JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 118/2010

APPLICATION NO 184/2010

BETWEEN	**FIRST FINANCIAL CARIBBEAN TRUST COMPANY LIMITED**	**APPLICANT**
AND	**DELROY HOWELL**	**1st RESPONDENT**
AND	**KENARTHUR MITCHELL**	**2nd RESPONDENT**
AND	**FIRST FINANCIAL CARIBBEAN (JAMAICA) LIMITED**	**3rd RESPONDENT**
AND	**FIRST FINANCIAL INTERNATIONAL GROUP LIMITED**	**4th RESPONDENT**
AND	**FIRST FINANCIAL CARIBBEAN LIMITED**	**5th RESPONDENT**
AND	**FIRST FINANCIAL CARIBBEAN (HOLDINGS) LIMITED**	**6th RESPONDENT**

Michael Hylton QC, Mrs Nicole Foster-Pusey and Kevin Powell instructed by Sundiata Gibbs of Michael Hylton and Associates for the applicant

Paul Beswick and G. Anthony Levy instructed by G. Anthony Levy and Company for the 1st respondent

Lord Anthony Gifford QC, Conrad George and Ms Noelle-Nicole Walker instructed by Hart Muirhead Fatta for the 2nd, 3rd and 5th respondents

Richard Small and David Batts instructed by Livingston Alexander and Levy for the 4th and 6th respondents

26, 28 October; 2, 3, 12, 17, 24 November; 1, 8, 21 December 2010; and 7 January 2011

IN CHAMBERS

PHILLIPS JA

[1] On the above mentioned dates I heard this application which was in essence for an injunction to restrain the respondents from disposing, transferring, charging, diminishing or in way howsoever dealing with their assets wherever situate and from withdrawing or transferring any funds from any accounts wherever held on their behalf, save so far as they exceed the sum of US$13,911,092.15, pending the hearing of appeal No 118/2010. On 7 January 2011, I granted the injunction against all the respondents restraining the disposal of their assets or withdrawal of sums in their accounts up to the amount of US$3,400,000.00 or the sum that represents the balance of the proceeds of sale of the asset and purchase agreement undertaken by the 3rd and 5th respondents. I promised to put my reasons in writing, and do so now. I apologise for the delay in providing the same.

This application relates to the appeal from the order of Brooks J given on 15 October 2010, which inter alia reads:

> "1. The freezing order made herein on 19 August 2010 by Cole-Smith J and varied on 3 September 2010 by McDonald-Bishop J is hereby further varied to the extent that the value of the assets specified is hereby reduced to a total of US $1,700,000.00 and is discharged in respect of the first, second, fourth and sixth defendants;"

Background

[2] The genesis of this matter arose out of a position taken by the applicant, that trust assets were being treated with, contrary to the provisions of the trust deed and to the interests of the cardholders, and the applicant therefore took out an action in the Commonwealth of the Bahamas to protect those assets. On 20 August 2008, Mohamed J, on the basis of many issues having been agreed between the parties, and the learned judge having recognized them as such, made several orders. He ordered, inter alia, that the defendant in that suit, Leadenhall Bank & Trust Company Limited, the trustee of a number of trusts of which the applicant was the successor trustee of the trusts (as of 15 March 2002 when the defendant retired as trustee, pursuant to a deed of retirement, appointment and indemnity), transfer to the applicant cash deposits amounting to the approximate sum of US$14,000,000.00, and some receivables and other funds held by Mastercard. The sums were to be treated by the applicant as a single trust fund for the benefit of the beneficiaries under the individual trusts, and the applicant in its capacity as successor trustee of the trusts was authorized to make a first distribution on a pro rata basis to all beneficiaries in the amount of $9,800,000.00 representing 70% of the $14,000,000.00 held by the applicant as trustee, pursuant to and in accordance with, the schedule of distribution exhibited in the proceedings. There was an order for the payment of certain funds to the applicant's attorneys Gibson Rigby and Co. The claim filed in the Supreme Court here by the applicant is against the 1st respondent Delroy Howell, his group of companies and another director, and contains similar allegations that the said assets transferred to the applicant in the action taken

out in the Bahamas, have been and are in the process of being misappropriated and/or dissipated by the respondents. The 1st respondent was one of the main deponents on behalf of the applicant in the suit filed in the Bahamas.

The proceedings below

[3] On 19 August 2010 the applicant, a trust company incorporated in the Turks and Caicos Islands, filed a claim to recover approximately US$13,000,000.00 of the said trust funds which fell under its management. As indicated, the allegations were that the 1st and 2nd respondents, as directors of the applicant, had transferred trust funds to the 1st respondent and the other corporate respondents all of whom were under the 1st respondent's direction and control. An affidavit sworn to on the same date and filed by Judith Wilchcombe, director of the applicant, in support of an application for a mareva injunction to preserve the assets, indicated that to the best of her knowledge, the 1st and 2nd respondents were Jamaicans, the 3rd respondent was incorporated in Jamaica with its registered offices at 6 Dumfries Road, the 4th, 5th and 6th respondents were all incorporated under the laws of the Cayman Islands, and that the 3rd, 4th, 5th, and 6th respondents were all owned and controlled by the 1st respondent. Ms Wilchcombe further recounted in her affidavit the difficulty she had been experiencing in obtaining information in respect of the trust funds. She deposed that, by way of research and investigation, she had discovered that trust funds were being used to purchase a property not in the name of the applicant, but in the name of another company controlled by the 1st respondent; a further property had been purchased in the name of

the applicant, but was being used by the respondents without any rental arrangements or sums being paid to the applicant for the use thereof, and no efforts were being made by the 1st respondent to pay the beneficiaries who were calling on her for explanations which she could not provide. The applicant's accountants were also unhappy with the mounting unacceptable situation when faced with the inexplicable silence of the 1st respondent, and a response from the 2nd respondent that he merely acted on the instructions of the 1st respondent. The concerns had escalated so much so that the attorneys who had represented the applicant in the proceedings in the Bahamas, felt impelled to place their serious dissatisfaction with the modus operandi being adopted by the 1st respondent in writing, and on 8 March 2010 they did so, and in the process disassociated themselves from that conduct. I have set out the letter in its entirety as it set the stage for the litigation which commenced in August later on in the year:

"GIBSON, RIGBY &
CO
Counsel & Attorney-at-law
Notaries Public

8th March, 2010

VIA E-MAIL

Delroy Howell
Chief Executive Officer
FIRST FINANCIAL CARIBBEAN TRUST CO. LTD
Turks & Caicos Islands
BWI

Dear Delroy:

Re: Leadenhall Bank & Trust and FFCTCL

This follows from our recent conversation in respect of the captioned matter.

As you are fully aware, on the 20th August, 2008 the Court ordered FFCTCL, as the new Trustee, to make a distribution of 70% of the trust asses [sic] to cardholders. This meant that FFCTCL was to make available to cardholders the sum of $9.8million of which it was holding a sum of approximately $14 million. Since the grant of the Order a number of accounting related issues have arisen whereby the payouts could not commence in a timely fashion. As far as I am aware, these issues are now resolved due to the fact that on the 30th November, 2009 I received the keys from the Liquidator to the storage unit where the information relating to cardholders were being kept. The keys were made available to FFTCL on the 3rd December, 2009 and shortly thereafter Judith forwarded to me by e-mail a reconciliation of the pay-out schedule based on the records. In fact, I also obtained from the Liquidator a schedule that was also handed to Judith to assist in the finalization of the pay-out schedules. As far as I am aware, all of the necessary information was reviewed and a final schedule was created as of the 10th February, 2010 and pay-outs were to commence shortly thereafter, even though we had indicated to cardholders that payouts would have commenced on the 30th December 2009.

Based on our recent conversation, it is now clear to me that you have no immediate intention of commencing the pay-outs, Cardholders have been rightly agitated and annoyed at the process and the delays that have ensued in returning the funds ordered by the Court. Whilst some of the delays have been necessary to ensure that the correct amounts were being paid out; I am not satisfied that this present delay is necessitated by any justifiable reason in respect of the due administration of the trust assets and their accounting.

It has also recently come to my attention based on our recent conversations that the trust assets have been predominantly invested in real estate holdings in The Bahamas, the Turks and Caicos and in Jamaica. This came as an utter surprise. In fact, the Condominium at Bay Roc in Nassau was purchased in the name of First Rock Ltd on the 28th April 2008 and although my partner handled the purchase for you, we had no idea that the proceeds were met with trust assets. Certainly, if I knew that at the material time I would have advised you against that decision. Furthermore, I received a letter dated the 23rd February, 2010 from Judith instructing me to record the ownership of

the Unit in the name of FFCTCL as it was purchased with trust assets; this served as confirmation that the Unit was purchased with trust assets. I telephoned her to confirm how the stamp duty will be paid on the transfer. Once I am put in hand the [sic] necessary funds to settle the stamp duty then the transfer will occur. I certainly support Judith's position. It is clear that the assets ought to have been placed in the name of the trust or be easily identifiable as trust assets. I hope that steps are being taken in TCI and Jamaica to sell the real estate holdings so that cash can be forwarded to Judith to ensure payment to the cardholders.

Additionally, by e-mail on the 12th February, 2010 I forwarded to your attention (and others) a letter dated the 10th February, 2010 concerning the intention of Bay Roc Condominium Management Company Limited to file a Notice of Charge against the Unit for outstanding maintenance fees due and owing. The amount due as of the 1st April, 2010 is $20,829.12. We render payment in the amount of $16,687.77. A balance of $4141.35 is owing, and upon payment the account will be made current.

What is so shocking by the contents of the aforesaid letter is that you had been formally advised in the past of the maintenance payments on the Unit and simply ignored the request for the payment of the fees. This action placed the trust asset in jeopardy. In fact, you did not even respond to the e-mail that I forwarded to you. This is not the actions of the prudent trustee. I hope that the other trust assets are not in similar jeopardy. This can lead to actions against you for breach of your fiduciary duty as the principal Director of FFCTCL.

It was this event that brought to my attention that you have no intent on liquidating the trust assets and that you intend to continue to delay in effecting the pay-outs to cardholders. You had indicated that the Unit at Bay Roc was actively on the market. I have discovered that it is not.

When you and I spoke early this year you indicated that you would take steps to ensure that Judith had available to her an initial payment of $5 million so that she can commence the pay-outs. I have been periodically checking with Judith to determine if she received the funds. As of the date of this letter she has not been forwarded the funds and therefore she is unable to carry out her work.

The Court Order is clear. The sum of $9.8 million is to be paid out. The sum of $14 million that you had was and remains trust assets and you were not to treat them as your personal resources to spend as you see fit. As a fiduciary, you had a right to invest them so as to safeguard them from depletion. However, any such investment was to be structured in such a way that the assets could be easily liquidated and payment rendered to cardholders, when ordered by the Court.

What strikes me is that you knew all along that we were working to arrive at a resolution of this matter. When the Order was granted you were immediately advised by e-mail and therefore steps should have been immediately taken to ensure that sufficient funds were made available to effect the payouts to cardholders. Certainly, since August 2008 you had sufficient time to convert any asset into cash.

I trust that the Board of Directors of FFCTCL understands that all of the Directors are complicit in your actions and if there are losses and acts which are of the character of breaches of trust the cardholders will have a right to sue the Directors for any shortfall. I have explained this to Judith so that she is fully aware of the legal position. I have not made contact with Dr. Marzouca but I have copied him onto this letter so that he has the full knowledge of what is transpiring and hopefully can assist in bringing a resolution to this matter.

Please note that I will not be a party to a direct and flagrant breach of the Court's order and this letter serves as a formal notice of my intention to advise opposing Counsel of these matters. You will note that I have elected to copy Brian Moree on this letter to ensure that he understands that I am not a party to your actions.

I am also deeply concerned about the fact that neither Judith nor I can reach you to have a sensible discussion about the pay-outs. My inquiries are met with your usual grand standing and delay tactics. It is nearly two years since the Order was granted and we are no way close to effecting compliance with the Order. I have addressed all of the legal issues, save the issue of the collection of the funds from MasterCard. I will continue to seek the conclusion of that issue.

Please note that Judith and I have been addressing cardholders complaints and their primary concern is when will they receive their funds. Just this morning I had to deal with a cardholder who lives in South Africa. He wants to know why he has not yet receive the funds as ordered by the Court. I could not offer him any direct answer but to refer him to Judith. In the future, I intend to pass your contact to the cardholders so that they can reach you directly. Judith need not be left all along trying to resolve a matter that you have created and obviously care nothing about.

I trust that upon your receipt of this letter you will take very seriously the need to commence the payouts and will take immediate steps to forward to Judith the necessary to do the same. I have advised Judith that an Affidavit of compliance will have to be filed at the end of the process and therefore she is to keep excellent records in this regard.

I regret having to put my views in writing to you and in the fashion and language outlined herein. But you have left me with no other option. I trust that you will now address your mind to this matter and will move expeditiously to ensure that the trust assets are made available to Judith and to the cardholders.

I look forward to the speedy resolution of this matter and your earliest confirmation that Judith with all of the necessary funds to commence the payouts by the 31st March, 2010, the latest.

Yours sincerely
GIBSON, RIGBY & Co.

Reynard S Rigby

c.c. Judith Wilchcombe, Vice President
Dr Joseph Marzouca, Director
Brian Moree QC
J. Kevin Higgins, Managing Director,
TCI Financial Services Commission"

[4] Subsequent to this, Ms Wilchcombe (with the assistance of Dr Joseph Marzouca, director/shareholder of the applicant, who was himself having grave misgivings of the

management of the applicant and the funds under its control), who on her evidence was endeavouring to obtain the resignation of the 1st respondent from the applicant, arranged for directors' meetings and an extraordinary meeting to be held which resulted in the removal of the 1st and 2nd respondents as directors, an increased share capital of the applicant, and Ms Wilchcombe becoming the largest shareholder in the applicant when she had not been either a shareholder or a director prior to these meetings. Needless to say the 1st respondent challenged these meetings vigorously, and referred to the applicant company being wrenched from him unlawfully, and to Ms Wilchcombe having no authority whatsoever to bring the proceedings commenced below in August 2010. An application for rectification of the register of members has been filed in the Magistrate's Court in the Turks and Caicos which will determine the efficacy of those actions, and was ongoing while the application for injunction was before me, and counsel indicated that a ruling was expected in November 2010, but none had been communicated to me before my decision was given herein.

[5] The application by the applicant in the court below for the mareva injunction was heard ex parte on 19 October 2010 and Cole-Smith J granted the same as prayed. She also ordered that there be full disclosure by the respondents of all assets and of all their accounts. One of the concerning events at the time was the pending sale of the shares of the 4th respondent to JN Money Services Limited, a Jamaican company, and National Building Society of Cayman, a building society existing under the laws of the Cayman Islands. Initially this transaction was stalled by the mareva injunction and so the parties varied the injunction by consent before McDonald-Bishop J on 3 September

2010, to allow for the completion of the transaction, which changed in its context in that the vendor became the 3rd and 5th respondents and the sale was now in respect of their assets. The purchase price however remained the same as did the purchaser but the sums already paid as a deposit under the transaction, namely US$3,700,000.00, were considered duly paid under the transaction, and not the subject of the mareva injunction which remained a bone of contention between the applicant and the respondents when the matter came before me. The injunction was extended on various dates, until finally on 15 October 2010 when Brooks J restricted the same to the sum of US$1,700,000.00 which was admitted in the accounts of the 3rd respondent, and only against the 3rd and 5th respondents. However, earlier on 1 October 2010 there were also before him applications filed on behalf of the respondents to strike out the claim as an abuse of the process of the court, on the basis that the claim was filed without any lawful authorization, and that the attorneys should also be held liable; that there was material non disclosure; and that any undertaking given as to damages in the circumstances of this case would be invalid and ineffectual, and therefore prejudicial to the respondents. The respondents claimed that the funds in relation to the sale of their assets were urgently required to complete the purchase of the Wyndham Hotel, and if payment could not be made with those funds, the potential losses would be severe.

[6] Brooks J in a very detailed and comprehensive judgment delivered on 1 October 2010 ruled as follows:

(i) With regard to the manner in which the applicant had allegedly been wrested from the 1st respondent, and the competing claims of the respective parties as to who had the majority shares and remained directors in charge of the company he said " I am of the view that it is unnecessary for me to undertake an investigation of those issues. I find that, the claimant being a company which is incorporated in the Turks and Caicos Islands, the issue ought to be resolved in that jurisdiction. By extension of that reasoning, the issue of the retention of the attorneys–at–law who acted for the claimant should abide the decision of that court".

(ii) He decided that there was no material non disclosure, and to the extent that there was any non disclosure, there had been a sufficient explanation for the same. He also found no fault with the fact that the application had been made without notice, as that is the jurisdiction of the mareva application.

(iii) In his view, in the circumstances of this case, the applicant should be excused from giving an undertaking as to damages and also from posting security for costs.

He therefore refused to strike out the claim, extended the injunction until the 5th October for further arguments relating to whether it should remain in place until trial, ordered the respondents to give full disclosure of all funds taken by them from the applicant's accounts, and ordered that sums representing sales of properties owned by the applicant be placed and held in interest bearing accounts in the applicant's name in Jamaica, and in the Cayman Islands. No undertaking for damages was therefore either ordered or given.

[7] On 15 October 2010, Brooks J delivered his further judgment, and as indicated, the injunction granted by him was limited and restricted and forms the basis of appeal no. 118/2010. He found that there was "prima facie evidence that many millions of the trust money, which is in the currency of the United States of America, were transferred from the claimant's accounts to Mr Howell, to some corporations for which Mr Howell is a director and a substantial shareholder, to other corporate entities and to certain individuals". He found that there had been some accounting for some of the trust monies and there was evidence of the existence of assets of value held by the respondents which appeared to be in excess of the value of the claim, but made specific mention of the monies admitted by the 3rd respondent to be due to the applicant. He accepted that the other respondents could be restrained on the basis that the 1st respondent was the controlling mind of all the companies, pursuant to the principles enunciated in **TSB Private Bank International SA v Chabra and Anor** [1992] 2 All ER 245. He however found, it seems, on the basis of the substantial investment of the 1st respondent in the Wyndham hotel that there was little likelihood that he would walk

away, and also that there was no evidence that any of the other respondents was likely to dispose of their assets. Since he said that very little evidence had been produced of the likelihood of the assets of the respondents being dissipated, and, the purchase of the hotel not appearing to be an attempt to make the respondents judgment proof, he made the order that he did.

The appeal

[8] The applicant filed notice of appeal on 19 October 2010 requesting that the restraint be replaced on all respondents and to the extent of the US$13,000,000.00. The grounds of appeal, in the main, were that the learned trial judge erred in law in treating the applicable test as one of whether there was a "likelihood" of dissipation when the true test was whether there is a "risk" of dissipation; there also is no need for there to be evidence of intention, and the judge failed to recognize (i) that the evidence of dissipation before him was not limited to the sale of the assets of the 3rd and 5th respondents and (ii) that monies in excess of the trust had not been identified; in fact he had failed to examine all the circumstances of the case before him.

The applicant's submissions

[9] Counsel for the applicant submitted that the single judge had the power to grant the injunction pending appeal (rule 2.11(1)(c) of the Court of Appeal Rules 2002). Additionally the applicant had a good arguable appeal and he relied on the dictum of Harrison JA in **Olint Corp Limited v National Commercial Bank Jamaica Limited**

(SCCA No 40/2008, Application No 58/2008 delivered 30 April 2008) wherein he stated when granting the injunction pending appeal, that:

> "In deciding whether or not an injunction should be granted, the question is not whether the applicant has a good arguable case but rather, does it have a good arguable appeal?"

Counsel referred to and relied on the judgment of Megarry J in **Erinford Properties Limited v Cheshire CC** [1974] 2 All ER 448 and also that of Stuart-Smith LJ in **Ketchum International plc v Group Public Relations** [1997] 1 WLR 4 with regard to the exercise of the discretion in the Court of Appeal to grant an injunction pending appeal. Counsel also referred to the principles applicable to the grant of a mareva injunction and in particular submitted that a "good arguable case" is where the standard of evidence "is more than barely capable of serious argument, but not necessarily having a 50% chance of success", and by analogy submitted that " 'a good arguable appeal' is one which is barely capable of serious argument but not necessarily having a 50% chance of success". Counsel submitted that the learned trial judge had found that the applicant had a good arguable case on the substantive claim, but had erred when he stated that the applicant had not proven that there was " the likelihood of the assets of the respondents being dissipated" as he used the wrong approach, and should have addressed the issue in keeping with established authorities as to whether there was a "real risk" of dissipation, and therefore whether any judgment obtained would remain unsatisfied if injunctive relief was refused. In the matter before me the

issue would be whether the appeal in the circumstances would be rendered nugatory. Counsel relied on **Jamaica Citizens Bank Limited v Dalton Yap** [1994] 31 JLR 43 from this court and **Peter Krygger and Others v F1 Investments Inc. and Others** 2009 HCV 3034 delivered 22 January 2010 and **First Global Bank Limited v Rohan Rose and Others** 2009 HCV 6797 delivered 8 April 2010, both unreported decisions of the court below. Counsel said that in the instant case, as in the **Yap** case, the respondents' "probity was in issue" which underscores the basis for the exercise of the discretion in granting an injunction in favour of the applicant.

[10] It was the applicant's position that the respondents had failed to comply with the order of Brooks J on 1 October 2010 to give full disclosure concerning the use of money taken by them or on their instructions from the applicant's accounts. Further, there was unchallenged evidence before Brooks J, all of which supported the real risk of dissipation of assets, not only of those of the 3rd and 5th respondents but generally, so as to be out of the reach of the applicant to satisfy any judgment if obtained. They were itemized in paragraph 9 of the affidavit of Sundiata Gibbs sworn to on 19 October 2010, in support of the application before me. I will refer to some of them:

> " ...
>
> c. While they were directors of the applicant, the 1st and 2nd Respondents transferred more than US$1.6 million of trust funds to the 1st respondent, more than US$ 10.7 million of trust funds to the 3rd respondent and other monies to or for the benefit of the Respondents.

d. The Respondents did not respond to demands by the Applicant, its auditors and the Financial Services Commission of the Turks and Caicos Islands that they repay or account for these funds."

[11] Counsel referred to volume 1 of the record of appeal, with particular reference to the applicant's financial report at Jamaica Money Market Brokers, showing monies being sent over an extended period (2003-2007) from the account to the 1st and 3rd respondents and to other entities and to bank accounts held by the 1st respondent; to letters from the applicant to the 3rd respondent requesting confirmation from the 3rd respondent in respect of information supplied by the applicant's auditors, that as at May 2009 the 3rd respondent owed the applicant in excess of US$10,000,000.00; and to e-mail from the 2nd respondent indicating that he was not sure what funds wired to the 1st respondent and others were used for, as he "only wired these funds based on instructions", or " just follow [sic] instructions as per letters signed by myself and Delroy" (see volume 1 pages 115, 120, 149, 150).

[12] Counsel referred to the letter from the attorneys set out in paragraph 10 herein and a later letter of 30 June 2010 from the applicant's chartered accountants to the 3rd respondent, addressed to its President, the 2nd respondent, indicating that they required copies of the bank statements and other records verifying the trust assets of the applicant and their whereabouts, for the financial years ending 31 May 2007, 2008, 2009 and 2010.The accountants however expressed their concerns thus:

"The management of FFCT has advised us that you have ceased cooperating in providing any financial information to

> the company regarding the Trust Assets under your management. This is a serious issue for you as the manager of the Trust Assets and hope [sic] that you would cooperate by providing the information required to complete the aforementioned audits and disclose the current whereabouts of the Trust Assets."

Counsel stated that there were a series of letters requesting information from the respondents from February to June and thereafter, which went unanswered and then information was received with regard to the selling of the 4th respondent's shares and the applicant commenced the action in the court below, in an effort to restrain that transaction.

[13] In paragraph 9 of Sundiata Gibbs' affidavit he also referred to the following "unchallenged evidence":

> " ...
>
> e. AFTER the freezing order was made and served on the Respondents, the 3rd and 5th Respondents entered into an agreement to sell their businesses and assets for US$11 million. This agreement replaced an agreement that had been entered into by the 4th Defendant in July 2010 to sell its shares in the 3rd and 5th Respondents.
>
> f. The assets sold by the 3rd and 5th Respondents included a commercial building in New Kingston which they admit was purchased with trust funds and which is owned by the Applicant.
>
> g. The proceeds from the sale of the businesses of the 3rd and 5th Respondents are the only substantial assets of the respondents identified in the jurisdiction.

h. The 3rd and 5th Respondents intend to transfer some or all of the proceeds of sale to Ocean Chimo Limited, a company that is not a party to these proceedings and in which they have no interest.

i. On or after July 30, 2010, the 3rd and 5th Respondents received US$ 3.7 million from the sale, but have not disclosed where those funds are being held or what has been done with them.

j. The balance of the proceeds of sale may be paid to the 3rd and 5th Respondents at any time, if they have not been paid already.

k. The 3rd and 5th Respondents intend to pass resolutions to immediately authorize the return of capital to their shareholders."

[14] Counsel referred to the agreement for sale which was exhibited to the Sundiata Gibbs affidavit, and which acknowledged receipt of the deposit of US$3,700,000.00 paid under the earlier agreement, and, which stated that the said deposit had been delivered to the 3rd and 5th respondents. The agreement showed, inter alia, the purchasers' obligation to complete the sale being subject to the Dumfries Road property (which was owned by the applicant) being included as one of the three properties in the schedule of assets, being transferred to the 3rd respondent "for no consideration, on the basis that the price paid for the FFC(J)L [3rd respondent's] Assets shall be deemed to include the value of the Jamaican property". Counsel also submitted that there was no dispute that the 1st respondent owned 60% and the applicant owned 20% of the shares in Ocean Bay Limited, which itself owned 100% of the shareholding in Ocean Chimo Limited. There was however no evidence before the court of the financial status of Ocean Bay Limited, particularly with regard to the extent of its liabilities. The debts in

respect of the purchase of the hotel were debts of Ocean Chimo Limited not the 3rd and 5th respondents. The intended disposal of the proceeds of sale was a dissipation of assets, which required an urgent restraint. Counsel drew my attention to correspondence which passed between the attorneys at the time that the freezing order was in place (September 2010), whereby the 1st, 3rd and 5th respondents were requesting the participation of the applicant in the release of these said proceeds, being "in the course of business" to facilitate funds being sent to RBTT Bank Jamaica Limited to satisfy financial obligations of Ocean Chimo Limited in relation to the hotel. When this was denied by the applicant's attorneys on the basis that the 1st respondent had no entitlement to the funds, the response was that the 3rd and 5th respondents would pass resolutions authorizing immediate distribution of capital to the shareholders, including the 1st respondent, putting at his disposal more than US$612,000.00. This, counsel submitted, showed a clear intention to dissipate the assets. Finally, counsel submitted, that with regard to these funds, in any event there was an amount already unaccounted for in respect of the purchase price, as there was a difference between the deposit paid, and the amount allegedly comprising the outstanding balance. So, aside from the lack of disclosure in relation to the disposal of the deposit received, there had already been dissipation of the proceeds of the sale, representing the only substantial known assets of the respondents in this jurisdiction.

[15] Counsel challenged the alleged accounting and value given by the respondents in respect of the assets purchased by them in the name of the applicant, and also the approach of ascribing the value of the asset as the true value without giving any

indication of the amount of sums used to purchase the same. Counsel referred to the affidavit evidence with specific regard to a property known as "Harbor House", one such asset, and pointed out that it was purchased in the name of Whale Watchers Limited, a company in which the 1st respondent is a shareholder, and that the information with regard to shares being held in trust for the applicant was not substantiated. Further, the liabilities of the company exceeded the value of the alleged investment, and the property was subject to a mortgage which would rank ahead of any equitable interest the applicant may have in the property, and, in any event, the property was in an abandoned and derelict state, damaged by a hurricane some years ago, and which had not been repaired.

[16] Counsel submitted that the issues raised by the respondents in their submissions, namely that the applicant had not come to the court with clean hands, referring to the change in ownership and control of the company, that they had breached their duty of full and frank disclosure, and their inability to satisfy any undertaking in damages, were inapplicable as they had been argued below and had already been ruled on by the trial judge in their favour. With regard to the undertaking in damages however, counsel submitted, if required, the applicant was prepared to give the usual undertaking as to damages, and that the authorities were clear that trust funds could be used to satisfy the same. The respondents' position therefore was without merit.

[17] The applicant's contention was that the only relevant consideration before the court was the issue of the dissipation of assets, which, on all the facts and the applicable law, was clear and the injunction ought to be granted pending the hearing of the appeal.

The respondent's submissions

[18] The respondents provided very detailed submissions and referred to the affidavits of the 1st respondent, which focused on and contained extensive material with regard to the proceedings in the Commonwealth of the Bahamas, and documentation in respect of the dispute between the parties concerning the ownership of the company, for instance articles of the company, minutes of meetings and letters of resignation of directors. The written submissions did not refer at all to the main issue before me on this application, namely whether there was a good arguable appeal, based on how the court approached the question of the dissipation of assets in respect of the respondents, and that if injunctive relief was not granted, whether that would render the appeal nugatory. Lord Gifford QC, however addressed these issues in his oral submissions.

[19] Lord Gifford QC submitted that the court should proceed with great caution when considering the imposition of a freezing order, particularly if differing from the trial judge. He said this case was different from the usual case where protection is required to protect dissipation from illegal actions. He argued that the unusual features of this case were:

"(a) It had its origin in a personal battle between various individuals particularly the 1st respondent and Judith Wilchcombe.

(b) There was no evidence that any beneficiary had been unable to receive any funds to which he or she is entitled.

(c) There was an outstanding issue to be resolved with regard to jurisdiction, and who was entitled to represent the claimant.

(d) There was substantial evidence accepted by Brooks J that the trust owns assets which are at least as great as the amount claimed.

(e) The consequences of continuing the freezing order beyond the limited amount ordered by Brooks J was potentially enormous in terms of damages for which there was no safeguard for the defendants because

(f) Any damages would have to come from the very trust (assets) sought to be protected and:

(i) There is no evidence that any other party has assets to satisfy the potential damage that the action is causing

(ii)The judgment of Brooks J was carefully reasoned, with the application of the correct legal tests and there is no proper basis for disturbing the judgment pending appeal."

[20] Counsel did a thorough review of the issues identified by Brooks J and his findings and submitted that he was correct. He conceded that the judge had made findings against the respondents, but did not concede that those findings were correct. He relied on what he said was the basis that motivated the judge's final order, which was – was there a risk of removal of the corporate assets? This, he said, the judge answered correctly and submitted that there was no good arguable appeal, particularly when in the midst of all these battles the beneficiaries were only on the sidelines, and not complaining about any losses. He argued that the learned judge had identified the

assets which were in place, so it was unnecessary to impose any draconian relief. Further, the undertaking in damages was a protection for the respondents, as it was meant to ensure that they would be compensated in respect of any losses suffered from the imposition of the freezing order. He submitted that the trustees should have approached the court first, to obtain the order, which is the normal procedure, failing which they could be held personally liable. He relied on **In re Beddoe** [1893] 1 Ch 547 for that proposition. Counsel reiterated that the matter before me was not about protecting the beneficiaries or their assets, but about the "fight", and as a result the main element missing from the case was any claim concerning prejudice, which he insisted was a very important element.

[21] Counsel for the 4th and 6th respondents submitted on the issue of the undertaking as to damages and stated that the only appropriate solution for the court in the exercise of its equitable jurisdiction was to order that the injunction be secured by assets other than the trust assets, namely by the shareholder who was pushing the litigation and making the allegations. On the substantive issues, he argued that as the role of the single judge in considering whether to grant an interim injunction pending appeal is not one sitting on appeal from Brooks J, then on a perusal of all the material before me, I should ask whether there is any material before me which would justify the imposition of protective measures which the judge who had heard and contemplated the matter had determined were unnecessary. The imposition of a freezing order is an extraordinary jurisdiction and one to be reluctantly imposed. One must pay heed to the conclusions drawn by the learned judge that there was not

sufficient evidence. Brooks J, he said, had stated the principle correctly, "real risk" is a degree of probability of something happening or not happening. So "little likelihood" must mean that there is no real risk. The probabilities of the assets being exposed are minimal. The learned judge had referred to the leading cases on the subject, and must therefore be presumed to have applied them pursuant to the principles enunciated therein. The 1st respondent, he submitted, had been prudent in his dealings, and even though he may not have differentiated in those dealings between the companies, it cannot be gainsaid, that on the evidence, there had been a net gain. "There would therefore be no need to worry, no-one was trying to sneak away with any assets, and the court should be comfortable with that situation until the hearing of the appeal".

Analysis

[22] The Court of Appeal Rules 2002 do provide that a single judge has the jurisdiction to grant an injunction while a matter is on appeal.

Rule 2.11 provides inter alia:

> "2.11 (1) A single judge may make orders-
>
> …
>
> (c) For an injunction restraining any party from dealing, disposing or parting with possession of the subject matter of an appeal pending the determination of the appeal."

I agree with learned Queen's Counsel for the applicant that the rules do not set out the factors or criteria to be used when considering whether to grant an injunction pending appeal. The principles to be applied however can be distilled from several cases from

this court, and include that there should be a good arguable appeal and the applicant ought to show that there is a risk that if the injunction is not granted the appeal may be rendered nugatory. Harrison JA endorsed in his judgment in **Olint Corp Limited v National Commercial Bank** the applicable principles derived from the dicta of Stuart-Smith LJ in **Ketchum International plc v Group Public Relations Holdings Limited and others**, and Megarry J in **Erinford Properties Limited v Cheshire CC**. In the **Ketchum** case Stuart Smith LJ stated:

> "In my judgment, this jurisdiction is not limited, as the judge thought, to cases concerned with the preservation of a fund or property the subject of the action, but is based on the wider principle enunciated by Cotton L.J. that justice requires that the court should be able to take steps to ensure that their judgments are not rendered valueless by an unjustifiable disposal of assets. Moreover, I cannot see any reason in principle why the considerations which are applicable when the court is considering the grant of a *Mareva* injunction should not be applied in favour of a plaintiff, even if he has lost in the court below, though the question will not be 'does he have a good arguable case?' but 'does he have a good arguable appeal?' This is likely to be a more difficult test to satisfy, and, if the case turns upon questions of fact which the judge has resolved against the plaintiff, may well be insuperable. This threshold must be at least as high as that which has to be satisfied when the court considers whether or not to grant leave to appeal where that is required."

Megarry J had this to say in **Erinford Properties**:

> "There may, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But

> subject to that, the principle is to be found in the leading judgment of Cotton LJ in ***Wilson v Church*** (No 2) ((1879) 12 Ch D 454 at 458), where, speaking of an appeal from the Court Of Appeal to the House of Lords, he said, 'when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory'. That was the principle which Pennycuick J applied in the ***Orion*** case ([1962] 3 All ER 466, [1962] 1 WLR 1085); and although the cases had not then been cited to me, it was on that principle, and not because I felt any real doubts about my judgment on the motion, that I granted counsel for the plaintiffs the limited injunction pending appeal that he sought. This is not a case in which damages seem to me to be a suitable alternative."

[23] In considering whether there is a good arguable appeal one must peruse the findings of law and fact made by the learned trial judge and the challenges to the same as set out in the grounds of appeal, and the basis for them. It is the contention of the applicant that the learned judge recognized that as at 5 October 2010 when he heard the application, on the basis of disclosure having been made thus far, there was no indication that the 1st, 3rd or 6th respondents, as he stated, "individually or collectively have assets which could meet a judgment requiring the return of the principal sum of US$13,911,092.15, claimed by the claimant". It is also the applicant's contention that the learned judge accepted, as is also stated in his judgment, that the 3rd and 5th respondents had sold their business "Quikcash" and other assets, and were expected to receive in the vicinity of US$7,000,000.00 as the balance sale price and intended to transfer this sum to "***Ocean Chimo*** and/or ***Ocean Bay*** as support for their local operation". Of course these parties were not parties to the proceedings nor were they

entitled to the money. The finding therefor by the judge that that purchase was not intended to make the respondents judgment proof and that there was little evidence of the likelihood of the assets being dissipated must be examined.

[24] In **Jamaica Citizens Bank v Dalton Yap** (1994) 31 JLR 43, Forte JA adopted the dictum of Mustill J (as he then was) in the case of **Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft MBH & Co. K.G. The Niedersachsen** [1984] 1 All ER 398, which set out the law thus:

> "Nevertheless, certain themes can be seen to run through the cases. It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstances of the case."

Forte JA indicated that these guidelines were approved by the Court of Appeal per Kerr JA in **Bertram Watkis v Anthony Simmons et al** SCCA No 48/1997 delivered on 19 July 1988, who stated:

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

Forte JA concluded:

> "Before a mareva injunction can be granted therefore, two things must be established:
>
> (1) That the plaintiff has a good arguable case the standard of which is evidence which is more than barely capable of serious argument, but not necessarily having a 50% chance of success, and
>
> (2) 'Solid evidence' that there is a real risk that the assets will be dissipated, either by removal or in some other way and that consequently a judgment or award in favour of the plaintiff would remain unsatisfied."

Sykes J applied those principles in **Peter Krygger and Others v F1 Investments Inc and Others**, and also made this statement:

> " … there is no need for proof of an intention on the part of the defendant to dissipate his assets. What is necessary is that on an objective view, there is a risk of dissipation."

Anderson J also followed suit in the following year with his decision in **First Global Bank Limited v Rohan Rose** and, endorsing the approach laid down in the Court of Appeal, enunciated the principle in this way:

> "it seems to me that the existence of the risk does not have to be proven to a very high standard... However, the risk of

> dissipation must involve a risk of impairing the claimant's ability to enforce a judgment or award. It is not necessary for the claimant to prove that the purpose of the defendant's actual or feared conduct is to frustrate the enforcement of any judgment which is obtained, provided that, objectively, that would be its effect."

Indeed Stuart-Smith LJ in the **Ketchum** case, indicating that the judge at first instance had erred in this regard, had this to say when the matter went on appeal:

> "...since we have heard considerable argument upon the point of whether there was a serious risk that Holdings would dispose of its assets before the hearing of Ketchum's appeal, and since I have come to the conclusion that the judge was in error on this point, I shall state my reasons as briefly as possible.
>
> In my judgment, the judge misdirected himself by relying on the passage already quoted from ***Derby & Co v Weldon*** (No 2) [1989] 1 All ER 1002, [1990] Ch 65 for the proposition that the plaintiff must show that the defendant intends to deal with his assets for the purpose of ensuring that a judgment will not be met. It is sufficient if there is a real risk that the judgment in favour of the plaintiff will remain unsatisfied if injunctive relief is refused: see ***Ninemia Maritime Corporation v Trave Schiffahrts-gesellschaft m.b.H. und Co.*** [1983] 1 W.L.R. 1412, 1422 ***Reg v Secretary of State for the Home Department, Ex parte Muboyayi*** [1992] Q.B. 244, 257H, where Lord Donaldson of Lymington M.R. clarified what he said in ***Derby & Co. Ltd. v. Weldon*** (Nos. 3 and 4) by explaining that in this context 'designed' does not mean 'intended' but 'having the consequence that'."

[25] It does appear to me that it is arguable that the learned trial judge may have misinterpreted the applicable legal test, when considering the second limb for the imposition of the mareva injunction and placed the threshold with regard to the evidence necessary to find dissipation of assets too high.

[26] I appreciate that it is not my role to sit on appeal of the judgment of Brooks J. It is also not my role to make any findings in respect of the abundance of evidence that was placed before me, particularly since the application before me is one to restrain the respondents from disposing or dealing with their assets wherever situate and withdrawing funds from their accounts wherever situate unless in excess of US$13,000,000.00 pending the hearing of the appeal of the judgment of Brooks J, which is scheduled to be heard on 7 March 2011. Further, it is important to note, that some of the issues canvassed before me, and no doubt other issues, with additional documentation and viva voce evidence will ultimately have to be tested and determined by a judge at trial.

[27] I have set out below some of the many matters which were put before me, and which were duly noted and considered in my deliberations, in order to dispose of this application.

- A sum of approximately US$14,000,000.00 representing trust funds was transferred to the applicant as successor trustee in 2008.
- The applicant was entitled to distribute a sum of US$9,800,000.00 to beneficiaries. The applicant did not do that.

- The applicant's attorneys were "shocked" at the 1st respondent's dealings with the trust funds. The probity of the respondents' actions was therefore an issue.
- The applicant's accountants requested but were unable to obtain information with regard to payments to the respondents and others at the behest of the 1st and 2nd respondents.
- The 2nd respondent acted on the 1st respondent's instructions: Funds were owed to the applicant by the respondents in at least the following amounts: US$1,607,876.41 (1st respondent); US$10,773,397.70 (3rd respondent) US$733,000.00 (6th respondent); US $ 1, 641,000.00 (Wachovia Bank Lauderhill, Florida/1st respondent). There was an admitted debt of US$1,700,000.00 owed to the applicant from the 3rd respondent.
- The 3rd, 4th, 5th and 6th respondents are all owned and controlled by the 1st respondent.
- The 4th respondent wholly owned the 3rd and 5th respondents.
- The 4th respondent sold its shares in the 3rd and 5th respondents and collected US$ 3,700,000.00 as a deposit in the transaction. There has been no accounting for this.
- The 3rd and 5th respondents were replaced as sellers in the agreement mentioned above, and the deposit stated in the agreement which was collected by the 4th respondent, was stated in the agreement, to have been delivered to them. It has still not been accounted for.

- The 3rd and 5th respondents intend to hand over all proceeds of sale to Ocean Chimo Limited, who is not a party to the action.
- The 3rd and 5th respondents are not shareholders in Ocean Chimo Limited.
- Ocean Chimo Limited owns 100% of the Wyndham Hotel.
- The applicant owns 20% of Ocean Bay Limited; 60% of the shares are owned by the 1st respondent.
- Ocean Bay Limited owns 100% of Ocean Chimo Limited.
- It is trite law that a shareholder does not own the assets of a company.
- The applicant therefore will not own the asset –the Wyndham Hotel
- There has been no evidence of the amount spent to purchase the hotel.
- There was no evidence of the state of the accounts of Ocean Bay Limited.
- The directors of the 3rd and 5th respondents, (the 1st and 2nd respondents) intended to pass resolutions to cause an immediate distribution of capital to shareholders.
- The applicant has a duty to protect the trust assets.
- There is an amount representing some or all of the balance proceeds of the sale of the assets of the 3rd and 5th respondents in the possession of the attorneys representing them, namely US$3,600,000.00.
- The cardholders/beneficiaries of the applicant were not slated to receive any of those sums, and in those circumstances it could appear, prima facie, that there was a real risk of dissipation of assets.

- The 1st respondent is not domiciled in Jamaica. He lives in the Cayman Islands. The 4th, 5th and 6th respondents are all incorporated in the Cayman Islands.
- Brooks J found that the issue of who owns the majority of the shares and who is the proper person to be in control of the applicant and to authorize its actions ought to be decided in the courts of the Turks and Caicos Islands, where the applicant was incorporated.
- The applicant was prepared to give the usual undertaking as to damages, and the authorities indicated that the trust assets could be used to satisfy the said undertaking.
- If the appeal is successful and those funds have been paid over to Ocean Chimo Limited and cannot be recovered to pay the applicant the appeal would be rendered nugatory.

[28] I accept on the basis of the authorities cited above that to satisfy the court that there is a good arguable appeal the threshold may be a high one but in this case, I was satisfied on the matters set out above, that the appeal was certainly not frivolous, indeed there is a good arguable appeal, firstly because the judge appeared to place a greater evidential burden on the applicant than the cases suggest was warranted, and it was clear to me that the payment of the proceeds of sale to Ocean Chimo Limited in the circumstances outlined above could amount to a dissipation of assets within the guidelines set out in the authorities. Further, save for the 2nd and 3rd respondents, the remaining respondents were all resident and/or located out of Jamaica, and as indicated, the evidence disclosed that the funds in the possession of the attorneys

representing the 3rd and 5th respondents were the only substantial funds in the jurisdiction. Additionally, as the disposal of the said funds was imminent I felt impelled to order a restraint on their doing so in order to preserve the same until the hearing of the appeal. I therefore made the order that I did on the 7 January 2011. I ordered the restraint against all respondents as they are all in receipt of funds from the applicant and as their operations are intertwined, and directed at all times by the 1st respondent, who desired the funds to pay debts relating to the hotel, and who claimed to be beneficially entitled to the same through the interlocking ownership of the companies, and who had the ability to, and seemed determined to distribute the capital of the companies. The injunction was granted on the usual undertaking as to damages having been given by the applicant.

[29] I must comment however that the hearing of this application was extended over a period of two months as it was interrupted by four different applications:

(i) that due to the order made by Panton P the applicant had no locus standi, the matter being res judicata between the parties;

(ii) an application was made to interpret the scope of the interim injunction granted by me on 26 October 2010 and extended on 2 November 2010 until the determination of the application for injunction pending appeal;

(iii) there was an application that the matter could not proceed with certain representation which was later withdrawn;

(iv) there was an application that the applicant ought not to be permitted to proceed with the hearing of the application for interim injunction pending appeal, as its main deponent was in contempt of court. Brooks J is seized of that aspect of the matter, which has not yet been determined.

I merely mention the above applications *en passant* as they did not affect either the deliberations or the determination of application no 184/2010.