NZLR

1014

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP174/99

LOW PRIORITY

BETWEEN: **EQUIPMENT FINANCE LTD**
a duly incorporated company having its registered office at 666 Great South Road, Penrose, Auckland, Financier
Plaintiff

A N D: **C KEETON LTD** a duly incorporated company having its registered office at 300 Queen Street, Auckland, importer
First Defendant

AND **CHRISTOPHER DAVID KEETON**
Formerly of 25 Calliope Road, Devonport, but now of unknown whereabouts, company director
Second Defendant

AND **MAERSK NEW ZEALAND LTD**
A duly incorporated company having its registered office at 209 Queen Street, Auckland, Carrier
Third Defendant

AND **MAERSK LINE** a partnership of Danish companies having its principal place of business in New Zealand at 209 Queen Street, Auckland, Carrier
Fourth Defendant

Hearing: 5 May 1999

Judgment: 5 May 1999

Counsel: ***P L Rice*** **for plaintiff**
No Appearance **for first and second defendants**
W A Smith **(subject to limitations appearing in judgment) for third and fourth defendants**

ORAL JUDGMENT OF WILLIAMS J

Solicitors:
Grove Darlow & Partners, DX CP24049 Auckland
Chapman Tripp Sheffield Young, DX CP24049 Auckland

Copy for:
1st and 2nd defendants

This is an application for a mandatory Mareva injunction against the defendants which, for reasons which will appear, is required to be dealt with on an urgent basis.

The case first came before the Court on 3 May 1999 at which time an order was made against the first and second defendants preventing them, pending further order of the Court, from dealing with assets under the value of $70,000 in a container then in transit on one of Maersk Line's vessels to Colon in Panama. The proceeding was then adjourned to 5 May 1999 to enable Mr Smith, counsel for the third and fourth defendants, to obtain further instructions.

It is of some importance to note that at the hearing on 5 May Mr Nicholson of counsel appeared but with no more than a watching brief for the first and second defendants. He advised the Court that he and his firm had acted for the first and second defendants in other matters but that although he had been given a copy of the pleadings he had no instructions in relation to this matter and certainly no instructions to appear formally at the hearing or to waive any rights of objection to the jurisdiction which the first and second defendants may have, that notwithstanding that the first defendant is a company registered in New Zealand.

It is also important to note that both on 3 and 5 May 1999 Mr Smith made it clear that he, too, had limited instructions and that although he had instructions to appear and to assist the Court, he had certainly no instructions to waive any rights to object to the jurisdiction of this Court, particularly on behalf of the fourth defendant,

which is apparently a partnership of Danish companies involved in shipping. The third defendant is a company registered in New Zealand, which appears to be a wholly-owned subsidiary of the fourth defendant.

The plaintiff is in the business of renting office equipment. On 6 November 1998 it entered into an agreement to rent a large quantity of office equipment to the first defendant, C Keeton Limited. The equipment included a copier, television video and other items of a total value of $59,044.46 excluding interest and GST. The precise details of the equipment rented are contained in a schedule attached to the statement of claim. The rental agreement was guaranteed by the second defendant, Mr Keeton.

The monthly instalments under the agreement were paid for a few months but began to fall into arrears in February 1999. Inquiries were then undertaken and it is now clear that the office leased by C Keeton Limited has been vacated and the plaintiff's equipment removed from it. A Mr Bannister, a sales executive for a local removal company, said that he quoted the Keetons a price on 8 March 1999 for the removal of goods from New Zealand, those goods being housed both at the company's address and at the residential address at which the Keetons were living. The quote was to remove the goods to Panama. The quote was addressed to Mrs Keeton but Mr Bannister was asked for all documents to be put in the name of "Brett Mikkelson" and altered the quote accordingly.

Equipment Finance instructed a private investigator who went to the properties on 16 April 1999 and found that both the business and residential addresses had been

vacated. He made inquiries from persons who knew the Keetons and was told that they had left. There was evidence from the Keetons' nanny who said the Keetons told her that they had entered New Zealand on false passports and used false names, and from a friend who, over dinner with the Keetons on 13 March 1999, was told that they were intending to load up all the plaintiff's equipment in the Keetons' container and take them out of New Zealand, the conversation on that occasion indicating an insouciance on the Keetons' part concerning Equipment Finance's rights of ownership.

On the evidence to date therefore it seems tolerably clear that all the plaintiff's equipment leased to C Keeton Limited has been removed from New Zealand in a container which almost certainly also contained the Keetons' private and personal effects. What is not yet established is whether items owned by other persons may also be in the container.

The container left New Zealand on board one of Maersk Line's vessels, bound for Hong Kong, where it was trans-shipped onto another of Maersk Line's vessels for delivery to Panama. Currently, the estimated time of the vessel's arrival in Panama is Sunday next, 9 May 1999, hence the urgency in dealing with this matter.

The claim is brought against the first and second defendants in breach of contract and breach of the guarantee, together with an additional cause of action in conversion or wrongful interference with the plaintiff's goods. On the face of the evidence to date it cannot be doubted that the plaintiff has a strong arguable case against both the first and second defendants in that regard.

Equipment Finance seeks an order from this Court requiring the entire container to be returned to New Zealand on its discharge in Panama without the container being unloaded in any way. Given that Equipment Finance seeks an mandatory order in that regard on what is no more than an application for an interim injunction, the first question is to determine whether the Court has jurisdiction to make such an order.

In the period since the original Mareva injunctions were granted in New Zealand, the authorities indicate a shifting of the Court's approach to the making of injunctions such as are sought here. In ***Countrywide Finance Ltd v Kirk*** (1991) 3 PRNZ 465, the Court declined to extend a Mareva injunction to involve assets outside this country. However, in a number of judgments since that time this Court has been prepared to make Mareva injunctions operating outside the New Zealand jurisdiction though none, it would appear, precisely in the circumstances for which Equipment Finance contends in this case.

In ***Zietlow v Simon*** (1991) 4 PRNZ 373 Temm J declined to follow the decision in ***Countrywide Finance*** largely on the basis that the jurisdiction had not been fully argued in the earlier case and on developments in the law which had occurred since it was decided. Relying on ***Republic of Haiti v Duvalier*** [1990] 1 QB 202 and ***Derby & Co v Weldon (Nos 3 and 4)*** [1990] Ch 1965, the Judge in that case was prepared to make a Mareva injunction in respect of assets held overseas by a defendant who resided in this country. That notwithstanding, the learned Judge observed that one of the reasons why he was prepared to make the orders sought in the

case before him was the presence of the defendant within the jurisdiction. Without that, as the learned Judge made plain (at 374), he would have been much more cautious about making such an order because of the difficulties in enforcement.

That case was followed by ***Allan Allen and Cook v Allegra Corporation & Ors*** (CP1850/91 Auckland Registry 9 March 1992 Tompkins J).

Further, in a carefully considered judgment in ***Fitzherbert v Faisandier*** (1995) 8 PRNZ 592, Neazor J reached the conclusion that the Court had jurisdiction to make an order, enforceable in New Zealand, against a defendant resident in this country in respect of overseas assets but only because the order operates *in personam* and not *in rem*. In particular, that conclusion was reached in reliance on ***Derby v Weldon (supra)*** and with reference to both English and Australian authorities. The learned Judge concluded (at 599)

> "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..."

The position in the United Kingdom now appears to go even a little further than the New Zealand cases. In ***Babanaft International Co SA v Bassatne*** [1989] 1 All ER 433 the English Court of Appeal made it clear that a Mareva injunction over foreign assets and foreign residents must be confined to the defendant in person and the order must expressly state that it did not affect the right of a third party or seek to control their activities.

Further, in ***Derby & Co Ltd v Weldon (No 6)*** [1990] 1 WLR 1139, obviously enough a further step in the litigation to which reference was earlier made, Dillon LJ considered the history of Mareva injunctions in circumstances such as this and concluded that earlier cases paying greater regard to comity with overseas jurisdictions were wrong. He held (at 1149) :

> "The jurisdiction of the court to grant a *Mareva* injunction against a person depends not on territorial jurisdiction of the English court over assets within its jurisdiction, but on the unlimited jurisdiction of the English court in personam against any person, whether an individual or a corporation, who is, under English procedure, properly made a party to proceedings pending before the English court. This is particularly underlined by the judgment of Lord Donaldson of Lymington M.R. in *Derby & Co Ltd v Weldon (Nos. 3 and 4)* [1990] Ch 65, 82, and, at p. 86, where he said, in relation to C.M.I. :
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> > "In this situation I do not understand why the order that the assets vest in the receiver should only take effect if and when the order was recognised by the Luxembourg courts. True it is that C.M.I. is a Luxembourg company, but it is a party to the action and can properly be ordered to deal with its assets in accordance with the orders of this court, regardless of whether the order is recognised and enforced in Luxembourg. The only effect of non-recognition would be to remove one of the potential sanctions for disobedience."
>
> Another potential sanction for disobedience that would remain is that a defendant who disobeyed an order of the court could be barred from defending the proceedings.
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> In truth the original, somewhat territorial, approach in *Ashtiani v Kashi* [1987] Q.B. 888 has been turned the other way round by the introduction of the so-called *Babanaft* proviso in *Babanaft International Co. S.A. v Bassatne* [1990] Ch 13. That was revised in *Derby & Co. Ltd. v Weldon (Nos. 3 and 4)* and as so revised is of course the basic order in the present case.. Application to a foreign court to recognise the order or to declare it enforceable is only necessary in so far as the order purports to have effect outside England and Wales and it is sought to affect by the order a person to whom the order is not addressed and who is not in certain categories of person subject to the jurisdiction of this court."

The learned Judge continued (at 1151) :

> "The object of a *Mareva* injunction is stated by Lord Donaldson of Lymington M.R. in *Derby & Co Ltd v. Weldon (Nos. 3 and 4)* [1990] Ch 65, 76, as being 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."
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> See also at p. 79. That is in line with the statement by Kerr L.J. in giving the judgment in this court in *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft m.b.H. und Co. K.G.* [1983] 1 W.L.R. 1412, 1422 :

> "the test is whether, on the assumption that the plaintiffs have shown at least 'a good arguable case,' the court concludes, on the whole of the evidence then before it, that the refusal of a *Mareva* injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied."

> I see no reason why that should not extend, in principle and in an appropriate case, to ordering the transfer of assets to a jurisdiction in which the order of the English court after the trial of the action will be recognised, from a jurisdiction in which that order will not be recognised and the issues would have to be relitigated, if – which may not be entirely the present case – the only connection of the latter jurisdiction with the matters in issue in the proceedings is that moneys have been placed in that jurisdiction in order to make them proof against the enforcement, without a full retrial in a foreign court, of any judgment which may be granted to the plaintiffs by the English court in this action or indeed if the only connection with the latter jurisdiction is financial, as a matter of controlling investments."

There now also seems to be a line of Australian authority where the courts of that country have accepted jurisdiction to grant Mareva injunctions against assets outside the jurisdiction (See also *McGechan on Procedure* para MV3 p 5-150).

In the light of those authorities the Court reaches the view that, at least on an interim basis, there is jurisdiction for this Court to make a Mareva injunction against parties such as Mr Keeton and Maersk Line who are not currently within the jurisdiction. Although R 236B in its terms does not apply, it is clear that Equipment Finance would have had the power to issue proceedings against Mr Keeton and Maersk Line, and that they would be persons properly named as parties in a claim commenced in this country. That comment of course is subject to Equipment Finance obtaining the necessary orders for service on defendants overseas and would, of course, also be subject to the rights of those defendants to object to the jurisdiction of this Court. However, it could not be said that those parties could not be properly named as defendants subject to their later exercise of those rights should they wish so to do.

The next question therefore is whether this Court is *forum conveniens* for the resolution of this dispute. Because of the way the matter has developed, the Court's views about to be expressed can be no more than tentative and must be subject to any later application relating to jurisdiction. However, counsel referred the Court to *Colinvaux: Carver's Carriage by Sea* 13th ed Vol.2 (1982) para 1591 p1110 where the following appears :

> "*Delivery under contract:* The shipowner must generally see that the goods are delivered to the person to whom he has contracted to deliver them. That is to say, as a rule, to the person named as consignee in the bill of lading, or to the assignee of the person who is empowered by the bill of lading to make an order or assignment of it.
>
> *Subject to superior claims:* But this is subject to claims to the good which may exist independent of the contract, and superior to those of the persons who would be entitled under that. If the goods have been originally shipped without the authority of their owner, and he claims them, the shipowner must give them up to him; and will, in that case, cease to be bound by the contract."

On that basis, Maersk Line's principal obligation is to deliver as carrier to the consignee, presumably Mr Keeton or Mr and Mrs Keeton. But that must be subject to the claims superior to theirs which, at least in relation to the equipment rented by Equipment Finance to the first defendant, must reside in the plaintiff.

Counsel also put the Maersk bill of lading before the Court. The terms do not require rehearsal but it seems that it is at least possible that the appropriate forums for the determination of disputes relating to this container may be England, possibly New York, obviously Panama, as well as the courts of this country. However, when one considers the *forum conveniens* question, it is clear that the onus is on a defendant sued in New Zealand to show that the Courts of this country are not *forum conveniens* (***Club Mediteranee NZ v Wendell*** [1989] 1 NZLR 216) and when the factors relevant to the determination of *forum conveniens* are considered it is clear that there must at

least be an arguable case for the correct commencement of this claim in New Zealand and for its continuation in this country. Most of the witnesses as to fact (other than Mr and Mrs Keeton) are in this country, most of the relevant documents are here, there is currently no other litigation in any other jurisdiction, at least two of the four defendants are subject to New Zealand jurisdiction and the remaining two are potentially so, subject to any objection. The law governing any dispute about the chattels must plainly be New Zealand law, subject to the bill of lading. The plaintiff's case so far as the equipment is concerned, appears, on the material currently before the Court to be strong and there are, at least currently, procedural advantages of having all matters dealt with in the one jurisdiction.

As against that, the enforceability of a judgment is perhaps more equivocal and this Court has no power to compel the second and fourth defendants to participate in litigation in this country if they object to that course (See *Goddard: Laws of New Zealand, Conflicts of Laws* para 30).

In the light of all those circumstances the Court, to this stage at least, having determined that it has jurisdiction to make a Mareva injunction in the circumstances of this case, the real question is the form of that order and in particular whether the order should be phrased so as to compel Maersk Line to return the unbroken container to this country. There are, in the Court's view substantial difficulties in the way of making a mandatory injunction in those terms notwithstanding that there is good reason for, as it were, freezing the container in Panama and preventing Mr and Mrs Keeton, and any others whose goods may be in the container, from having access to its contents. It is also to be noted that Equipment Finance has given Maersk Line an

undertaking to meet the costs of any return transit of the container to this country but has declined to provide Maersk Line with full indemnification against any claims which may be made against it by those having an interest in the contents. Maersk Line, as noted, whilst not unsympathetic to Equipment Finance, takes the view that its obligation, pursuant to the law and the bill of lading, is to release the container to the consignee on demand subject to any assertion of superior rights to part of the contents by the plaintiff.

In the light of that, the orders the Court is prepared to make are that pending further order of the Court :

1. The first and second defendants are restrained from dealing in any manner whatsoever with any of the contents of Container no. CAXU4079814 for one month from the date of delivery of this judgment.

2. The fourth defendant does not permit any persons to have access to Container No. CAXU4079814 for one month from the date of delivery of this judgment once that container is discharged at the Port of Panama.

3. The undertaking given by Equipment Finance to Maersk Line is to be extended to include the costs of storage of the container whilst so impounded.

Although not part of the order, the intention of the orders made to date are to enable any objections to jurisdiction by any defendant to be filed and served or for any

interpleader application in this case to be filed, or for proceedings to be issued relating to the matter in any other jurisdiction.

The interval should also permit an opportunity for the parties to negotiate with a view to settlement, given that Equipment Finance's claim against first and second defendants, even inclusive of interest, GST and costs, is unlikely to greatly exceed the sum of $NZ70,000.

The order will be subject to a condition that it is directed personally against the first, second and fourth defendants and is not to affect the rights of any other third party or seek to control their activities.

The order is also to be subject to a condition requiring Equipment Finance to advise the Court before the next mentions date of the amount standing to the credit of the first defendant with the Devonport Branch of the ANZ Bank in current account 0137-0001311-00 with the expectation that if there are any funds in that account they may ultimately be taken into account as part of a satisfaction of any judgment which Equipment Finance may obtain.

The proceeding is to be adjourned part-heard, to be called for mention on *2 June 1999*, subject to leave granted to any party to apply earlier. Although there may be advantages in my dealing with the matter on any future call, it can be dealt with by any Judge. Apart from that, orders 2-12 inclusive, made on 3 May, are confirmed.

WILLIAMS J.