JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 106/99
SUIT NO. C.L. A060/99

BEFORE: **THE HON.MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN:	**DELROY LINDSAY**	**APPELLANT**
AND	**THE ATTORNEY-GENERAL OF JAMAICA**	**RESPONDENT**

Dr. Ronald Manderson -Jones for the appellant

Dennis Morrison, Q.C., and Yolande Whitely for the respondent
Instructed by the Director of State Proceedings

January 20, 21, 24 and November 27, 2000

DOWNER, J.A.

Delroy Lindsay is a former banker who describes himself as a self- employed consultant. He is the second defendant in a suit instituted by the Attorney-General to recover over J$49.m. There are nine other defendants namely, Friends Group Ltd. (formerly Corporate Resorts Limited (In Receivership), Trevor Owen Patterson, Claudette Angella Maxwell, Raphael Gordon, Veritat Corporation, KPMG Peat Marwick (A firm), Corporate Merchant Bank Limited (Vested in the Minister of Finance and Planning pursuant to the Financial Institutions Act), Myers Fletcher & Gordon (A firm) and Corporate Group Limited.

This appeal by Lindsay seeks to set aside the inter- partes order of Reid J. dated 16th December 1999, who refused to discharge the ex-parte Mareva Injunction granted by Theobalds J. dated 11th August, 1999. This Order has restrained the appellant Lindsay from removing his assets out of the jurisdiction or dealing with his assets elsewhere. One of the complaints of Dr. Manderson-Jones of counsel is that his client was singled out by the respondent Attorney-General for a Mareva Injunction while the assets of the other nine defendants to the suit have not been so restricted.

It is pertinent to refer to the dominant role of Lindsay in the affairs of some of the other defendants. Here is how Audrey Deer-Williams put it in her affidavit in support of the summons in applying to Theobalds J. in the first instance for injunctive relief:

> "4. That the Second Defendant was at all material times a Banker, the Chairman of the Board of Directors and the Chief Executive Officer of the First Defendant, as well as the Eighth and Tenth Defendants. The Second Defendant was also a shareholder of the First and Tenth Defendants and a member of the Prospectus Committee which supervised the public share issue of the First Defendant."

Then she explains the involvement of the Attorney-General thus:

> "3. That I crave leave to refer to the Writ of Summons and Statement of Claim filed in this suit. The Plaintiff filed suit by virtue of the Crown Proceedings Act on behalf of the National Insurance Fund which was established pursuant to section 39 of the National Insurance Act."

Here it should be explained that Audrey Deer-Williams is a "public officer" and that the fund administered by her is controlled by the Minister of Finance.

As for her own role here is what she said:

> "1. That my true place of abode and postal address is 7 Glebe Crescent, Dunrobin Acres, Kingston 10 in the parish of Saint Andrew and I am a Manager of the National Insurance Fund and I am duly authorized to make this affidavit on behalf of the Plaintiff herein.

2. That the contents of this affidavit are derived from documents and information supplied to me by or on behalf of the Plaintiff and are true to the best of my knowledge, information and belief. That I make this affidavit in support of an application by the Plaintiff for a Mareva Injunction to be granted against the Second Defendant in terms of the draft Minute of Order filed herewith, or in such other terms as may be just and convenient."

It is regrettable that she failed to exhibit some of the documents supplied to her. The blame however is probably to be attributed to the Attorneys who prepared her affidavit.

As for the claim against Lindsay, Audrey Deer-Williams put it thus:

"5. That the claims against the Second Defendant are for fraudulent misrepresentation, negligence, breach of statutory duty and conspiracy to defraud. These arise out of the public share issue in the First Defendant, conducted in 1993, in which there was an offer to the public of 100 million shares at a price of $3.50 per share for a total of $350,000,000.00 payable in full on application in the First Defendant.

6. That the Prospectus relating to the said share issue stated that the subscription list would open on the 21st day of May 1993 and close on the 7th day of June 1993. The Prospectus further stated that each application must be accompanied by cash or cheque for the full amounts payable. The minimum subscription which had to be met at June 7, 1993, by the share issue was set at $200 million. The net proceeds of the share issue was earmarked principally for the repayment of high cost debt and to exercise the option to purchase Plantation Inn. This option had to be exercised by or before June 14, 1993 and was in fact exercised on June 11, 1993.

7. That in reliance on the representations made in the Prospectus the Plaintiff made 35 applications for a total purchase of 14,285,700 shares at a cost of $49,999,950.00. That 14,285,700 shares at a cost of $49,999,950.00 were allotted to the Plaintiff. That the Plaintiff subsequently sold 300,000 shares for a total consideration of $519,930.63."

Then Audrey Deer-Williams explained how Lindsay breached Sec.47 of the Companies Act and why the plaintiff failed to recover its investment as there was a failure to institute proceedings within two years as required by the Act. Paragraph 12 sets out the means by which the respondent was defrauded thus:

> "12. That the Plaintiff alleges that it did not obtain a refund of its monies and was prevented from making such claims due to the fact that the Second Defendant by himself or in conjunction with other Defendants in this suit, contrived and/or conspired to conceal the fact that the share issue had not been fully subscribed by the date of closing of the share issue."

According to Audrey Deer-Williams, the appellant, Lindsay compounded his wrongful conduct thus:

> "13 That further, the Second Defendant caused or allowed to be published in the Daily Gleaner newspaper dated June 12, 1993, a Statement which indicated that the offer had been fully subscribed. That in addition in the Chairman's Report contained in the Annual Report of the First Defendant, for the year ending December 1993, the Second Defendant also made false representations that the offer had been fully subscribed. The Second Defendant also signed on behalf of all the Directors of the First Defendant to the Audited Financial Statements, accompanying the said Report, which accounts indicated the full subscription of the issue."

With respect to this paragraph it is strange that the auditors did not detect the alleged fraud concerning the "full subscription"

There is a Caymanian aspect for which Audrey Deer-Williams gave evidence. This evidence was acceptable for an ex-parte application, and might even have been acceptable at the inter partes hearing having regard to the urgency and its nature. It is arguable that if the following evidence is to be used at a trial some expert evidence will be required of Cayman law and there will be the need it seems of some- one from the Cayman Islands to give the factual evidence. It is difficult to know what weight

Reid J. gave to this evidence as regrettably he gave no reasons for his decision in refusing to discharge the injunction. Here is the evidence:

> "14. That however, by letters dated 7th day of June 1993, the date on which the share offer closed, the Second Defendant, writing as the Chairman of Corporate Group Limited, wrote to one Michael DeLeon three separate letters relating to three companies, Tamron Limited, Kleinworth Limited and Kelner Limited. These letters referred to Mr. DeLeon's acquisition of all the shares of the said companies, which companies were each described as "... a company incorporated in the Cayman Islands for the purpose of applying for a block of shares in Corporate Resorts Limited ("CRL") pursuant to the public issue made by CRL". The letters also referred to Mr. DeLeon's intention to take up and pay for as much of the shares of the First Defendant as may be allotted to each company."

These letters ought to have been exhibited. In any event they ought to have alerted the auditors that something was unusual concerning the full subscription. Then the evidence continues.

> "15. That the said Caymanian companies were not incorporated in the Cayman Islands until June 28, 1993, on instructions from the Third Defendant, another director of the First Defendant through the offices of the Ninth Defendant. This was 21 days after the share issue had closed. No shares in these companies were ever issued and no directors were ever appointed at the time of their incorporation or at any material time thereafter.
>
> 16. On the 15th day of June 1993, the Second Defendant wrote to the said Mr. DeLeon setting out the number of shares allocated to each of the three Caymanian companies as follows:
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> | | |
> |---|---|
> | Kleinworth Limited | 17,000,000 shares |
> | Kelner Limited | 13,000,000 shares |
> | Tamron Limited | 23,000,000 shares |
>
> 17. That the fees for incorporation of these companies were paid to Messrs. Myers & Alberga, Attorneys in

> the Cayman Islands, under cover of letter dated September 30, 1993 signed by the Second Defendant on behalf of the Tenth Defendant."

Then comes the illegality which the Plaintiff claims:

> "18. That the shares allotted to these Caymanian Companies were paid for by loans to these companies by the Eighth Defendant, of which the Second Defendant was Chairman of the Board of Directors and Chief Executive Officer. These loans were made in contravention of the provisions of Section 13 of the Financial Institutions Act."

The polite language cannot conceal the fact that the allegation is that Lindsay or his nominees were the recipient of those funds. Be it noted that criminal sanctions can be imposed for breach of Section 13 of the above Act.

Then the affidavit continued:

> "19. Accordingly, the Plaintiff asserts that the Second Defendant acted in bad faith towards the Plaintiff; that the Second Defendant breached its common duty of care to the Plaintiff as he, by himself or with others negligently or deliberately by their acts and/or omissions misled subscribers in general and the Plaintiff in particular, as to the true position with the share issue; that he breached his statutory duty under section 47 of the Companies Act; that he conspired with others to deceive the Plaintiff and other subscribers and that he did in fact through fraudulent representations made deceive the Plaintiff and other subscribers."

Paragraph 25 is instructive. It explains why Lindsay's affidavit seem to mock the Attorney-General. It reads:

> "25. That I do believe that the Second Defendant is not within the jurisdiction of this Honourable Court. That I refer to the affidavits of Herman Grace and Noel Murray sworn to and filed herein, in support of an application for substituted service, which show the results of their attempts to locate him for the purpose of effecting service of the Writ of Summons and Statement of Claim. That the said Herman Grace was advised by the Second Defendant's brother, Keith Lindsay, at Y2L Distributor's Limited, 3 Musgrave Avenue, Kingston

> 5, that the Second Defendant is no longer associated with the business, can no longer be found there and he does not know where to locate him."

Then to demonstrate the extent of the allegations made against Lindsay, Paragraph 27 reads:

> "27. That there are four (4) suits related to this matter; namely Suit No. C.L.T. 082 of 1999, Suit No. C.L.J.053 of 1999, Suit No. C.L.W.095 and Suit No. C.L.N.133 of 1999, filed by other subscribers, in which the said Second Defendant is sued jointly and severally with others in respect of a total sum, including that claimed in this action, of approximately $80,000,000.00 and interest thereon, arising out of the share issue mentioned in paragraph 5 of this Affidavit. That there are two (2) other Suits, namely, Suit No. C.L.W. 116, also filed by this Plaintiff, in which the said Second Defendant is joined as a Third party and Suit No. C.L.C. 206 of 1999, filed by a subsidiary of this Plaintiff, in which the Second Defendant is sued as a Defendant, which are also related to the said share issue. That the Second Defendant has not yet been served in these suits as he cannot be located for service. That an Order for substituted service has been made by this Honourable Court in respect of this suit and the first four (4) suits mentioned above."

There does not seem to be any assets owned by Lindsay in this jurisdiction known to the plaintiff. There was a transfer of a property at 69 Lady Musgrave Road owned by the appellant Lindsay and his wife Patricia Elizabeth Lindsay. That is, it was sold on the 7th June 1999 for six million dollars which is three days after the Writ of Summons was filed on 4th June 1999. Where is this six million dollars? The ex-parte Mareva injunction was obtained 11th August 1999. There is also knowledge that the appellant Lindsay is a shareholder in two companies, Linpat Consultants Ltd. and Y2L Distributor's Ltd., but there is no indication in the affidavit as to the assets of these companies. Further it does not seem that the Attorney-General has any knowledge as to where the appellant Lindsay is to be found. This is the most extraordinary aspect of

this case. It is also stated in the affidavit that the illegalities alleged also involves criminality on the part of Lindsay and that the matter has been submitted to the Director of Public Prosecutions for further ruling. That learned lawyer will certainly take into account Sec. 54 of the Companies Act, Sec. 27 of the Larceny Act as well as Section 13 of the Financial Institutions Act. These proceedings seem unreal. If there are assets to warrant the Mareva proceedings where is the report of the forensic accountants who play such a crucial part in cases of this nature?

The injunctive relief granted by Theobalds J.

It was in the light of the foregoing affidavit evidence that Theobalds J. granted an exparte Mareva injunction on the following undertaking by the respondent Attorney-General:

> "a) to pay the reasonable costs incurred by any person other than the Second Defendant to whom notice of this Order may be given in ascertaining whether any assets to which this Order applies are within the power, possession, custody and control and in complying with this Order and to indemnify any such person against all liabilities which may flow from such compliance; and
>
> (b) to obey any Order this Court may make as to damages if it shall consider that the Second Defendant shall have sustained any by reason of this Order which the Plaintiff ought to pay."

Then it was ordered:

> "1. That the Second Defendant be restrained and an injunction is hereby granted restraining him until trial or further Order by himself, his servants or agents or otherwise from removing outside of the jurisdiction of this Court any of his assets within the jurisdiction or disposing, pledging, charging, transferring or dealing with any of his assets wherever situated, whether within or outside of the jurisdiction.

SAVE that this Order shall not apply in so far as the said assets of the Second Defendant exceed $49,480,019.37.

SAVE that the Second Defendant is to be at liberty to expend such sum for ordinary and proper living expenses, and obtaining legal advice and representation as may be requisite and reasonable.

PROVIDED further that:-

This Order is declared to be of no effect against, and is not intended to bind any Third Party outside of the jurisdiction of this Court, directly or indirectly affected by the terms of this Order, unless and until this Order shall be declared enforceable or recognized or is enforced by any Court of the jurisdiction (in) which the Second Defendant's assets are situated.

2. That the Second Defendant do forthwith disclose the full value of his assets, held solely or jointly within or outside the jurisdiction of this Court identifying with full particularity the nature of all such assets, their whereabouts and whether the same be held in his own name or by nominees or otherwise on his behalf and the sums standing in such disclosures to be verified by affidavits to be made by the Second Defendant and served on the Plaintiff's Attorneys-at-law within fourteen (14) days of service of this Order or notice thereof being given."

There is no evidence that efforts have been made to trace Lindsay or to ascertain if he has control over any assets. Then the third paragraph is the order for costs which is that, costs are to be costs in the cause.

Despite my reservations about gaps in the affidavit I am satisfied that Theobalds J. exercised his discretion correctly at the ex-parte stage of these proceedings. Two extracts from **Watkis v Simmons** (1988) 25 JLR 282, are cited to demonstrate that the learned judge took into consideration the relevant issues. The first passage at p. 285 reads:

> "Now in the **Ninemia Corp** case, [1984] 1 All ER 398, Mustill, J., after examining and considering statements in a number of cases cited in arguments at pages 402-3 said:
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> > 'These cases are not easily reconciled, but to my mind they establish that the strength of the plaintiff's case is relevant in two distinct respects: (i) the plaintiff must have a case of a certain strength, before the question of granting Mareva relief can arise at all. I will call this the 'threshold'; (2) even where the plaintiff shows that he has a case which reaches the threshold, the strength of his case is to be weighed in the balance with other factors relevant to the exercise of the discretion. It seems to me plain that the second proposition is justified by common sense and by the authorities'."

The second reads at page 286:

> "In **Ninemia Corp** (supra), Mustill,J., after referring at pages 405-6 to dicta of how Lord Denning and Lawton, L.J., in **Third Chandris Shipping Corp. v. Unimarine S.A. The Pythia, The Angelic Wings, The Genie** [1979] 2 All E.R. 972, said:
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> > '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'."

The inter-partes hearing before Reid J.

In view of the Mareva injunction the appellant issued a summons returnable on Thursday 16th September 1999, to discharge it and for an enquiry into damages. The affidavit of Delroy Lindsay in support of the Summons to discharge the Mareva injunction is economical. To reiterate, it is written in a mocking tone and paragraph 13 is the only paragraph which attempts in a general way to answer the detailed particulars of the respondent's affidavit. It reads:

> "13. As regards paragraph 30 of the Affidavit, I am further advised by my Attorney-at-law and verily believe that the Affidavit has failed to provide any evidence that there is a real risk or any risk at all that I will dissipate within or remove my assets from the jurisdiction so that any judgment obtained by the Plaintiff against me would remain unsatisfied."

To illustrate the mockery here is how he treats the issue of his residence:

> "11. As regards paragraph 26, I removed from Townhouse 15, Kimberly, 8-10 Broadway Road, Kingston 8 to my present address at Townhouse No. 5 Waterworks Mews, 5 Palomino Way, Kingston 8. The use of container, therefore, was clearly not mysterious or in pursuance of any alleged plan to leave the jurisdiction permanently."

This is in marked contrast to the evidence of the respondent on this aspect: To reiterate, it reads:

> "25 That I do verily believe that the Second Defendant is not within the jurisdiction of this Honourable Court. That I refer to the affidavits of Herman Grace and Noel Murray sworn to and filed herein, in support of an application for substituted service which show the results of their attempts to locate him for the purpose of effecting service of the Writ of Summons and Statement of Claim. That the said Herman Grace was advised by the Second Defendant's brother, Keith Lindsay, at Y2L Distributor's Limited, 3 Musgrave Avenue, Kingston 5, that the Second Defendant is no longer associated with the business, can no longer be found there and he does not know where to locate him.'"

So it is convenient to refer to paragraph 30 of the respondent's affidavit which reads:

> "30. That having regard to all the circumstances, I verily believe that unless a Mareva Injunction is granted in the appropriate terms against the Second Defendant there is a real risk that the Second Defendant will dissipate within or remove his assets from the jurisdiction so that any judgment obtained by the Plaintiff against him would remain unsatisfied.

> That in all the circumstances, I do verily believe it would be just and convenient for the Court to grant the Mareva injunction in terms of the draft Minute of Order filed herewith."

Paragraphs 8-10 of Lindsay's affidavit illustrate the lighthearted way in which he treats the issue:

> "8. A Defence has also been filed herein on 7 September, 1999, a copy of which is exhibited herewith as "DL 1" in answer to paragraphs 3 to 22 of the Affidavit of Audrey Deer-Williams in support of the Summons For Mareva Injunction.
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> 9.. As regards paragraphs 23 of the Affidavit of Audrey Deer-Williams, so far as I am aware the sale by myself and my wife recorded on the Certificate of Title registered at Volume 1193 Folio 704 was a perfectly legal and bona fide transaction for disclosed consideration, the amount of which has not been challenged as an undervalue and was accepted by the Stamp Commissioner.
>
> 10. I am indeed a shareholder in Linpat Consultants Limited and also of Y2L Distributors Limited. So far as I am aware that is perfectly legal."

Paragraphs 19 and 20 of the Defence set out the main ground of the plea and it was projected with force by counsel:

> "19. The Second Defendant in all his statements and actions in respect of the offer of shares and the allotment thereof was speaking and acting as Chairman of the company and relied on the advice of the Board of Directors, the auditors, accountants, Registrar to the issue, legal and other advisers of Corporate Resorts Limited. THE ALLOTMENT WAS CARRIED OUT BY CORPORATE RESORTS LIMITED and not by the Second Defendant. At all material times the Directors were Delroy Lindsay – Chairman (Second Defendant), Trevor Patterson (Third Defendant), Angela Maxwell (Fourth Defendant), George Phillip (Managing Director) – not sued, Howard McIntosh (not sued), Marguerite Orane (not sued). No action has been brought by the Plaintiff against the other directors who are not alleged to have been guilty of any fraud, breach of statutory duty or negligence.

> 20.The Second Defendant further contends that if he made any fraudulent representations (which is denied) the means of discovering the alleged fraud were always available to the Plaintiff from 8 July, 1993, the date of delivery and filing with the Registrar of Companies of the Return of Allotment of the First Defendant pursuant to section 51(1) of the Companies Act, as alleged in paragraph 41 of the Statement of Claim. The Plaintiff from then could have established whether Tamron Limited, Kelner Limited and Kleinworth Limited were in existence at the closing date of the offer or at the date of the allotment and had collectively subscribed for 50% of the shares at a total cost of $185 million as alleged at paragraph 35 of the Statement of Claim."

Against the background of the affidavits of the appellant and respondent, Reid J. made the following order without stating any reasons for his decision:

> "IT IS HEREBY ORDERED THAT;
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> 1. Application refused.
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> 2. Costs to the plaintiff to be taxed if not agreed.
>
> 3. Leave to appeal granted"

No doubt the learned judge took into account the guidance given by Mustill J. cited by Kerr J.A. in **Watkis** (supra) at page 287 thus:

> "I accept as the proper approach to the evidence at the inter-partes hearing of an application for a Mareva injunction that advocated by Mustill, J., in **Ninemia Corp** case thus: (p 409)
>
> > 'The judge who hears the proceedings inter partes must decide on all the evidence laid before him. The evidence adduced for the defendant will normally be looked at for the purposes of deciding whether it is enough to displace any inference which might otherwise be drawn from the plaintiff's evidence. But I see no reason in principle why if the defendant's evidence raises more questions than it answers, and does so in a manner which tends to enhance rather than allay any justifiable apprehension concerning dissipation of assets, the court should be obliged to leave this out of account. On the other hand, the plaintiff has no right to criticize the defendant's evidence, for omissions or obscurities. The defendant is entitled to choose for himself what evidence, if any,

> he adduces. The less impressive his evidence, the less effective it will be to displace any adverse inferences. But there must be an inference to be displaced, if the injunction is to stand, and comment on the defendant's evidence must not be taken so far that the burden of proof is unconsciously reversed'."

Proceedings in this Court

The grounds of Appeal are as follows:

> "1) The pre-trial injunction prohibiting disposal of assets in Jamaica and worldwide is inconsistent with and repugnant to the fundamental right and freedom to enjoyment of property enshrined in sections 13 and 18 of the Constitution of Jamaica.
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> 2) The Supreme Court has no power to grant a pre-trial injunction prohibiting disposal of the Defendant/Appellant's assets in Jamaica and worldwide.
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> 3) The Supreme Court has no jurisdiction to prohibit the Defendant/Appellant from disposing, pledging, charging, transferring or dealing with his assets outside the jurisdiction of Jamaica."

These grounds must have been drafted on the basis that the appellant has assets both within and outside the jurisdiction. Then the grounds continue.

> "4) The learned Judge exercised his discretion wrongly and on the wrong principles, in failing to recognize that the Affidavit in support of the Ex Parte Injunction which was granted failed to disclose any basis for granting the injunction.
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> 5) The learned Judge erred in failing to find that the scope of the disclosure order extending outside the jurisdiction was unjustifable as it is not in aid of execution.
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> 6) Alternatively, the learned Judge erred in failing to require the Plaintiff to support its cross-undertaking in damages by payment into Court."

The Constitutional point as embodied in Ground 1

Section 13 of the Constitution in part reads:

> "13. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following namely-
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law.
>
> ... "

Then 13 further continues:

> "the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

Here is how the enjoyment of property is presumed to have existed prior to Independence in 1962, and is now enshrined so as to ensure it will be protected by the Constitution. Section 18 is the relevant section and in so far as material reads:

> "18.-(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that –
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> (a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and
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> (b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of –
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> (i) establishing such interest or right (if any);

> (ii) determining the amount of such compensation (if any) to which he is entitled; and
>
> (iii) enforcing his right to any such compensation."

Then limitations are imposed on these extensive rights in the interests of the rights and freedoms of others and in the public interest. So Section 18(2) reads:

> "(2) Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property –
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> ...
>
> (b) upon the attempted removal of the property in question out of or into Jamaica in contravention of any law:
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> ...
>
> (h) in the execution of judgments or orders of courts;
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> ...
>
> (k) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry... "

In the case of a temporary restraint on the enjoyment of property as the Mareva injunction imposes, the ample words "for so long only as may be necessary for the purpose of any trial" are adequate constitutional authorisation for the award of a Mareva injunction. Further, there was the usual undertaking for damages in this case. Then the Constitution envisages that the "law" which it permits will be applied "upon the attempted removal of the property in question out of or into Jamaica in contravention of any law". In this context it must be emphasised that "law" is defined in Section 1 of the Constitution as written and unwritten law. Thus "law includes any instrument having the force of law and any unwritten rule of law and "lawful" and "lawfully" shall be construed accordingly". Then also of relevance is 18(2)(h) which specifically states restraint may be imposed by the Court thus: "in the execution of judgment or orders of courts".

When we examine the pre-existing law whose continuity is sanctioned by the principal savings clause of the Constitution in Section 4(1) of the Jamaica (Constitution) Order in Council 1962, it is to be found in Section 49(h) of the Judicature (Supreme Court) Act which reads:

> "(h) A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just, and if an injunction is asked either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court thinks fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or(if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable."

It is also necessary to emphasise that "unwritten law" refers to judicial decision and there are two notable decisions of this Court namely, **Bertram Watkis v Anthony Simmons et al** (1988) 25 JLR 282 and **Jamaica Citizens Bank Ltd. v Dalton Yap** (1994) 31 JLR 42 the first of which has been followed by judges of first instance for upwards of twelve years. It should also be noted that there were many Mareva injunctions issued in the Supreme Court prior to those two cases but there were no appeals from the Supreme Court and there does not appear to be any written decision from that Court.

In the light of the foregoing, the contention by Dr. Manderson-Jones for the appellant that the Mareva injunction is inconsistent with Section 13 and 18 of the Constitution cannot be supported.

As to Grounds 2 and 3

Reference has already been made to the combined effect of Sections 13 and 18 of the Constitution as well as Section 49(h) of the Judicature (Supreme Court) Act which empowers the Supreme Court to prohibit the appellant Lindsay removing his assets from the jurisdiction pending the determination of the case against him and nine other defendants. What has not yet been addressed is the jurisdiction of the Supreme Court to prohibit Lindsay from dealing with his assets outside the jurisdiction until the hearing and determination of the principal action. This issue was extensively canvassed in **Jamaica Citizens Bank Ltd. v. Yap.** My contribution in part is stated at pages 65-66:

> "Injunctive relief to restrain a defendant from proceeding in a foreign country, was given in **Re North Carolina Estate Co. Ltd.**[1889] T.L.R. 328. Where the courts of equity led in providing a remedy outside the jurisdiction, the commercial court followed in creating and expanding the jurisdiction of the Mareva injunction. The commercial court was also influenced by the "saise conservatoire" of continental jurisprudence: see Z Ltd. (supra) at p. 573. Mr. Hylton for the bank helpfully referred the court to **Derby & Co. Ltd. and Others v. Weldon and Others** (No. 2) [1989] 1 All E.R. 1000. The following passage by Lord Donaldson, M.R., at 1009 sets out the position with clarity:
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> > '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 on 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 order should be made subject, of course, to ordinary principles of international law. When Sir Nicolas Browne-Wilkinson, V.C. 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.

Further on the same page Lord Donaldson cites the modern cases where worldwide order was granted. It runs thus:

> 'The reality is, I think, that it is only recently that litigants have sought extra-territorial relief and that the courts have had to consider whether to grant it and on what conditions. During the last year it has been granted in the three cases to which Sir Nicolas Browne-Wilkinson, V.C., referred, namely the **Babanaft** case [1989] 1 All E.R. 433. [1989] 2 W.L.R. 232, **Republic of Haiti v. Duvalier** [1989] 1 All E.R. 456, [1989] 2 W.L.R. 261 and **Derby & Co. Ltd. v Weldon** (No. 1) [1989] 1 All E.R. 469. [1989] 2 W.L.R. 276. Counsel for CMI seeks to distinguish the **Babanaft** case on the grounds that the injunction was granted in aid of execution of an existing judgment. This I accept as a distinction in that the court will have less hesitation in taking measures in support of a judgment creditor than it would in support of a potential judgment creditor. The decision in **Republic of Haiti v. Duvalier** (supra) he seeks to distinguish on the grounds that it was a tracing case and that the funds were under the control of an agent resident within the jurisdiction. This is certainly a distinction in fact, although I am not sure that it is one of principle. In **Derby & Co. Ltd. v. Weldon** (No. 1) (supra) he seeks to distinguish on the ground that the defendants had assets within the jurisdiction, but, for the reasons which I have already given, I do not consider this to be a distinction in principle'."

Forte J.A. put it thus at page 55:

> "This question was dealt with in the case of **Derby & Co. Ltd. and Others v. Weldon and Others** (No. 2) [1989] 1 All E.R. 1002, where Lord Donaldson, M.R., (pp.1008-9) approved in substance the following dicta of Sir Nicolas Browne-Wilkinson, V.C. in **MBPXL Corp v. Intercontinental Banking Corp. Ltd.** [1975] C.A. Transcript 411:
>
> > 'It has been said many times that Mareva relief is a developing field. There is no doubt that as a matter of English law this court has jurisdiction to grant relief against any party properly before it in relation to assets wherever situate. However, the circumstance under which such jurisdiction should be exercised must

> depend on and vary with the circumstances of every case. The rationale of the earlier decisions was plain: the court was seeking to freeze assets against which an eventual judgement in the English court could be enforced. In my judgment the earlier decisions merely show what was a settled practice in the ordinary case: that is to say in a case where there was no question of extending the order beyond local assets. For myself, I believe that the practice of requiring some grounds for believing that there are local assets is still applicable in such case. But the three recent Court of Appeal cases were not the normal case [see **Babanaft International Co. S.A. v Bassante** [1989] 1 All E.R. 433, [1989] 2 W.L.R. 232, **Republic of Haiti v. Duvalier** [1989] 1 All E.R. 456, [1989] 2 W.L.R. 261 and **Derby & Co. Ltd. v Weldon** (No. 1) [1989] 1 All E.R. 469. [1989] 2 W.L.R.276]. In each judgment the Court of Appeal stressed they were very special cases. They involved a claim for Mareva relief over assets not situate here. If the case of **Derby & Co. Ltd. v Weldon** (No.. 1) before the Court of Appeal was a very special case, so is this application, which is intimately linked with exactly the same matter. In my judgment, I am free to exercise the undoubted jurisdiction to make the orders sought in the particular circumstances of this case. But, to my mind, three requirements ought to be satisfied before the court takes the extreme step that is asked for in this case. The first requirements is that the special circumstances of the case justify such an exceptional order. Second, that the order is in accordance with the rationale on which Mareva relief has been based in the past. Third, that the order does not conflict with the ordinary principles of international law'."

Rattray P. put it thus at page 51:

> "We were concerned with the question of whether the Mareva Injunction could properly be made in respect to assets of a defendant outside the jurisdiction of the Jamaican court to wit the defendant's assets in Miami, Florida. The authorities satisfy me that the Injunction can be made in relation to assets of a defendant held worldwide, as the remedy is in personam and the defendant would be in contempt of the court's order if he breaches the Injunction in relation to the assets wherever held. A sufficient sanction exists not only in the usual penalties for contempt, but additionally in that the court could bar the defendant's right to defend if he disobeyed the order. {See **Derby & Co. v. Weldon** (No. 2) (1989) 1 All E.R. 1002.]"

From the preceeding analysis Grounds 2 and 3 have not been successful.

Grounds 4, 5 & 6

The affidavit evidence supporting the ex-parte and inter-partes hearings has been set out previously. It presents a strong arguable case on behalf of the respondent. This disposes of ground 4. Further there was no effective evidence from Lindsay which sought to disprove the evidence of the respondent. Ground 5 is really superfluous as it is really questioning the Court's jurisdiction to compel Lindsay to disclose his assets outside the jurisdiction. In so far as ground 5 suggests that, the order that Lindsay disclose his assets both within and outside the jurisdiction was without justification, the claim is untenable. This aspect of the Mareva Injunction has always been regarded as necessary to be effective. Nevertheless there are safeguards which the Attorney-General as respondent in this case should note. In Steven Gee's **Mareva Injunctions and Anton Piller Relief** third edition at page 296 cited by Mr.Morrison Q.C., the following passage appears:

> "Similarly, when a plaintiff has obtained Mareva relief, he is bound to prosecute the action to trial, not simply to 'rest content with the injunction' **Lloyd's Bowmaker Ltd. v Britannia Arrow Ltd [1988] 1 W LR 1337 at pp 1349-1350, per Dillon LJ.** If an injunction is granted pending the hearing of a motion or summons to continue the relief, the plaintiff is under a duty to press on with that hearing: **Hong Kong Toy Centre v Tomy UK** (1994) **The Times** 14 January (Aldou, J); **Intercontex v Schmidt** [1988] FSR 575. Accordingly, if there is unjustified delay, the injunction is liable to be discharged."

Theobalds J ordered the usual undertaking in damages as F **Hoffmann-La Roche & Co. AG and others v. Secretary of State for Trade and Industry** [1974] 2 All ER 1128 and **Kirklees Metropolitian Borough Council v Wickes Building Supplies Ltd.**[1992] 3 All ER 717 explained. The appellant Lindsay is not satisfied. He seeks a payment into Court. It is most unusual to seek such an undertaking from

the Attorney-General whose role is described in the Constitution as the principal legal advisor to the Government. See Section 79(1) of The Constitution. No principle was referred to or any authority cited to justify such an order and it will not be entertained. Consequently, ground 6 has not been successful.

Conclusion

Some of the facts which have emerged in this case are disturbing. In the face of a widespread failure in the Banking system it is odd that the National Insurance Fund did not monitor this large investment and make a move against Lindsay at an earlier date. As the evidence discloses Lindsay was the dominant director in the Friends Group, Corporate Merchant Bank and Corporate Group Ltd. It is evident that Lindsay is not now within the jurisdiction yet he managed to sell a town house a few days before these proceedings were instituted. Furthermore Lindsay avers in his defence that the relevant authorities were guilty of aiding and abetting him. To reiterate here is paragraph 20 of his Defence:

> "20. The Second Defendant further contends that if he made any fraudulent representations (which is denied) the means of discovering the alleged fraud were always available to the Plaintiff from 8 July, 1993, the date of delivery and filing with the Registrar of Companies of the Return of Allotment of the First Defendant pursuant to section 51(1) of the Companies Act, as alleged in paragraph 41 of the Statement of Claim. The Plaintiff from then could have established whether Tamron Limited, Kelner Limited and Kleinworth Limited were in existence at the closing date of the offer or at the date of the allotment and had collectively subscribed for 50% of the shares at a total cost of $185 million as alleged at paragraph 35 of the Statement of Claim."

The late Dr. Manderson-Jones of counsel when asked if he knew the whereabouts of Lindsay, replied in the negative. The Mareva injunction is drastic remedy because it restricts the enjoyment of property before the outcome of the trial.

Consequently, the authorities suggest that if there is unjustified delay as regards the main action, the injunction is liable to be discharged. The Attorney-General and other plaintiffs should take note. Despite some reservations I am prepared to affirm the order of Reid J. and I would refuse to order the discharge of the injunction. The costs should be costs in the cause.

HARRISON, J.A.

I have read the judgment of my brothers Downer & Panton JJA. I agree with their reasoning. I have nothing to add. I agree that the appeal should be dismissed.

PANTON, J.A.

This appeal questions the constitutionality and legality of the granting of a Mareva injunction in Jamaica.

On August 11, 1999, Theobalds, J. made the following ex- parte order:

> "That the second defendant be restrained and an injunction is hereby granted restraining him until trial or further order by himself, his servants or agents or otherwise from removing outside of the jurisdiction of this Court any of his assets within the jurisdiction or disposing, pledging, charging, transferring or dealing with any of his assets wherever situated, whether within or outside of the jurisdiction.
>
> Save that this order shall not apply in so far as the said assets of the second defendant exceed $49,480,019.37.
>
> Save that the second defendant is to be at liberty to expend such sum for ordinary and proper living expenses, and obtaining legal advice and representation as may be requisite and reasonable.
>
> PROVIDED further that:
>
> This order is declared to be of no effect against, and is not intended to bind any third party outside of the jurisdiction of this Court, directly or indirectly affected by the terms of this order, unless and until this order shall be declared enforceable or recognized or is enforced by any Court of the jurisdiction (in) which the second defendant's assets are situated.
>
> 2. That the second defendant do forthwith disclose the full value of his assets, held solely or jointly within or outside the jurisdiction of this Court identifying with full particularity the nature of such assets, their whereabouts and whether the same be held in his own name or by nominees or otherwise on his behalf and the sums standing in such disclosures to be verified by affidavits to be made by the second defendant and served on the plaintiff's attorneys-at-law within fourteen (14) days of service of this order or notice thereof being given.

3. Costs to be costs in the cause."

Reid, J. was asked on September 16, 1999, to discharge the above-mentioned order. In refusing the application, he granted leave to appeal. We are not privy to the reasons for his decision as they were either not given or, if given, they were not reduced into writing.

The grounds of appeal are:

> "1. The pre-trial injunction prohibiting disposal of assets in Jamaica and worldwide is inconsistent with and repugnant to the fundamental right and freedom to enjoyment of property enshrined in sections 13 and 18 of the Constitution of Jamaica.
>
> 2. The Supreme Court has no power to grant a pre-trial injunction prohibiting disposal of the defendant/appellant's assets in Jamaica and worldwide.
>
> 3. The Supreme Court has no jurisdiction to prohibit the defendant/appellant from disposing, pledging, charging, transferring or dealing with his assets outside the jurisdiction of Jamaica.
>
> 4. The learned Judge exercised his discretion wrongly and on the wrong principles, in failing to recognize that the affidavit in support of the ex -parte injunction which was granted failed to disclose any basis for granting the injunction.
>
> 5. The learned Judge erred in failing to find that the scope of the disclosure order extending outside the jurisdiction was unjustifiable as it is not in aid of execution.
>
> 6. Alternatively, the learned Judge erred in failing to require the plaintiff to support its cross-undertaking in damages by payment into Court."

THE NATURE OF THE SUIT

Delroy Lindsay is one of ten defendants in this suit brought by the Attorney General. The defendants are listed as follows on the writ of summons:

FRIENDS GROUP LIMITED (Formerly Corporate Resorts Limited in Receivership)	FIRST DEFENDANT
DELROY LINDSAY	SECOND DEFENDANT
TREVOR PATTERSON	THIRD DEFENDANT
CLAUDETTE ANGELLA MAXWELL	FOURTH DEFENDANT
RAPHAEL GORDON	FIFTH DEFENDANT
VERITAT CORPORATION	SIXTH DEFENDANT
KPMG PEAT MARWICK (a firm)	SEVENTH DEFENDANT
CORPORATE MERCHANT BANK LIMITED (Vested in the Minister of Finance and Planning pursuant to the Financial Institutions Act)	EIGHTH DEFENDANT
MYERS, FLETCHER AND GORDON (a firm)	NINTH DEFENDANT
CORPORATE GROUP LIMITED	TENTH DEFENDANT

The endorsement to the writ reads thus:

> "The plaintiff's claim against the defendants jointly and/or severally is for damages as detailed below:-
>
> 1. against the first defendant for fraudulent misrepresentation and conspiracy to defraud;
>
> 2. against the second defendant for fraudulent misrepresentation, negligence, breach of statutory duty and conspiracy to defraud;
>
> 3. against the third defendant for fraudulent misrepresentation, negligence, breach of statutory duty and conspiracy to defraud;
>
> 4. against the fourth defendant for fraudulent misrepresentation, negligence, breach of statutory duty and conspiracy to defraud;
>
> 5. against the fifth defendant for negligence and conspiracy to defraud;

6. against the sixth defendant for fraudulent misrepresentation, negligence and conspiracy to defraud;

7. against the seventh defendant for fraudulent misrepresentation and negligence;

8. against the eighth defendant for conspiracy to defraud;

9. against the ninth defendant for negligence; and

10. against the tenth defendant for conspiracy to defraud

arising out of the acts and/ or omissions of the defendants in connection with the first public offer of the first defendant to the public, including the Accountant-General for Jamaica on behalf of the National Insurance Fund, for the purchase of shares in the first defendant which opened on the 21st day of May, 1993, and closed on the 7th day of June, 1993."

The plaintiff, in particularizing his loss, has claimed a sum of $49,999,950.00 as being the amount paid for shares by the Fund, less the value of shares sold, $519,930.63, leaving a net claim of $49,480,019.00. The claim is for damages, interest under the Law Reform (Miscellaneous Provisions) Act at commercial rate, and costs as well as any other relief that the Court thinks fit.

THE RESPONDENT/PLAINTIFF'S UNDERTAKING

When Theobalds, J. made the order in August, 1999, he made it on the basis of an undertaking given by the respondent (The Attorney General of Jamaica) –

"(a) to pay the reasonable costs incurred by any person other than the second defendant to whom notice of this order may be given in ascertaining whether any assets to which this order applies are within the power, possession, custody and control and in complying with this order and to indemnify any such person against all liabilities which may flow from such compliance; and

(b) to obey any order this Court may make as to damages if it shall consider that the second defendant

shall have sustained any by reason of this order which the plaintiff ought to pay."

With this in mind, it is convenient at this time to deal with **ground of appeal number 6** which relates to what the appellant refers to as the plaintiff's "cross-undertaking" and which is laid as an alternative ground. It complains of an error on the part of the judge in failing to require the Attorney General to support his cross-undertaking in damages by payment into court. To say the least, this is a novel complaint in this country as regards the Attorney-General so far as grounds of appeal are concerned.

In 1896, the English Court of Appeal, in upholding the judgment of North, J. in **Attorney-General v. Albany Hotel Co** [1896] 2 Ch 696, laid it down that the Crown ought not to be required to give an undertaking .In that case, the Crown was seeking to assert its rights as lessor of Crown lands. Since 1947 in England, and 1959 in Jamaica, however, the position has changed with the enactment of the Crown Proceedings Act. And now, following the reasoning of the majority in the House of Lords case of **Hoffmann-La Roche and Co. v. Secretary of State for Trade and Industry** [1974] 2 All ER 1129, requiring the Attorney-General to give an undertaking as regards damages is regarded as a matter in the discretion of the Court.

Section 13(1) of the Crown Proceedings Act makes it mandatory for civil proceedings by the Crown to be instituted by the Attorney-General. Section 16(1) of the said Act gives the Court the power to make **"all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require**." The making of orders that an undertaking be given or that there be a payment into court to support an undertaking would be within the contemplation of section 16(1) aforesaid and be regarded as discretionary. The plaintiff here is not an

ordinary plaintiff. Although that fact does not give him any privileges, good reason ought to be shown for the Court below to have made an order requiring a payment into court in a situation where the Attorney-General is the litigant who seeks the injunction. No good reason appears to have been offered then, and none has been proffered to us. In a matter of this nature, the Attorney-General's word is his bond and the Courts of our land will hold him to it. The history of our country has not so far produced any reason for there to be any doubt as to the strength and honour of the Attorney -General's word on a matter of the sort. I refuse to endorse the statement of counsel for the appellant that " honour cannot be enforced; it is meaningless". It would not be expected that the Attorney-General of Jamaica would knowingly be a party to the disregarding of an undertaking given to the Court. If he were to transgress in this way, the Court would not hesitate to ensure the application of whatever sanction would be necessary to effect the honouring of that undertaking.

By the Constitution of Jamaica, the Attorney –General is the principal legal adviser to the Government of Jamaica (section 79(1)). Furthermore, no one is qualified to hold or act in the office of Attorney--General unless he is qualified for appointment as a Judge of the Supreme Court (section 79(4)).

The foregoing provisions of the Constitution, in my view, illustrate the importance of the office of Attorney-General, and add weight to the canons of professional ethics set out in The Legal Profession (Canons of Professional Ethics) Rules which were gazetted on December 28, 1978. **(See the Jamaica Gazette Supplement Proclamations, Rules and Regulations No 71).**

Canon V1 (c) states:

> " An Attorney shall not commit a breach of an undertaking given by him to a Judge, a Court or other tribunal or an official thereof, whether such undertaking relates to an expression of intention as to future conduct or is a representation that a particular state of facts exists."

Canon V1 (d) states:

> "An Attorney shall not give a professional undertaking which he cannot fulfil and shall fulfil every such undertaking which he gives."

Although the Attorney- General is a party in the suit, the fact is that he does not shed his constitutional role as principal legal adviser to the Government of Jamaica by naming himself plaintiff. If the need arises, he will be held bound by the canons of professional ethics of the legal profession. There is absolutely no evidence that such a need may even remotely arise. In this regard, the appellant is clutching at what does not even appear to be a straw. This ground of appeal is, in my view, misconceived.

The other grounds of appeal, except ground 4, are in respect of the alleged inconsistency of the injunction with , and repugnance to the fundamental right and freedom to enjoyment of property which the Constitution of Jamaica undoubtedly gives, as well as the power of the Supreme Court and the geographical extent and jurisdiction of that power. Ground 4 deals with the affidavit which was filed by the plaintiff in support of the ex- parte injunction.

Ground 1

> "The pre-trial injunction prohibiting disposal of assets in Jamaica and worldwide is inconsistent with and repugnant to the fundamental right and freedom to enjoyment of property enshrined in sections 13 and 18 of the Constitution of Jamaica."

Section 13 reads:

> "13. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> (b) freedom of conscience, of expression and of peaceful assembly and association; and
>
> (c) respect for his private and family life,
>
> the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

Section 18 (1) reads:

> "18.-(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that-
>
> (a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and
>
> (b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of-
>
> (i) establishing such interest or right (if any);
>
> (ii) determining the amount of such compensation (if any) to which he is entitled; and

(iii) enforcing his right to any such compensation."

The marginal note to section 18 reads "Compulsory acquisition of property". This note accurately describes the text of the section which does not require any aid to construction as the language is clear.

The appellant's attorney-at-law submitted that any order which prohibits use and enjoyment of one's property is not only offensive, but also it is a compulsory acquisition. His submissions (written and oral) did not include any reference to any authority which supports this bold proposition. In my view, the restriction may indeed be offensive to the person who holds a proprietary interest but it certainly does not amount to a compulsory acquisition. And, if it is not a compulsory acquisition, there can be no legitimate complaint of a breach of this section of the Constitution.

The claim by the appellant that his property has been compulsorily acquired is not dissimilar to the claim made a few years ago before the Supreme Court and the Court of Appeal by two shareholders in certain financial institutions that had come under the scrutiny and temporary management and control of the Minister of Finance in the exercise of powers conferred on him by Parliament by way of legislation. In the case **Donald Panton and Janet Panton v. The Minister of Finance and the Attorney-General** (Supreme Court Civil Appeal No. 113/96- judgment (unreported), delivered on November 26, 1998), declarations were sought that the provision by statute of full powers of management in the institutions to the Minister of Finance amounted to permitting the compulsory acquisition of the property of the appellants who were shareholders in the institutions. The Supreme Court held, and the Court of Appeal agreed, that the Minister's exercise of full powers of management on a temporary basis did not amount to a

compulsory acquisition of property because of the exemptions recited in section 18 (2) of the Constitution.

The Mareva injunction granted by Theobalds, J. in the instant case gave no property to anyone. The appellant's right of ownership is fully intact. He is merely temporarily forbidden from dealing with the property up to a certain value in a manner that would be prejudicial to the legitimate interests of the respondent.

Grounds 2 and 3 bear some co-relation and may be dealt with together. Ground 2 asserts that the Supreme Court has no power to grant a pre-trial injunction that prohibits the disposal of the appellant's assets in Jamaica and worldwide whereas Ground 3 states that the Supreme Court has no jurisdiction to prevent the appellant from disposing, pledging, charging, transferring or dealing with his assets outside Jamaica.

These grounds of appeal are in fact challenging the jurisdiction of the Supreme Court to grant applications for a Mareva injunction. This challenge is at least twelve years late, it would seem, as in 1988 this Court sanctioned the granting of a Mareva injunction. The case in which this was done was **Watkis v. Simmons, S.Simmons, Watkis & Desnoes** (1988) 25 J.L.R. 282. Kerr, J.A. said at page 283: "The jurisdiction to grant a Mareva Injunction is well established." He reviewed most of the relevant English cases that had been decided up to that point in time and, having applied the principles and tests established therein, he concurred in the decision to dismiss the appeal which had been filed against the order of a Judge of the Supreme Court granting a Mareva injunction restraining the appellant from disposing of assets. There have been other occasions on which this Court has pronounced on the validity of the exercise of

granting such an injunction. The most notable perhaps has been the case **Jamaica Citizens Bank Limited v. Dalton Yap** (1994), 31 JLR 42. Rattray, P. at page 51 D said:

> "The authorities satisfy me that the Injunction can be made in relation to assets of a defendant held worldwide, as the remedy is in personam and the defendant would be in contempt of the Court's order if he breaches the Injunction in relation to the assets wherever held."

Forte, J.A. (as he then was) referred to the fact that the **Watkis** case (above) had established "that the Courts in our jurisdiction have the jurisdiction to grant Mareva injunctions."(page 17). After referring to the English cases **Derby & Co.Ltd. and others v. Weldon and others** (No. 2) [1989] 1 All ER 1002 and **MBPXL Corp v. Intercontinental Banking Corp Ltd.** [1975] CA Transcript 411, he concluded:

> " that the Court has jurisdiction to grant a Mareva injunction which extends to assets outside of its jurisdiction provided that (i) there are special circumstances for doing so, (ii) the order is in accordance with the rationale for granting such injunctions i.e. to prevent a defendant from taking action which may frustrate the plaintiff recovering the fruits of a subsequent judgment, and (iii) that it does not conflict with international law."

It should be noted that the basis of the jurisdiction to grant Mareva injunctions is not English case law by itself. Even if Dr. Manderson -Jones was correct when he said that the Mareva injunction was an offshoot of British law which has cropped up in the garden of our jurisprudence, he was off base in submitting that there was no statutory basis for it. There is a statutory foundation as was pointed out by Kerr, J.A. in the **Watkis** case (supra) (page 283), and Downer, J.A. in the **Yap** case (supra) (page 61). The relevant provision is the Judicature (Supreme Court) Act, section 49 (h) which reads thus:

> "49. With respect to the law to be administered by the Supreme Court, the following provisions shall apply, that is to say-
>
> ...
>
> (h) A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just...."

This sub-section is similar in terms to legislation that was passed in England in the form of section 25 (8) of the Supreme Court of Judicature Act, 1873, which was re-enacted in 1925 in section 45 (1) of the Supreme Court of Judicature (Consolidation) Act. It is this provision that has sanctioned in England the granting of Mareva injunctions. There was further statutory intervention in 1981, but not before some important decisions such as **The Siskina** [1977] 3 All ER 803 (House of Lords), **Third Chandris Shipping v. Unimarine** [1979] 2 All ER 972 (Court of Appeal), **Chartered Bank v. Daklouche and another** [1980] 1 All ER 205 (Court of Appeal), **Barclay-Johnson v. Yuill** [1980] 3 All ER 190 (Chancery Division-Sir Robert Megarry, Vice-Chancellor), and **Prince Abdul Rahman v. Abu-Taha** [1980] 3 All ER 409 (Court of Appeal).

In **Third Chandris Shipping v. Unimarine**, Lord Denning, MR, in stating his understanding of the law , said:

> "It is just four years ago now since we introduced here the procedure known as Mareva injunctions. All the other legal systems of the world have a similar procedure. It is called in the civil law saisie conservatoire. It has been welcomed in the City of London and has proved extremely beneficial. It enables a creditor in a proper case to stop his debtor from parting with his assets pending trial. Two years ago, the House of Lords had this procedure under their close consideration. It was in **The Siskina**. If the House had any

> doubts about our jurisdiction in the matter, I should have expected them to give voice to them, rather than let the legal profession continue in error. But none of their Lordships did cast any doubt on it." (p 983 c-d)

The English Court of Appeal, in **Prince Abdul Rahman v. Abu-Taha** (supra) approved the reasoning of Sir Robert Megarry,V-C in **Barclay-Johnson v. Yuill** (supra) and held:

> "that a Mareva injunction can be granted against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied." (per Lord Denning, MR, at page 412a)."

In view of the foregoing, it seems quite clear that grounds 2 and 3 of this appeal cannot succeed. The English decisions prior to 1981 as well as our own cases of **Watkis** and **Yap** have put the matter beyond doubt that the Mareva injunction is here to stay and is available in circumstances such as those of the instant case.

Finally, it should be mentioned that in 1981, the passage of the Supreme Court Act gave legislative approval to the Mareva doctrine in England. This is not to say, in my view, that it was at all necessary. It was put this way in Odgers' Principles of Pleading and Practice (22nd edition) at page 63:

> "The judicial development of the Mareva injunction is recognized by the Supreme Court Act 1981. Section 37 (1) re-enacts in substance the Judicature Act 1925, section 43 and section 37 (3) provides:
>
> > 'The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in

> cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction'."

Ground 4

> "The learned Judge exercised his discretion wrongly and on the wrong principles, in failing to recognize that the affidavit in support of the ex parte injunction which was granted failed to disclose any basis for granting the injunction"

The affidavit which is the subject of this complaint was sworn to by Audrey Deer-Williams, a manager of the National Insurance Fund. It paints the following picture: The appellant, a shareholder of the first and tenth defendants listed above, was a member of the Prospectus Committee which supervised the public share issue of the first defendant. The prospectus stated that the subscription list would be open from May 21, 1993, to June 7, 1993. The minimum subscription to be met by the closing date was two hundred (200) million dollars. However, this did not materialize. By virtue of section 47 of the Companies Act, the plaintiff, having invested in this share offer, was entitled to void the allotment of shares and to have his money refunded with interest. The appellant, on the date of the closure of the public share offer, wrote to a potential shareholder advising that he had been allotted all of the shares in certain named companies which the appellant said had been incorporated in the Cayman Islands. These companies were not in existence at the time as they were not incorporated in the Cayman Islands until three weeks after the appellant's letter. No shares in these companies were ever issued and no directors ever appointed at the time of their incorporation or at any material time thereafter, according to Mrs. Deer-Williams' affidavit. The shares allotted to these companies were paid for by loans made available by the eighth defendant of which the

appellant was chairman of the board of directors and chief executive officer. This activity was in breach of section 13 of the Financial Institutions Act.

The affidavit alleges that the appellant breached his common law duty of care to the plaintiff; and that he negligently or deliberately misled subscribers including the plaintiff in respect of the share issue. He is also alleged to have deceived the plaintiff and other subscribers through fraudulent representations.

The deponent also gave details of the disposal of real estate situated in St. Andrew in the names of the appellant and his wife. At the same time, the appellant's brother is alleged to have informed the deponent that he did not know where to locate the appellant who was no longer associated with a business in which they both had had an interest.

In his affidavit filed supposedly in answer to that filed on behalf of the plaintiff, the appellant has not sought to refute the evidence or inferences contained in the latter. He made no reference to the fact that his brother and business partner was not in a position to say where he could be located. Nor did he explain the remarkable coincidence that he and his wife disposed of the St. Andrew property within three days of the filing of the action against him. To my mind, this is clear evidence of the risk of dissipation of his assets.

His affidavit, instead of seeking to allay obvious fears, has done naught but heighten them. It would not be incorrect to say that he has merely attempted to deal with legal arguments and points which he ought to have left for his counsel to make submissions on.

For example, he sought in paragraph 6 to submit that the summons was not ex parte. Also, in paragraph 9, he states:

> "...so far as I am aware the sale by myself and wife...was a perfectly legal and bona fide transaction for disclosed consideration, the amount of which has not been challenged as an undervalue and was accepted by the Stamp Commissioner."

It is clear that the appellant has ignored the real point here which is the ease and speed with which he has been able to dispose of this particular asset.

In **Barclay-Johnson v. Yuill** (referred to above), Sir Robert Megarry V-C said:

> "It seems to me that the heart and core of the Mareva injunction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in the action. If there is no real risk of this, such an injunction should be refused; if there is a real risk , then if the other requirements are satisfied the injunction ought to be granted. If the assets are likely to remain in the jurisdiction, then the plaintiff, like all others with claims against the defendant, must run the risk, common to all, that the defendant may dissipate his assets or consume them in discharging other liabilities, and so leave nothing with which to satisfy any judgment. On the other hand, if there is a real risk of the assets being removed from the jurisdiction, a Mareva injunction will prevent their removal. It is not enough for such an injunction merely to forbid the defendant to remove them from the jurisdiction, for otherwise he might transfer them to some collaborator who would then remove them; accordingly, the injunction will restrain the defendant from disposing of them even within the jurisdiction."(page 194 d-f).

In addition to the establishment of the existence of a sufficient risk of removal of the assets, Sir Robert Megarry at p 195 d-g referred to three other requirements. Firstly, there must be an apparent danger of default if the assets are removed from the jurisdiction (or disposed of). Secondly, the plaintiff must show that there is a good arguable case. Thirdly, the case must be one in which, on weighing the considerations for and against the grant of an injunction, the balance of convenience is in favour of granting it.

In the instant case, the sheer size of the claim suggests that there might be a default if there is a disposal of the appellant's assets. That there is an arguable case is also quite clear from the affidavits. Finally, the balance of convenience is in favour of the granting of the injunction. Some very serious allegations have been made against the appellant. If proven, there may even be repercussions in criminal law. The loss alleged is huge. These two factors alone go a far way in tilting the balance of convenience in favour of granting the injunction.

Ground 5

> "The learned Judge erred in failing to find that the scope of the disclosure order extending outside the jurisdiction was unjustifiable as it is not in aid of execution."

This ground fails for the reasons given above in respect of grounds 2 and 3. As Rattray, P. said in the **Yap** case (supra), the injunction is **in personam.**

The appellant having failed to show any merit in any of the six grounds of appeal filed, I would dismiss the appeal.

DOWNER, J.A.

Appeal dismissed. Order of the Court below affirmed. Costs to be costs in the cause.