

REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
SUB-REGISTRY, SAN FERNANDO**

No. S-1437 of 2000

In the matter of the property comprised in
Deed of Mortgage registered on the 27th August
1999 as Deed No. 17901 of 1999 and made between

MOOSAI DEVELOPMENT COMPANY LIMITED
DHALJIT MOOSAI
PRAKASH MOOSAI
HARRY MOOSAI
PRAKASH MOOSAI (Executor of the Estate of RANJIT MOOSAI)
Mortgagors

AND

INTERCOMMERCIAL BANK LIMITED
Mortgagee

AND

**IN THE MATTER OF THE CONVEYANCING AND THE LAW OF
PROPERTY ORDINANCE, CHAPTER 27 NUMBER 12**

BETWEEN

INTERCOMMERCIAL BANK LIMITED
Plaintiff

AND

MOOSAI DEVELOPMENT COMPANY LIMITED
DHALJIT MOOSAI
PRAKASH MOOSAI
HARRY MOOSAI
PRAKASH MOOSAI (Executor of the Estate of RANJIT MOOSAI)
LOCHAN MOOSAI
Defendants

Before the Honorable Madam Justice Maureen Rajnauth-Lee

APPEARANCES:

Dr. Fenton Ramsahoye Q.C. for the Plaintiff
Mr. Prakash Deonarine with him.

Mr. Seenath Jairam S.C. for the First and Sixth Defendants
Mr. Dharmendra Poonwasie with him.

REASONS

Before me were two (2) summonses:

- (1) the Plaintiff's summons of the 27th November, 2000 ("**the Plaintiff's summons**") to continue until trial or further order the ex parte Mareva injunction granted by Smith J. on the 22nd November, 2000 that:

"The First Defendant MOOSAI DEVELOPMENT COMPANY LIMITED must not:-

- 1.1 *Remove from Trinidad and Tobago or in any way dispose of or deal with or diminish the value of any of its assets which are in Trinidad and Tobago whether in its own name or not and whether solely or jointly owned up to the value of \$15,000,000; or*
- 1.2 *Without the prior written consent of the Plaintiff or its Attorneys Messrs. Girwar and Deonarine in any way dispose*

of or deal with or diminish the value of any of its assets whether they are in or outside Trinidad and Tobago whether in its own name or not and whether solely or jointly owned up to the same value.

2. *If the total unencumbered value of the first Defendant's assets in Trinidad and Tobago exceeds \$15,000,000 the first Defendant may remove any of those assets from Trinidad and Tobago or may dispose or deal with them so long as the total unencumbered value of its assets still in Trinidad and Tobago remains above \$15,000,000.*
3. *If the total unencumbered value of the first Defendant's assets in Trinidad and Tobago does not exceed \$15,000,000 the first Defendant must not remove any of those assets from Trinidad and Tobago and must not dispose or deal with any of them, but if it has other assets outside Trinidad and Tobago the first Defendant may dispose of or deal with those assets so long as the total unencumbered value of all its assets whether in or outside Trinidad and Tobago remains above \$15,000,000.*
4. *The Defendants or any of them may cause this Order to cease to have effect if any Defendant satisfies the judgment by paying the sum of \$20,968,287.38 plus accrued interest*

and costs to the Plaintiff's attorneys or makes provision for payment of that sum by another method agreed with the Plaintiff's Attorneys.

5. *The first and sixth Defendants must:-*
 - 5.1 *Inform the Plaintiff in writing at once of all his or its assets whether in or outside Trinidad and Tobago and whether in his or its own name or not and whether solely or jointly owned, giving the value, location and details of all such assets, including full details of any encumbrances to those assets. The first and sixth Defendants or any of them may be entitled to refuse to provide some or all of this information on the grounds that it may incriminate him or them.*
 - 5.2 *Inform the Plaintiff of all monies received by the first Defendant in the course of its business since the 3rd August 1999.*
 - 5.3 *Confirm the information set out at paragraphs 5.1 and 5.2 above in an affidavit which must be served on the Plaintiff's Attorneys and a copy lodged with the Court within 21 days after this Order has been served on that Defendant.*
6. *This order will remain in force until 29th November 2000 (the return date) unless varied or discharged.*
7. *Costs reserved."*

(2) the summons of the First and Sixth Defendants of the 12th January, 2001 (“**the summons to discharge**”) to have discharged the said ex parte Mareva injunction granted on the said 22nd November, 2000.

Affidavits:

The Plaintiff’s summons was supported by the affidavit of Gerard Chung sworn on the 22nd November, 2000. In opposition, the Sixth Defendant Lochan Moosai (“**Lochan Moosai**”) swore affidavits on the 12th January, 2001, the 26th January, 2001 and the 8th February, 2001 on behalf of the First and Sixth Defendants. Gerard Chung has responded by an affidavit filed on the 30th January, 2001 and on the 9th February, 2001, Miss Geeta Maharaj, Attorney-at-Law, swore an affidavit on behalf of the Plaintiff. The above-mentioned affidavits were also used in respect of the summons to discharge dated the 12th January, 2001.

Originating Summons:

The substantive matter before the Court was the Plaintiff’s Originating Summons dated and filed the 22nd November, 2000. By that summons in addition to the injunctive relief sought at paragraph 4 thereof, the Plaintiff sought against the Defendants:

“1 (a) *The sum of \$15,492,221.52 together with interest at the rate of 21% per annum from the date of filing of this Originating Summons until Judgment.*

- (b) *The sum of \$1,318,172.17 together with interest at the rate of 21% per annum from the date of filing of this Originating Summons until Judgment.*
- (c) *The sum of \$2,143,931.52 together with interest at the rate of 17.918% per annum from the date of filing of this Originating Summons until Judgment.*
- (d) *The sum of \$2,013,962.19 together with interest at the rate of 15.5% per annum from the filing of this Originating Summons until Judgment.*

2. *The total sum of \$20,968,287.38 against the Defendant Lochan Moosai on the various accounts in (a), (b), (c) and (d) above together with the various interest rates in (a), (b), (c) and (d) above from the date of filing of this Originating Summons until Judgment pursuant to an open written guarantee signed by the said Lochan Moosai and delivered to the Plaintiff in or about June 1999 whereby the said Lochan Moosai agreed to guarantee payment, and to satisfy the Plaintiff on demand in writing for all sums of money owing and/or due and/or payable to the Plaintiff by the First Defendant in consideration of the Plaintiff making advances to the First Defendant;*

3. *Delivery of possession of the property subject to the said mortgage being two lots of land more or less situate at Tunapuna in the Ward of Tacarigua in the Island of Trinidad measuring more or less 170 feet along the Eastern and Western boundary lines, 82 feet 6 inches along the Southern boundary line and bounded in the North by Cemetary Back Street now Sapodilla Street on the South by the Eastern Main Road on the East by lands of the Heirs of V. Lique and on the West by lands of J. E.Coryat together with the buildings thereon and the appurtenances thereto belonging;”*

The said originating summons was amended with leave on the 9th February, 2001 by substituting “2000” for “1999” in line 7 of paragraph 2 thereof.

The continuation of the Mareva injunction against the First Defendant Company:

The thrust of the submissions made before me on behalf of the Plaintiff was that Lochan Moosai, the Sixth Defendant, being the main mover behind the First Defendant Company, was a man who made promises which he did not keep, in particular promises to pay the Plaintiff. The Court was specifically referred to “G.C.3”, “the facility letter” of the 2nd February, 2000 in which the First Defendant Company inter alia agreed to make certain assignments as security for credit

facilities granted by the Plaintiff to the First Defendant Company. The Plaintiff complains that the First Defendant has refused to make the said assignments and has countermanded the assignment given to the Sanatan Dharma Maha Sabha [see paragraph 12 of the Gerard Chung affidavit sworn on the 22nd November, 2000].

The Court was also specifically referred to “G.C.13” the letter of the 19th September, 2000 in which Lochan Moosai acting as Managing Director of the First Defendant Company indicated that certain monies would be paid to the Plaintiff. It is not in dispute that these monies have not been paid.

By a later affidavit sworn by Gerard Chung on the 30th January, 2001, at paragraph 23 thereof, Gerard Chung deposed that subsequent to the granting of the injunction a search was carried out in the Companies Registry which revealed the following:

- (1) a Company by the name of Moosai Caribbean Development Company Limited was registered with its Directors being Lochan Moosai, Ramcharan Moosai and Sharma Suraj.
- (2) On the 28th July, 2000, the First Defendant Company transferred a parcel of some 26 acres of land to one Sunil Kevin Moosai by way of Deed of Gift No. 17368 of 2000.

The First and Sixth Defendants opposed the continuation of the ex parte Mareva injunction on basically the following two (2) grounds:

- (a) The Plaintiff was guilty of material non-disclosure in that it had failed to disclose to the Judge hearing the ex parte

application all material facts, and to state to the Judge fairly or fully or frankly the points which the First and Sixth Defendants were making against the Plaintiff.

- (b) The Plaintiff had failed to set out the evidence on which the Court can be satisfied that there was any dissipation or risk of dissipation of the assets of the First Defendant Company.

Throughout my judgment, I have been guided by the principles upon which a Mareva injunction should be granted. The following guidelines are laid down by Lord Denning M.R. in **Third Chandris Shipping Corporation –v Unimarine SA** [1979] Q.B. 645 at pages 668-669:

- “(i) *the plaintiff should make full and frank disclosure of all matters in his knowledge which are material to the judge to know (see The Assios [1979] 1 Lloyd’s Report 331);*
- (ii) *the plaintiff should give particulars of his claim against the defendants, stating the ground of his claim and the amount thereof and fairly stating the points made against him by the defendant;*
- (iii) *the plaintiff must give some grounds for believing that the defendant has assets here, overdraft or not; and*
- (iii) *the plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied.”*

As to the summons to discharge for material non-disclosure, the Court has looked at the documents referred to in the summons to discharge dated the 12th January, 2001 and is of the view that the Plaintiff's failure to disclose these documents did not amount to material non-disclosure. In my judgment, the Plaintiff placed before the Court the material facts surrounding the alleged debt of the First Defendant Company to the Plaintiff. Further, the Plaintiff also fairly, fully and frankly stated the points the First and Sixth Defendants were making against the Plaintiff: see paragraphs 14, 16 – 19 and the relevant exhibits of the affidavit of Gerard Chung sworn on the 22nd November, 2000.

As to the issue of risk of dissipation, in the case of **Rahman (Prince Abdul) Bin Turki Al Sudairy –v- Abu Taha** [1980] 1 W.L.R. 1268 at page 1273 (letter A) Lord Denning M.R. set out the relevant principle as follows:

“So I would hold 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.”

The principles and cases are fully set out in the case of **Ninemia Maritime Corporation –v- Trave Schiffahrtsgesellschaft mbH & Co KG The**

Niedersachsen [1984] 1 All E.R. 398 to which the Court was referred extensively.

At page 419 of the judgment of Kerr LJ, the test is laid down as follows:

“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 a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiff would remain unsatisfied.”

In my judgment, the evidence of risk of dissipation is sorely lacking. The Plaintiff has failed to carry out the necessary enquiries about the origins, business dealings and assets of the First Defendant Company in order to satisfy the Court that a refusal of the injunction would involve a real risk that a judgment or award in the Plaintiff’s favour would remain unsatisfied because of the dissipation by the First Defendant Company of its assets. The Court considers that there was a duty on the Plaintiff to make the necessary enquiries about the origins, dealings and assets of the First Defendant Company, which duty it failed to carry out. The First Defendant Company has been in existence since 1976 and by the Plaintiff’s own evidence, the First Defendant Company holds substantial contracts with the Government of Trinidad and Tobago: see Exhibit “G.C.15”.

Further, the Court has observed that the Deed of Gift – Exhibit “G.M.1” – was executed in July, 2000 when the Plaintiff and the First Defendant Company were still in a relationship of co-operation, [see “G.C.4.”] the First Defendant

depositing over Two Million Dollars (\$2,000,000.00) into the account on the 14th July, 2000. In my judgment, a Company must be free to deal with its property once it is not for the purpose of avoiding the payment of legitimate debts. There was no evidence placed before me that the said 26 acres of land, the subject of the Deed of Gift, were intended to stand as security for the subject debt. Accordingly, the Deed of Gift being made since July, 2000 and there being no further evidence of any transactions or dealings by the First Defendant Company with its assets, in my judgment, the Plaintiff has not satisfied me that there is a real risk of dissipation to warrant the continuation of the ex parte Mareva injunction.

Further, the Court has also observed that inspite of the setting up of Moosai Caribbean Development Company Limited there is no evidence of any transfer of any of the assets of the First Defendant Company into the new company.

Kerr LJ in **Nimenia** sets out the further principle that a Mareva injunction will not be granted merely for the purpose of providing a Plaintiff with security for a claim even when it appears likely to succeed and even when the grant of the injunction will not cause hardship to the Defendant (see page 419 letters c-d). In my judgment, the Plaintiff having failed to do what a diligent bank should have done prior to the disbursement of facilities to the First Defendant Company, that is to say, to ensure that proper security for the facilities granted had been provided by the First Defendant Company, sought by way of the Mareva injunction to provide itself with security for its now sizeable debt.

The action against Lochan Moosai, the Sixth Named Defendant:

The action against the Sixth Named Defendant is founded on a document headed “Guarantee” purportedly signed by Lochan Moosai in July, 2000 (“G.C.2.”). Senior Counsel appearing for Lochan Moosai has submitted that the document albeit signed by Lochan Moosai omits certain material terms and accordingly the action against him should fail outright. I have observed that the following material terms have been omitted from the document:

- [i] the name of the Guarantor(s). The question then arises – Did the parties intend that this should be a joint guarantee or was Lochan Moosai to be the sole guarantor?
- [ii] The document is undated.
- [iii] The rate of interest is omitted.
- [iv] The limit or amount of the Guarantee is omitted although the facility letter “G.C.3” stipulated that Lochan Moosai was to sign a personal guarantee for Two Million Dollars (\$2,000,000.00).
- [v] The capacity in which Lochan Moosai signs is omitted. Does he sign as a Director or in his personal capacity?

In my judgment, in this case, extrinsic evidence would be inadmissible to remedy the defects which plainly exist in the document: [see **State Bank of India –v- Gurmit (1996) 5 Bank LR 158 at page 161**].

Accordingly, the Court held that as to the order for disclosure made against the Sixth Defendant, the Plaintiff has not established that there is a serious question

to be tried or that there was a proper claim or a real likelihood that the Plaintiff would have received judgment against the Sixth Defendant.

Moreover, the Order for disclosure set out at paragraph 5 of the Ex Parte Order of the 22nd November, 2000 appears to have been made without any basis. An Order for disclosure is normally made in aid of the Mareva injunction and does not normally stand on its own. In my judgment, there is nothing in the affidavits on which the Order for disclosure against Lochan Moosai could have been made. This appears to be nothing more than a fishing expedition against this Defendant.

Having considered all the evidence before me and the submissions of both Counsel, I discharged the ex parte injunction and orders made on the 22nd November, 2000. Accordingly, the Court dismissed the Plaintiff's summons dated and filed the 27th November, 2000 and ordered that the Plaintiff pay to the First and Sixth Defendants costs certified fit for two (2) Advocate Attorneys.

As to the summons to discharge filed by the First and Sixth Defendants of the 12th January, 2001, I also dismissed that summons since the substance of the summons, that there was material non-disclosure, was not proved. The First and Sixth Defendants will pay to the Plaintiff its costs of this summons certified fit for two (2) Advocate Attorneys. Leave was granted to the First and Sixth Defendants to appeal the order for costs herein.

During the course of the hearing, I was requested by the Attorneys to hear all the applications pending in the proceedings. Having regard to the constraints of Senior Attorney for the Plaintiff, by consent, I have adjourned the other

applications to the 1st March, 2001 before me in Port of Spain for mention to fix a date convenient to the parties.

Dated this 14th day of February, 2001.

MAUREEN RAJNAUTH-LEE
Judge