order wrongfully and unlawfully to frustrate the execution in Jersey of the said judgment obtained".*

Secondly, he accepts that the burden falls on the Second Defendant: see Gee: "Mareva Injunctions and Anton Piller Relief" (3rd Ed'n) at pp.245 & 246:

> ***The general principle is that where a party seeks a variation to the injunction to enable a payment to be***

made, it is incumbent on that party to satisfy the court that the proposed payment would not be in conflict with the policy underlying the Mareva jurisdiction. Where the defendant is seeking the variation, it is usual for him to satisfy this requirement by swearing an affidavit deposing to the amount of the proposed payment, and the reason for making it. If the proposed payment is for a number of items, these should be identified. If the payment concerns a particular transaction between the defendant and the third party, then ordinarily the defendant will give some details of that transaction and exhibit any appropriate documents to negative any suggestion that the transaction is other than bona fide. Often the defendant will also disclose in his affidavit what assets he has subject to the injunction, although this is not invariably necessary.

He submitted that Mrs. Smith was not seeking to dissipate assets but to fund a defence. It was, he said, irrelevant where these assets came from, and indeed on the affidavits these were the only funds available.

It was not asserted for the Plaintiff that there was any proprietary interest and the Order of Justice makes no claim for this or for tracing.

In addition, Mrs. Smith claims that these funds predated any fraud committed by her husband.

It was, he conceded, correct that a Judgment had been obtained against Mrs. Smith. However, it was not, as Mr. Kelly appeared to claim "established" but one obtained by default. In this regard he referred the Court to Gee at pp.256 & 257:

If the plaintiff has become a judgment creditor then he will be in a much stronger position, compared with his position pre-judgment, to resist an application by the defendant or a third party for a variation of the injunction. In considering such an application the court will take into account the plaintiffs status as a judgment creditor, and the other remedies which are or may be available to him, including execution of the judgment or the commencement of bankruptcy or winding-up proceedings.

...

If a default judgment has been obtained which the defendant intends to seek to set aside, the court may well grant a variation to the injunction pending the hearing of that application, even though such a variation would not have been permitted after final judgment had been obtained at trial or by way of proceedings for summary judgment.

It is common for default judgments to be set aside, albeit occasionally, on terms, and the fact that the judgment is only a default judgment will be taken into account. The court hearing the application for a variation is not obliged to deal in detail with the merits of the application to set aside the judgment, but is entitled to take into account the apparent merits or demerits. Often it would be entirely premature to treat such a defendant as being in substantially the same position as if judgment had been obtained after the merits of a the claim had been determined.

As to the level of fees, Gee at p.248 says this:

If, within the reasonable confines of an interlocutory application, the plaintiff can demonstrate a strong probability that his proprietary claim to the assets is well founded, this should be taken into account in the court's decision whether, and if so on what terms, any variation is to be permitted. When a variation is allowed, the court will not ordinarily concern itself with the quantum of individual items of costs, although it may well fix a limit to the overall amount to be allowed for this purpose pending further application to the court. The court is not concerned with whether the defendant might have gone to cleaper lawyers, or whether the lawyers could have spent less time on the case, and will not act as a form of provisional taxing body for the purpose of scrutinizing the defendant's legal fees: Cala Cristal SA -v- Emran Al-Borno (1994) The Times 6 May.

The Court is not concerned with finding cheaper lawyers, although, as it is being asked here, it may fix a limit pending further application. The case both here and in Georgia involved a considerable amount of work. Furthermore, there was considerable urgency as the hearing was coming on shortly.

To paraphrase, on the affidavits, the Plaintiff's case is that the Plaintiff thinks that the Second Defendant's case is unmeritorious and that there therefore she should submit to Judgment. The strict enforcement of the Mareva injunction was not to preserve assets but to enforce a judgment by ensuring that the Second Defendant should not have available funds in order properly to contest it.

In answer, Miss Lacey made the point that the Plaintiff comes as a judgment creditor. The value of the funds in England and Jersey is barely sufficient, if that, to meet the Judgment. In these circumstances the Plaintiff is naturally unhappy that the Second Defendant, who is facing criminal charges in Georgia, will, despite there being no constructive trust or tracing order,

effectively use up what are really the Plaintiff's funds in a vain attempt to stop the Plaintiff recovering them.

Furthermore, legal aid is available here; and as to the United States, the great bulk of the work was effectively already done. There might indeed be a requirement for counsel to act *pro bono*.

Put succinctly, Mrs. Smith's position was that she was well aware of the proceedings - for there was, of course, a substantive action upon which the injunction depended - and knew or should have known that the Plaintiff could have proceeded. She deliberately did not appear, concealed and hoped to conceal her assets in England and Jersey - found upon execution of a writ of *fi. fa.* in Georgia after 8th March - and has only acted here now, after a considerable delay when she has been found out.

As to the second part of the Defendant's summons, Miss Lacey had no instructions and no chance to take any regarding United States lawyers' fees. In these circumstances the Court ought not and indeed could not authorise a payment for United States lawyers' fees.

This is clearly a case where we must exercise a discretion.

First and foremost it is not for us to take any decision which falls properly to the Court in Georgia and we do not do so.

What we are asked to do is to consider whether, in effect, the Second Defendant should use funds to instruct lawyers here and in the United States to have the application heard in Georgia and the proceedings contested here.

Given the circumstances of the endorsement of the Act of the Court in Georgia (see above) on 4th January and Mr. Baptiste's affidavit of 3rd February, 1995, in the Supreme Court of Bermuda, it seems to us entirely proper that funds should be released for these purposes. Furthermore, Mr. Baptiste was aware in February that there were bank accounts in the United Kingdom (see paragraph 7 of his affidavit). There is no reason why these funds should not be used, nor is there any reason why, on the affidavits, the Second Defendant should be forced to rely on legal aid in Jersey, or seek to enquire if it is available in the United States.

We, therefore, give leave for £6,000 to be paid to Bedell & Cristin and $5,000 to the United States attorneys involved in the application to set the Judgment aside in Georgia. Liberty to apply.

Authorities

Iraqi Ministry of Defence & Ors. v. Arcepey Shipping Co. SA [1980] 1 All ER 480.

R.S.C. (1995 Ed'n): O.29/1/25.

P.C.W. (Underwriting Agencies) Ltd v. Dixon [1983] 2 All ER 697.

Gee: "Mareva Injunctions and Anton Piller Relief" (3rd Ed'n): pp.245-257.

Barclays Bank PLC v. Thorpe (13th June, 1995) Jersey Unreported.