IN THE HIGH COURT OF NEW ZEALAND 16/7 CP No. 49/95
WELLINGTON REGISTRY

833

BETWEEN ROBERT KENT FITZHERBERT

Plaintiff

AND ANITA FAISANDIER

Defendant

Date of Hearing: 20 March 1995

Date of Judgment:

Counsel: P.C.M. Feist for Plaintiff
M.B. Wigley for Defendant

JUDGMENT OF NEAZOR J

This dispute in this case relates to a claim by the plaintiff who is resident in Hong Kong against the defendant, who is a New Zealand resident, for US$2.8 millon. This amount represents the price alleged to be payable for the plaintiff's half equity interest in a business known as US Foods.

The background of the matter, as put forward by the plaintiff, is that US Foods was Mrs Faisandier's company. In March 1991 she was lent by the plaintiff, over a period, US$300,000.00. In early 1992 a further US$400,000.00 was paid but an agreement then made that Mr Fitzherbert would own the half equity interest in the company.

Subsequently Mr Fitzherbert asked Mrs Faisandier to buy his share of the business; that was agreed on at the price of US$2.8 million. No such payment has been made.

Ex parte Mareva orders were made on 9 March 1995 requiring the defendant to file and serve details of all her bank accounts in New Zealand including all relevant details of such accounts. The defendant was also restrained from removing out of New Zealand or otherwise disposing of or dealing with all funds she held in New Zealand bank accounts save in so far as they exceed US$2.8 million. In response to the first of those orders, the defendant swore to the existence of five bank accounts with a total net credit of $2,867.99.

Two applications were then made:

(a) by the defendant to rescind or vary the orders made ex parte; if variation was ordered, the defendant sought insertion of a lower sum than US$2.8 million, and that the plaintiff provide sufficient security in New Zealand to support his undertaking as to damages;

(b) by the plaintiff seeking a world-wide Mareva injunction and full discovery of the plaintiff's assets inside and outside New Zealand.

Apart from a short affidavit made by the defendant, the defendant's argument was based on insufficiency of what had been put forward by the plaintiff in support of its ex parte application for the original orders. In correspondence between solicitors it had been contended on the defendant's behalf that there never was an agreement for sale of half the equity in the business, and that the business was never worth US$5.6 million (being twice the alleged purchase price for half of it), but at most US$3.2 million.

According to the plaintiff the company US Foods Inc was supposed to have been first established in New Zealand and later transferred to Hawaii as a United States registered company, but no record of a company registered in that name has been found, nor has any record of a company registered as US Foods Ltd been found in New Zealand.

Evidence of the transmission of funds has been produced in the form of telegraphic transfer application forms in respect of US$300,000.00 for credit of the defendant's account at a New Zealand bank under the trade name of First Impressions. Similar evidence was produced in respect of the US$400,000.00 remitted to one of the accounts

under the account holder's name of Anita Preese later disclosed by the defendant as hers (which at the time of disclosure had a small debit balance). The last of those documents is dated 10 February 1992.

A document has been produced dated 10 June 1992. That was a letter signed by the plaintiff which he asked the defendant to sign as an acknowledgment of loans in total of US$700,000.00 outstanding and payable on demand. The plaintiff asked the defendant to take other steps to protect his interest including making a provision by will.

Also produced has been an undated agreement purportedly signed by both parties, evidencing the sale of the half-share of the company for US$700,000.00 paid, the shares to be held in trust for the plaintiff. According to the statement of claim that agreement was signed in consideration of the payment of the US$400,000.00. The plaintiff assigns the date of 3 or 4 September 1992 to this document; the defendant has deposed that she has no recollection of ever signing it. A forensic document examiner has expressed the opinion that it is highly probable that the person who signed the agreement was the same person who wrote or signed other documents attributed to the defendant.

The document dated 10 June 1992 was first put on the record by the defendant, the plaintiff deposing that he had forgotten about it and probably had never received back a copy of it. Explanations have been given by the plaintiff as to why the letter may have been given in the terms it was, including that it was consistent with an earlier agreement for sale and purchase of a half interest in the company.

It is alleged that the agreement that the defendant would buy the plaintiff out was made orally in May 1993. A document has been adduced dated 8 July 1993 evidencing sale of the whole of the company to the plaintiff for US$700,000.00 and purporting to remove the company as an asset in the defendant's estate; there is another document to the same effect dated 31 August 1993. There were, the plaintiff deposed, discussions about liquidating the company to pay him US$2.8 million, but agreement to carry on, with a further document dated 12 November 1993 being supplied by the defendant. This document recorded the sale to the plaintiff of the company for US$700,000.00, in the event of the defendant's death.

Then, in a letter dated in mid-January 1994, the plaintiff has deposed he asked the defendant for US$200,000.00 immediately, confirmation that the company was to stop trading in March and payment of the balance of US$2.8 million before 15 June. The

defendant's response was that payments should be able to be started about 20 June 1994, that she could not immediately pay the US$200,000.00 but would arrange bridging finance.

Various correspondence followed. It included a letter dated 4 April in which the defendant referred to payments totalling US$2.8 million and payments over a period to total US$2.8 million. An acknowledgment that the defendant will pay US$2.8 million is explicit in the letter. It is not without significance that the letter speaks of "the repayment of your loan and the remaining money taking it up to $2.8 million". In a later faxed message dated 31 August 1994 the defendant said that the company had realised about US$3.5 million and that the plaintiff would receive US$2.8 million. On 19 October 1994 the plaintiff received a further explanation as to why no money was available. That message also indicated that the defendant was trying to keep her financial interests out of New Zealand.

At that time, the defendant deposed, he had suggested that in his discretion, after he had received the US$2.8 million he might return to her any excess over what he would have earned on the US$700,000.00 had it continued in other investments.

A solicitor was then brought into the matter for the defendant, but in terms that he would be able to facilitate settlement of the arrangement. Much correspondence followed with a consistent theme that the defendant had money overseas, and was expecting its release and had agreed to pay the plaintiff in accordance with their agreement. There was little or no apparent advance in bringing the matter to a conclusion except that on 13 January 1995 the defendant sent by fax a message to the plaintiff including the statement that money had been transferred from Honolulu. The plaintiff deposed that on 11 January 1995 the defendant had agreed to have funds by then released by the United States authorities remitted to New Zealand. By 26 January 1995 the plaintiff had still not received money or any indication of where the defendant's money from the business was and instructed his solicitors. The application for Mareva injunction followed and an application for summary judgment which has since been entered for US$700,000.00 with directions that the action for the balance proceed to trial.

The defendant's only response in respect of the Mareva injunction was her statement that she had no recollection of signing the agreement to sell half her equity and was having the document checked by the forensic document examiner and to produce the document dated 10 June 1992.

The application for the original orders was made on the grounds that:

(a) the plaintiff has a good arguable case against the defendant. That the defendant is liable to the plaintiff for US$2.8 million plus interest relating to her purchase in or about May 1993 of the plaintiff's half-share in the company called US Foods Inc.;

(b) the defendant has appropriate assets within the jurisdiction namely a bank account in her name in which the proceeds from the liquidation of a business or company of that name, approximately US$3,200,000.00 are deposited; and

(c) if the orders were not granted there was a real risk that the proceeds would be transferred overseas or otherwise dealt with, such that the defendant would have insufficient assets to satisfy judgment if the plaintiff succeeded in his case against the defendant.

The defendant sought to rescind those orders on the basis that:

(1) there was no right at law allowing for a Mareva injunction and an affidavit setting out details of bank accounts etc in the circumstances;

(2) the plaintiff had failed to disclose all material facts in breach of his duty on an ex parte application and the injunction should therefore be discharged;

(3) there was not a good arguable case;

(4) the plaintiff had presented insufficient evidence of a real risk of dissipation of assets;

(5) the plaintiff had insufficient assets and income to support his undertaking and his assets and income would be difficult to obtain access to as he is a Hong Kong resident. The orders should be rescinded for that reason or alternatively the plaintiff should be required to provide adequate New Zealand base security;

(6) there had been undue delay in making application and as an equitable remedy the application ought not therefore to have been granted.

The plaintiff sought further orders in lieu of those already made namely:

(1) that the defendant file and serve within 7 days an affidavit -

(a) disclosing full details and whereabouts of all her assets of any description including assets in which she has a partial and/or beneficial interest;

(b) disclosing the precise amount and whereabouts of the proceeds from the liquidation of the business or company called US Foods or US Foods Inc.; and

(2) until after judgment in the proceeding or further order of the Court the defendant be restrained from disposing of or transferring, charging or diminishing or in any way whatsoever dealing with any of her assets wheresoever they might be except in so far as the value of such assets exceeded US$2,800,000.00 with the proviso that in so far as the order purported to have any effect outside New Zealand no person should be affected by it or concerned with the terms until it shall have been declared enforceable or shall have become recognised or registered or enforced by a foreign Court (and that then it should only affect such person to the extent of such declaration or recognition or registration on enforcement) unless that person is -

(a) a person to whom the order is addressed or an officer or agent appointed by Power of Attorney of such a person;

(b) a person who is subject to the jurisdiction of this Court and who -

(i) has been given written notice of the order at his or its residence or place of business within the jurisdiction; and
(ii) is able to prevent acts or omissions outside the jurisdiction of this Court which assist in the breach of the terms of the order.

(3) the plaintiff shall not without the leave of the Court use any information obtained by reason of Order 1 except for the purposes of -

(a) securing compliance with Order 2; or
(b) enforcing any judgment obtained by the plaintiff against the defendant in the proceeding.

(4) the plaintiff shall not without the leave of the Court seek to enforce the order in any country other than New Zealand;

(5) the defendant may apply or rescind to vary the orders or if orders are required as to her living, business or legal expenses, on three days' notice to the plaintiff.

The grounds on which the replacement orders were sought are that:

(a) the plaintiff has a good arguable case against the defendant. That the defendant is liable to the plaintiff for US$2.8 million plus interest relating to the purchase in or about May 1993 of the plaintiff's half-share in the company;

(b) the defendant had advised the plaintiff in January 1995 that she had appropriate assets within the jurisdiction namely a bank account in her name in which the proceeds from the liquidation of the nominated business, approximately US$3.2 million were deposited and that ex parte orders had been sought and granted restricting the defendant's use of her New Zealand bank accounts;

(c) the defendant had sworn that she had 5 bank accounts in New Zealand, none of which had a balance in excess of $2,000.00;

(d) there was a real risk that the proceeds would be transferred overseas or otherwise disposed or dealt with, such that the defendant would have insufficient assets available and accessible to satisfy judgment if the plaintiff succeeded in his case.

The plaintiff's application has been challenged in argument on every point:

(a) that there is no jurisdiction in New Zealand to grant an injunction in relation to assets and steps taken outside New Zealand;

(b) that if there is jurisdiction this case is not one on the facts in which such an order should be made, and any order should be limited to assets in New Zealand;

(c) there is no good arguable case in support of the orders sought;

(d) that non-disclosure of the letter of 10 June 1992 on an ex parte application was such a failure on the plaintiff's part that the orders ought to be rescinded, not expanded;

(e) that there is insufficient evidence of real risk that assets will be dissipated;

(f) that the plaintiff's undertaking as to damages is insufficiently supported by New Zealand based assets to warrant the issue of an injunction without the provision of security.

In his application, the plaintiff has relied on *Derby & Co* v *Weldon* (Nos 3 & 4) [1990] 1 Ch 65 and *Re Bank of Credit and Commerce International* [1994] 1 WLR 708 as

supplying both the justification for, and the wording of, a world-wide injunction. The English provision on which the Courts have relied is s 37(1) of the Supreme Court Act 1981:

> "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so."

Subsection (3) of that section is in terms comparable in effect with those of R 236B(1) of the High Court Rules. The New Zealand provision on which the plaintiff relies as the source of jurisdiction is s 16 of the Judicature Act 1908, since R 236B deals with assets in New Zealand. That section provides:

> "The Court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand."

Section 16 was accepted as the source of jurisdiction for the Court to make an order restraining a New Zealand business from a re-organisation which would involve the sale of overseas assets: *Leucadia National Corp* v *Wilson Neill Ltd* (1994) 7 PRNZ 701 (although the injunction was refused on the merits). The Court of Appeal said:

> "*Leucadia* and *Rastin* sought the interim injunction in reliance on the inherent jurisdiction of the Court. That jurisdiction was confirmed by s 16 of the Judicature Act 1908. As was said by this Court in *Quality Pizzas Limited* v *Canterbury Hotel Employees' Industrial Union* [1983] NZLR 612, 616, the Court has inherent jurisdiction to make any order necessary to enable it to act effectively, even in respect of those matters regulated by rules of Court, so long as it does not contravene those rules."

Reference was made to *Hunt* v *BP Exploration Co (Libya) Ltd* [1980] 1 NZLR 104 where Barker J held that the Court had inherent jurisdiction to issue a Mareva injunction to prevent a defendant absent from New Zealand from disposing of his assets within the jurisdiction and later, at p 706, reference was made to the instant case where

the injunction was sought pending determination of issues which had been referred to arbitration in California. The respondent in the proceedings was a New Zealand company and the appellants claimed that that company was indebted to them under a contract of guarantee. The Court said that that is a proper cause of action under New Zealand law and although the causes of action had been stayed in New Zealand pending the outcome of arbitration whilst they remained pending it was within the jurisdiction of the Court to restrain the disposal of assets.

It is, as was submitted for the plaintiff, established in England that world-wide Mareva orders may be made and that ancillary orders for discovery may be made, one of the purposes of the discovery order being to give the plaintiff information on the basis of which the plaintiff may seek an order freezing an asset or all assets in an overseas jurisdiction. Similarly that jurisdiction has been upheld in New South Wales on the basis of a general provision in that State's Supreme Court Act 1979 similar in terms to s 16 of the Judicature Act 1908 - *Ballabil Holdings Pty Ltd* v *Hospital Products Ltd* (1985) 1 NSWLR 155 (CA) and *Yandil Holdings Pty Ltd* v *Insurance Co of North America* (1987) 7 NSWLR 571.

It has also been accepted in New Zealand that such orders may be made against a party in New Zealand in respect of assets overseas: *Zietlow* v *Simon* (1991) 4 PRNZ 373 (Temm J), not following the judgment of Wylie J in *Countrywide Finance* v *Kirk* (1991) 3 PRNZ 465 that such orders could only be made, whether under R 236B or in the inherent jurisdiction, in respect of assets within the jurisdiction. Temm J referred to *Derby & Co* v *Weldon* (Nos 3 & 4) and *National Australia Bank* v *Dessau* [1988] VR 521 which followed, inter alia, the New South Wales decision.

The underlying principle to be applied was expressed in England in *Derby & Co* v *Weldon* (Nos 3 & 4) [1990] 1 Ch 65 by Lord Donaldson MR at p 79:

> "In my judgment the key requirement for any Mareva injunction, whether or not it extends to foreign assets, is that it shall accord with the rationale upon which Mareva relief has been based in the past. That rationale, legitimate purpose and fundamental principle I have already stated, namely, that no Court should permit a defendant to take action designed to frustrate subsequent orders of the Court. If for the achievement of this purpose it is necessary to make orders concerning foreign assets, such orders should be made, subject, of course, to ordinary principles of international law. When the Vice Chancellor said that special circumstances had to be present to justify such an exceptional order, I do not understand him to have been saying more than that the Court should not go

> further than necessity dictates, that in the first instance it should look to assets within the jurisdiction and that in the majority of cases there will be no justification for looking to foreign assets."

The Master of Rolls went on to say:

> "The existence of *sufficient* assets within the jurisdiction is an excellent reason for confining the jursidiction to such assets, but, other considerations apart, the fewer the assets within the jurisdiction the greater the necessity for taking protective measures in relation to those outside it."

It was held in that case that considerations of international comity require the Courts in a local jurisdiction to refrain from making orders which infringe the exclusive jurisdiction of the Courts of other countries. That difficulty has been met in England as is shown in the case of *Derby & Co* v *Weldon* (Nos 3 & 4) 1 Ch 65 by the consideration that a Mareva injunction operates solely in personam and ought to be framed in terms that make it clear that that is how it is to operate so that there is no doubt in the mind of a foreign Court which might be asked to give effect to it that that is the nature of the order made by the local Court.

Mr Wigley submitted that the English decisions were based originally on s 45 of the Supreme Court of Judicature (Consolidation) Act 1925 (UK) which has no counterpart in New Zealand and specifically authorises the grant of injunction whenever it appears to the Court to be just or convenient to do so, and on s 37 of the Supreme Court Act 1981 of which also there is no New Zealand equivalent. It followed, in his submission, that s 16 of the Judicature Act 1908 is not wide enough to allow the making of a world-wide order.

Further he submitted, R 236B which relates to a Mareva type injunction is restricted in its terms to New Zealand assets from which it can be inferred that that is the legislatively intended limit of the jurisdiction. That proposition has not stood in the way of recognition of the extended jurisdiction in England where s 37(3) of the Supreme Court Act 1981 is in terms comparable with our Rule, or in Victoria where s 37(3) of that State's Supreme Court Act 1980 is also in specific terms related to restraint of a party from removing from Victoria or otherwise dealing with assets in Victoria, wherever the party is domiciled or resident. Brooking J in *National Australia*

Bank v *Dessau* specifically rejected the argument put forward by Mr Wigley. The basis for rejection of it is stronger in New Zealand because R 236B is specifically declaratory and is introduced with the words "without limiting the generality of the Court's powers in relation to the granting of injunctions ...".

There is in my view clear and authoritative acceptance now that the Court has power to make an order enforceable in New Zealand against a party resident in New Zealand even in respect of overseas assets, which is as far as I need to go in this case.

When and how the jurisdiction should be exercised is a different question. In *Zietlow* v *Simon*, Temm J made an order on a pre-judgment application as was the case in *Leucadia National Corporation* v *Wilson Neill Ltd.* In England *Babancraft International Co SA* v *Bassatne* [1989] 1 All ER 433 related to a post-judgment application. *Derby and Co Ltd* v *Weldon* [1990] 1 Ch 48 and 65 (decisions of two divisions of the Court of Appeal) and *Republic of Haiti* v *Duvalier* [1989] 1 All ER 456, a decision of a third division of that Court, were in respect of pre-judgment applications.

In the last named case it was said that the making of such an order will be rare, if not very rare, a proposition repeated in the first *Derby* v *Weldon* decision, although with the qualification of Kerr LJ in *Babancraft* v *Bassatne* that "some situations ... cry out - as a matter of justice to plaintiffs - for disclosure orders and Mareva type injunctions covering foreign assets of defendants even before judgment".

Parker LJ in the first *Derby* v *Weldon* decision (pp 56, 57) expressed the relevant tests thus:

> "The mere fact that the plaintiff shows a good arguable case and a real risk of disposal or hiding of English assets - the requisites for an internal Mareva - clearly cannot by itself be sufficient to justify an extra-territorial Mareva either world-wide or at all. Such a Mareva would clearly be unjustified if, for example, there were sufficient English assets to cover the appropriate sum, or if the Court were not satisfied that there were foreign assets or that there was a real risk of disposal of the same, or if it would in all the circumstances be oppressive to make the order. ... The defendants are clearly sophisticated operators who have amply demonstrated their ability to render assets untraceable and a determination not to reveal them. In those circumstances it appears to me that there is every justification for a world-wide Mareva, so long as, by undertaking or proviso or a combination of both,

(a) oppression of the defendants by way of exposure to a multiplicity of proceedings is avoided,

(b) the defendants are protected against the misuse of information gained from the ordinary order for disclosure in aid of the Mareva, and

(c) the position of third parties is protected."

The need for care in making such an order was again emphasised by Nicholls LJ in the same decision at p 62:

> "An order restraining a defendant from dealing with any of his assets overseas, and requiring him to disclose details of all his assets wherever located, is a draconian order. The risk of prejudice to which, in the absence of such an order, the plaintiff will be subject is that of the dissipation or secretion of assets *abroad*. This risk must, on the facts, be appropriately grave before it would be just and convenient for such a draconian order to be made. It goes without saying that before such an order is made the Court will scrutinise the facts with particular care."

Similar cautions were expressed in the second *Derby* v *Weldon* decision - see for example per Butler-Sloss LJ at pp 96 and 97.

Counsel on both sides accepted that the appropriate test on the merits of the application for injunction was whether the plaintiff was shown to have "a good arguable case" against the defendant, as well as showing that the defendant has appropriate assets within or outside the jurisdiction, that there is a risk of the dissipation of those assets so that any subsequent Court order against the defendant will be frustrated and that the overall justice of the case is in favour of making the order.

In respect of the first point Mr Wigley referred to *Z* v *A* [1982] 1 All ER 556 (CA), an internal Mareva case where Kerr LJ said at p 572 that Mareva injunctions should be granted only when it appears likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum. That seems a stronger test than was propounded by Megarry VC in *Barsley-Johnson* v *Yuill* [1980] 3 All ER 190, 195:

> "the plaintiff must establish his claim with sufficient particularity, and show a good arguable case, but he need not demonstrate that his case is strong enough to entitle him to summary judgment ..."

The words "a good arguable case" were accepted as denoting the test by Kerr LJ for the Court in *Ninemia Corp* v *Trave Schiffahts* [1984] 1 All ER 398, 413 with the qualification:

> "'A good arguable case' is no doubt the minimum which the plaintiff must show in order to cross what the Judge rightly described as the 'threshold' for the exercise of the jurisdiction. But at the end of the day the Court must consider the evidence as a whole in deciding whether or not to exercise the statutory jurisdiction."

The case for the plaintiff here can be shortly summarised: the advances totalling US$700,000.00 are not disputed; the defendant does not deny by affidavit or letter produced selling the plaintiff half of the equity interest in US Foods, and the subsequent documents emanating from the defendant are consistent with the plaintiff's allegations as to the agreements to transfer the half-equity and to buy it back at US$2.8 million, and to the defendant putting herself in possession of funds from which she would make the payment.

Mr Wigley submitted that there are too many discrepancies in the documentation, and the significant failure of the plaintiff to refer to the "loan" letter of 10 June 1992, to warrant the view that the plaintiff has a good arguable case.

Mr Wigley submits that the plaintiff has put forward three versions of the facts:

(a) advances of US$700,000.00 completed in mid-1992 with a later agreement as to a change from a loan arrangement to purchase of the half interest. This version is based on a letter from the plaintiff's solicitor;

(b) Advances totalling US$300,000.00, then advances totalling US$400,000.00 with agreement in January 1992 to alter the arrangement to a half-share in the equity, with the agreement recorded in writing in September 1992;

(c) a version that the matter was a loan, based on the letter of 10 June 1992 signed by the plaintiff, with an explanation given for the letter which Mr Wigley submitted defies credibility;

(d) a version that after the alleged agreement in May 1993 to buy back the half interest for US$2.8 million, which was based on a price calculated by the plaintiff on the basis of worksheets supplied by the defendant, and was never directly documented, the plaintiff obtained three documents signed by the defendant referring to the sale of the whole equity interest for US$700,000.00.

Mr Wigley submitted that on the evidence there is nothing more shown with any certainty than a unilateral promise and that the inconsistencies in the documentary material are such that no conclusion can properly be drawn to the level required that the transactions were as the plaintiff claims. As against that, the plaintiff has deposed in respect of the documents purporting to evidence or effect a right in him to the whole of the equity that that was designed to be some sort of mortgage and the inconsistent documents were not in terms of his seeking, but were what the defendant supplied.

One thing which does stand out in the material which I have considered is that there is no independent evidence of the existence of the company called US Foods Inc, or of the money which it is alleged (and which the defendant has said in writing) the defendant received on sale of the business.

So far as an arguable case is otherwise concerned, it is difficult for present purposes to go beyond what the defendant has herself expressed in writing (accepting the handwriting expert's opinion) in the course of events: that there was a transaction involving transfer to the plaintiff of half of the equity and a transaction whereby the plaintiff was to receive, as he claims, US$2.8 million.

In all the circumstances I accept that the plaintiff has crossed the threshold of a good arguable case, although I would not in the face of discrepancies amongst the documents be prepared to go further.

In terms of whether an order should be made these factors are in my view relevant:

(a) on the material before the Court in respect of this application, the defendant does not have in New Zealand assets worth anything like US$2.8 million;

(b) the payment of money by the plaintiff is not disputed, nor is it disputed that it was paid for the purposes of a business operated by the defendant outside the jurisdiction;

(c) the defendant who is within the jurisdiction and ordinarily resident here, has said that she had and has disposed of that business, realising more than US$3 million outside the jurisdiction, and that funds have been remitted to New Zealand, but those funds have not been disclosed as being in any bank account in New Zealand. In the face of what the defendant has written it should be accepted for present purposes that the asset exists;

(d) if the funds exist, they are, on the basis of what the defendant has written, capable of being transferred rapidly;

(e) what the defendant has written over time suggests strongly that she is not frank about what has been happening, and there is evident a real risk that she would remove assets so as to make it difficult, if not impossible, to enforce judgment against her.

In my view the case for confirming the original Mareva injunction is made out, and there is no justification for reducing the maximum amount required to be held under it.

When I stand back and look at the overall justice of the case, even with all the qualifications expressed in the cases as to the making of a world-wide order, subject to what will be said about the plaintiff's position, in my view the case is made out for extending that order to inhibit the defendant from dealing with her assets outside the jurisdiction. The case requires, in terms of justice, that the plaintiff be able to ascertain whether the money exists in some form of asset, and subject to direction of the Court, be able to take steps to restrain the defendant's disposal of it.

So far as the point of non-disclosure of the letter of June 1992 is concerned, it has been submitted for the defendant that this was innocently done on his part; that it should be accepted that he had sent all copies of the letter to the defendant and had received none back. The defendant has deposed only that she received the letter, not as to what was done with it other than that she gave it to her accountant. It is not possible to determine the issue of innocence one way or the other; but it is also not possible to determine that the plaintiff deliberately misled the Court in omitting reference to the letter or exhibiting it.

In my view in this respect it is preferable to follow the view, in the circumstances of this case, of Sinclair J in *Barson Computers* v *Bristow* (1988) 2 PRNZ 584 that on these cross-applications the matter is to be looked at de novo and deal with it on the basis of the material disclosed on both sides. Accordingly, I do not accept that this issue could properly be determinative of the applications.

Accepting all the reservations about making an order for discovery ancillary to the injunction to be found in such cases as *Ashtiani* v *Kashi* [1986] 2 All ER 970, 977 and *Derby & Co* v *Weldon* [1990] 1 Ch 48, 60, this case is in my view one where disclosure of assets is important at this stage of the litigation as an adjunct of the injunction so as to enable it to be made effective, if this Court should allow that, not least because the case is one in which the plaintiff seeks a payment which has been related in dealings between the parties to realisation of a particular asset.

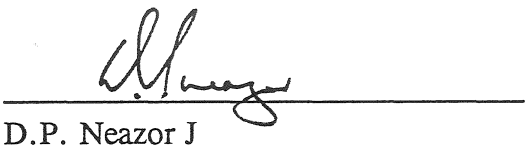
Protections for the defendant against oppression will be given by the form in which the orders are sought.

I have had reservations about the plaintiff's position. Mr Wigley submitted that an undertaking as to damages by him in respect of an injunction in respect of US$2.6 million is of doubtful value, since he is not a New Zealand resident, he has indicated that all of his assets are in his wife's name, and his only disclosed asset is an annual base salary equivalent to about NZ$335,000.00. That consideration is relevant not only to the injunction which is sought, but also to the restrictions which the orders sought would place on action by the plaintiff outside the jurisdiction without the leave of the Court. Those requirements would be able to be enforced by the Court in respect of a New Zealand resident by exercise of the contempt power as well as by dismissing the plaintiff's claim if there was a substantial breach, but the first of those sanctions will not be available against the plaintiff unless he comes into the jurisdiction.

In my view the justice of the case would normally require that the plaintiff should put up a substantial security against both possibilities, accepting that loss to the defendant arising from the injunction would be a loss of earnings on the sum involved. However, because of the regrettable time it has taken me because of other commitments to consider the arguments on this application, the plaintiff has obtained summary judgment in this proceeding against the defendant of US$700,000.00. It would seem absurd in that situation to require him to provide further security, and none will be ordered.

In the circumstances there will be orders dismissing the defendant's application for rescission or amendment of the original injunction and allowing the plaintiff's application for orders in lieu of those originally made, in the terms moved.

Costs are removed.



D.P. Neazor J

Solicitors: Chapman Tripp Sheffield Young, Wellington for Plaintiff
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