

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2020/CLE/gen/00329

BETWEEN

SUNSET EQUITIES LTD

Plaintiff

AND

(1) STERLING ASSET MANAGEMENT LTD

(2) DAVID KOSOY

(3) STEPHEN TILLER

Defendants

Before Hon. Mr. Justice Ian R. Winder

Appearances: Gail Lockhart Charles with Charles MacKay for the plaintiff
Brian Simms QC with Ramonne Gardiner for the first and second
defendants

19 August 2020, 16 October 2020 and 20 October 2020

DECISION

WINDER J,

This is my decision on the plaintiff's application for a freezing injunction.

Background

1. The first defendant (Sterling) is a licensed money lender and facilitates loans within The Bahamas. The second defendant (Kosoy) is the Chairman and Chief Executive Officer of Sterling.
2. Yaron Herscho (Herscho) is the President and majority shareholder of the plaintiff (Sunset)
3. Beginning in March 2013, Sterling through a series of credit facilities loaned Sunset an aggregate principal amount of US\$12,500,000. The loaned facilitated Sunset's acquisition and development of property situate in New Providence at West Bay Street including the hotel formerly known as the Nassau Palm Resort ("the Property").
4. As a part of the transaction Sterling became a 10% shareholder in Sunset (later a 15% shareholder). A Shareholders Agreement was entered into by Herscho, Parris Jordan (another shareholder of Sunset) and Sterling on 31 May 2013.
5. On 22 February 2016, Sunset notified Sterling that it intended to pay off the amount outstanding under the loans. According to Sterling, under the finance documentation full repayment would have been due before 22 May 2016, a ninety day period. On 25 June 2016, Sterling wrote to Sunset indicating that the 90-day notice period had expired and the loan became due and payable. Sterling indicated that a default rate of interest would be applied if the sum was not paid within 7 days and threatened to appoint a receiver over Sunset.
6. On 30 June 2016, Sunset immediately wrote to Sterling indicating that it was not in default.
7. On 5 July 2016 the parties executed a new commitment letter (amended on 6 July 2016) for Sunset to borrow \$6,030,000 from Sterling. Loan documents relative to the new proposed new loan was sent to Sunset which were not returned or executed.

8. On 23 September 2016, Sterling sent a letter to Sunset which stated, inter alia, that if they did not receive duly executed loan documents in accordance with the terms of their agreements, the new commitment letter would become null and void in 7 days. Sterling says that the demand was without prejudice to any other remedies. On 28 September 2016, Sunset wrote to Sterling indicating that it was not minded to proceed with the new borrowing and requested the pay-out amount for its facilities. Sunset insisted that it was not in default of its existing loan commitments with Sterling.
9. On 7 October 2016, Sunset commenced action 2016/CLE/gen/14306 against Sterling and obtained an injunction restraining the appointment of a receiver.
10. On 26 October 2016, Sterling filed a Writ of Summons (2016/CLE/gen/1447) against Sunset, Herscho & Jordan for breach of the contract contained in the 5 July 2016 commitment letter. They claim damages for interest payments, loss of opportunity and the breach of the agreement to repurchase the Sterling's shares in Sunset. The commitment letter, Sterling says, provided it with a right of first refusal on financing. Sterling says that in breach of the loan documentation, Sunset entered into a loan agreement dated 16th August 2016 with SF IV BLE LP. This action remains outstanding. Sterling, it seems, also filed an action against Stabilis Capital Management LP, a related company to SF IV BLE LP alleging tortious interference with and/or wrongful inducement of a breach of the 5 July 2016 commitment letter.
11. By virtue of a 2 November 2016 Consent Order in action 2016/CLE/gen/14306, Sunset and Sterling agreed a mechanism for Sterling to receive, and Sunset to pay, the sums due under the then existing facilities. The sums were paid in accordance with the Consent Order.
12. On 6 April 2017, Sterling filed a Petition seeking to wind up Sunset in action 2017/COM/com/004 on the basis of insolvency. Sunset filed an application to have the Petition dismissed. On 23 September 2019, this Court struck out the Petition on the basis that it was not prosecuted within the statutory time limit. The Court made no determination of the merits of the Petition or decided upon any of the evidence as to insolvency or otherwise. On 29 January 2020 leave was given to

appeal and subsequently an extension of time within which to appeal was granted, on 17 June 2020, by the Court of Appeal. The matter remains outstanding before the Court of Appeal.

The Claim

13. The instant action was filed by Sunset on 5 March 2020 by specially indorsed Writ of Summons. The (Amended) Statement of Claim seeks, inter alia, the following relief:

- (i) Damages for malicious presentation of a winding up petition;
- (ii) Damages against the defendants for conspiracy to injure by unlawful means;
- (iii) Special Damages in the sum of \$4,750,000 as of May 2020 and increasing monthly from the date of the Writ
- (iv) Interest pursuant to the Civil Procedure (Award of Interest) Act; and,
- (v) Injunction to restrain the Defendants from removing from the jurisdiction or otherwise disposing of any of the assets within the jurisdiction until judgment has been given in this matter as in particular all moneys payable to the defendant under certain mortgages listed in the claim.

14. The third named defendant has not been served and has not participated in these proceedings to date. In relation to the claim, Sunset says the following in its submissions:

[1] Breach of Shareholders Agreement

49 Article Three (3) the shareholders agreement that was executed between the Ron Herscho, Parris Jordan, the First Defendant provided in material part as follows:-

“...the Shareholders and the Company covenant with each other that for so long as the Shareholders are the holders of the Shares in the capital of the Company, Hershco as President and majority shareholder shall not cause the Company to do any of the following without the unanimous prior written consent of the Shareholders of the Company...

3.2.6: Pass a resolution for the winding up of the Company (unless it shall have become insolvent); nor shall any of the parties present or cause to be presented any petition for the Winding up of the Company” (emphasis supplied).”

50 The Winding-up petition that was filed by the First Defendant with the concurrence of the Second and Third Defendant was self-evidently in breach of the Shareholder’s agreement.

[2] Dishonesty

51 In addition, the evidence adduced and exhibited to the Affidavit of Ron Hershco shows that not only was the Winding-up Petition filed in

breach of the Shareholders agreement, but the Petition was prosecuted dishonestly when the Defendants well knew that there was no basis for asserting that the Company was insolvent.

[3] Conspiracy

52 As to this tort on the part of all Defendants (which is fully pleaded in the Statement of Claim, to which the Court is referred):

- a. The main elements of the relevant form of the tort of conspiracy for present purposes are (see Clerk & Lindsell on Torts [22nd Ed; 24-93ff]):
 - (i) A combination of two or more persons.
 - (ii) To act unlawfully.
 - (iii) With the intention of causing damage to a third party (although it is not necessary for this to be the conspirators' predominant purpose).
- b. Those elements are all clearly evidenced here. Specifically, the defendants have plainly combined with a view to presenting a petition for the winding up of the company in a manner which is manifestly inconsistent with the terms of the Shareholders agreement, specifically Article 3 thereof. It must be obvious to all defendants that their joint course of action would cause damage to the Plaintiff.

The Application

15. Sunset has applied for a mareva or freezing injunction against Sterling and Kasoy.

The Summons filed on 14 July 2020, some four months prior to the commencement of the action, was the second such summons filed by Sunset. A similar Summons was filed on 5 March 2020, along with the Writ of Summons but never proceeded with. Sunset's application is supported by the affidavit of Hershco. Sterling, in defending against the application, has filed a two affidavits in response.

16. I accept that the Court will exercise its discretion whether it will grant the injunctive relief having regard to the following criteria:

- (1) a cause of action must exist at the time the order is to be granted, and the plaintiff must demonstrate a good arguable case;
- (2) the defendant must have assets within the jurisdiction of the court;
- (3) the balance of convenience must be in favour of the plaintiff being granted the injunction;
- (4) the plaintiff must establish that the defendant lacks probity and that there is a real risk of dissipation of assets; and
- (5) there has been no delay in applying for the injunction.

17. The draconian nature of the mareva injunction is well recorded. In **Derby & Co. LTD and other v Weldon and others [1989] 2 WLR 276, 287** it was stated:

“An order restraining a defendant from dealing with any of his assets overseas, and requiring him to disclose details of all his assets wherever located, is a draconian order. The risk of prejudice to which, in the absence of such an order, the plaintiff will be subject is that of the dissipation or secretion of assets abroad. This risk must, on the facts, be appropriately grave before it will be just and convenient for such a draconian order to be made.”

Emphasis added

Further, in **Bank Mellat v. Nikpour [1985] FSR 87, 92 Donaldson J** (as he then was) stated:

“So for my part I would reject Mr. Rattee's submission. The rule requiring full disclosure seems to me to be one of the most fundamental importance, particularly in the context of the draconian remedy of the Mareva injunction. It is in effect, together with the Anton Piller order, one of the law's two "nuclear" weapons.”

Suffice it to say that the grant of such relief is made only where the circumstances mandate it, i.e. where the risk that the defendants will dissipate their assets are appropriately grave.

18. On the question of risk of dissipation, Sunset asks the Court to infer a risk of dissipation from what they describe as the dishonest conduct of the defendants. In its submission, at paragraphs 54 and 55, Sunset says:

54 It is accepted that where dishonesty is alleged, it is sometimes possible to infer a risk of dissipation from the fact of the dishonesty. The court is required to scrutinise with care whether what is alleged to have been the dishonesty of the person against whom the order is sought in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted. In the present case, the Hershco affidavit shows that the threat of dissipation is not merely speculative, but very real.

55 In *Madoff Securities International Ltd v Raven* [2011] EWHC 3102 (Comm) the court granted a freezing injunction and made orders for the disclosure of assets by certain Defendants, referred to as “the Kohn Defendants” on the ground that there was a sufficiently arguable case of deliberate wrongdoing and therefore ample evidence of a risk of dissipation of assets if the Kohn Defendants were not restrained by a freezing injunction.

19. Respectfully, the allegations as to dishonest conduct and the evidence advanced by Sunset in this case do not warrant a comparison to what occurred in ***Madoff Securities International Ltd v Raven***. In ***Madoff*** the facts reflected sham invoices over many years which the judge said cried out for a proper explanation which, had not, been provided. ***Flaux J*** stated that he found a sufficiently arguable case of deliberate wrongdoing, the issuing of sham invoices and the disguising of the true nature of the payments of millions of dollars made to the defendants over many years.

20. Unlike in ***Madoff***, Kasoy in his evidence provides, in my view, plausible explanations for Sterling's actions. Whether the explanations come up to proof at trial is not a matter for me at this stage. Some of those explanations, if true, may indeed amount to boorish conduct, sharp business practices and/or poor judgment, but that is an entirely different issue from dishonesty or want of probity. Whilst the allegations are made here of dishonest conduct, I am not satisfied that what is alleged demand that I infer a risk of dissipation so as to warrant the imposition of the nuclear weapon of a mareva injunction.

21. According to the learned authors of ***Gee on Commercial Injunctions*** at paragraph 2.015:

"What the case [of American Cyanamid] clearly establishes is that there is "normally" no need on applications for an interim injunction to embark upon a mini trial on witness statements or affidavits to assess the quality of the claimant's case or the defendant's defences, or to assess the rival merits on a disputed, complicated question of law. This would be wasteful of the parties resources and those of the court. It would also be inconsistent with the objective of the court to not pronounce an opinion on the substantive merits of the case until trial. This objective encourages judges not to decide important applications on assessment of the apparent merits based on evidence, which is incomplete, and without the benefit of cross-examination, full disclosure of documents and detailed argument. These features made it fair and sensible to avoid assessment of the merits in American Cyanamid. However, the principles are "guidelines", and not a "straitjacket", where the function of the court is to hold the position as justly as possible pending final determination of the triable issue at trial"

I am therefore not permitted in this application to engage in a mini trial to assess the truth of Sunset's allegations against the defendants' responses.

22. The unchallenged evidence is that Sterling is a licenced Financial and Corporate Service Provider operating in The Bahamas. Sterling is licenced under the Money Lending Act, having loaned considerable sums to Sunset. Kasoy says that Sterling has always had an account in The Bahamas and has been doing the business of lending money since 2006. Kasoy also says that he and Sterling are well known in the Bahamian community for their investments. Sunset's direct evidence of a risk of dissipation, made up principally of a property search detailing Sterling's transactions and the receipt of disbursement payments from a third party. Sunset says that the property search shows satisfaction of mortgages and the facts that the disbursements came from a third party in the Cayman Islands suggests something untoward. This evidence has not, in my view, met the required threshold. The evidence of Kasoy, which is not seriously contradicted by any real evidence, is that the property search identified by Sunset merely demonstrates that Sterling is a money lender and facilitates loans. I am not persuaded that the transactions identified, as having been engaged into by Sterling, arise other than in Sterling's ordinary business as a money lender.

23. Whilst I express no view as to the viability of Sunset's cause of action or the balance of convenience, I am nonetheless satisfied that this is not a proper case for the exercise of the Court's discretion to grant injunctive relief. I am not satisfied that there exists the grave risk of dissipation of assets which Sunset contends and must show. Finally, there has been an unexplainable delay in moving the application and no real effort by Sunset to explain the cause of this delay. If the risk was real, one would have expected Sunset to have moved with greater alacrity.

24. In all the circumstances I dismiss Sunset's application for a freezing injunction. I order that the costs will be Sterling's and Kasoy's costs in the cause. They will be

entitled to them if they succeed in the action. Sunset will never be entitled to those costs.

Dated the 4th day of November 2020

A handwritten signature in black ink, appearing to read 'I. Winder', with a large loop at the end.

Ian Winder

Justice