

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 491

BETWEEN:

MARSHALL DIEL & MYERS LIMITED

PLAINTIFF

-and-

ANDREW CRISSON

DEFENDANT

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Adam Richards, Marshall Diel & Myers Limited, for the Plaintiff**

Mr Cameron Hill, Westwater Hill & Co, for the Defendant

Date of Ruling **7 May 2020**

RULING

Application to vary a freezing injunction based upon the Angel Bell exceptions; distinction between a Mareva and preservation order

1. These proceedings relate to the attempts by Marshall Diel & Myers Limited (“the Plaintiff” or “MDM”) to collect outstanding legal fees due from Mr Andrew Crisson (“the Defendant” or “Mr Crisson”) arising out of bitterly fought and protracted divorce proceedings between Mr and Mrs Crisson during the period 2012 to 2019. Stoneham J delivered her Judgment in relation to ancillary relief issues on 7 November 2019. During the relevant time Mr Crisson was represented by Mrs Georgia Marshall of MDM.

2. It appears that by January 2018, the Defendant owed MDM a sum in excess of \$280,000 on account of legal fees incurred by him relating to the divorce proceedings. Indeed, in January 2018 MDM ceased to act as Attorney of Record on behalf of the Defendant on account of non-payment of outstanding fees. This was confirmed by an Order of this court dated 11 January 2018.
3. However, the Defendant was keen to retain the services of Mrs Marshall and on 15 January 2018 confirmed his agreement to the following terms in relation to outstanding legal fees:
 1. *I will provide to the firm a signed Acknowledgement confirming that I owe a current debt of \$288, 417 to date;*
 2. *I confirm that I will begin making weekly payments towards the above stated debt, of \$346.26 (BDA) (based on \$1,500 per month annualised) until the Judgment of the Court is rendered. The payment will be made by way of an attachment of earnings so that the funds are paid by the payroll clerk of Crisson directly to this firm. At the time that the judgment is handed down, payments with respect to the sum which remains outstanding will be payable at a rate to be negotiated at that time, but, based on a minimum monthly payment of \$1,500 (BDA);*
 3. *The trustees of the Andrew Crisson Trust will provide the firm a guarantee that from my share of the net equity in Mirabeau and subject to whatever order is made by the Court in that regard, the trustee will pay to the firm the outstanding fees or such portion thereof which is reflected in my share of the net equity which should be less than what is owed to this firm;*
 4. *MDM will be given a charge over apartment of 8E in New York for \$100,000. This charge will only be executed upon if the outstanding fees are not met from #3 above. Upon payment of the outstanding fees in full from #3 above, the charge will be discharged.*

5. *With respect to outstanding proceedings, resolving the divorce matter, I will pay to the firm \$50,000 (BDA) on or before end of January 2018 or the cost of work required to complete this case. I understand that you will cap fees for drawing this case to conclusion at \$50,000 and that this does include any appeal which may arise from the judgment.”*
4. The Trustees of the Andrew Crisson Trust did not consider that they were able to provide the guarantee envisaged in paragraph 3 of the agreement referred to above and in light of that development the Defendant agreed that he will “*guarantee that upon completion of the case and rendering of the judgment, I will ask that the Trustees of the Andrew L. Crisson Trust, to exercise their discretion to release to the Firm the net equity of Mirabeau, sufficient funds to clear off my debt to the Firm*”. On 22 January 2018, the Defendant executed the following document setting out the agreed position between MDM and the Defendant in relation to the issue of payment of outstanding fees:

“Acknowledge of Debt Due and Payment Agreement to Marshall Diel & Myers Limited

The following Payment Agreement is associated with the outstanding debt to Marshall Diel & Myers Limited (“the Firm”), with respect to Georgia Marshall representing me, Andrew L. Crisson in my divorce proceedings (Andrew L. Crisson and Christine H. Crisson) to date, i.e., to January 2018. In which case, I, Andrew L. Crisson (“the Respondent”), acknowledge that my current debt is BD\$288, 417. I am committed to paying this debt by means of the following, and in this order:-

1. *with respect to the above stated debt, I confirm that I will begin making weekly payments of BD\$ 346.26 (based upon BD \$1, 500 per month annualised) until the Judgment of the court is rendered. The payment will be made by way of an attachment of earnings so that the funds are paid by the payroll clerk of Crisson Limited directly to*

the Firm. My first payment will be arranged on or prior to January 31, 2018.

2. *I guarantee that upon completion of the case and rendering of the Judgment, I will ask that the Trustees of the Andrew L. Crisson Trust, to exercise their discretion to release to the Firm from the net equity of Mirabeau, sufficient funds to clear off my debt to the Firm. If there are insufficient funds received from the sale of Mirabeau or if the Trustees do not exercise their discretion in my favour, then a Guarantee from the owners of the New York apartment will be relied upon, in accordance with the "Charge Over Security Guarantee" dated...*
3. *Please see attached "Charge Over Security Guarantee", with respect to the New York apartment.*
4. *Any sum which remains outstanding after paragraph 2 above and the fulfilment of the "Charge Over Security Guarantee" will be paid from my other resources, but in any event in the sum of not less than \$1,500 per month."*
5. As noted above Stoneham J delivered a judgment on 7 November 2019. Following the delivery of the judgment, Mrs Marshall, in her First Affidavit dated 12 December 2019, states that she confirmed with the Defendant that payment would be transferred by the Trustees of the Andrew L. Crisson Trust to MDM to meet the balance of the outstanding legal fees owed by the Defendant.
6. The Defendant, in his First Affidavit dated 10 February 2020, states that when approached *"the trustees began to evince a certain squeamishness about paying such a large sum to my lawyers"*. The Defendant further states that *"in the circumstances, I asked the trustees to transfer my share of the net proceeds of the Former Matrimonial Home to my account held*

with HSBC Bermuda. This was not an attempt to place those funds beyond the reach of my creditors. Quite the contrary, I did so in order to ensure that the funds were available to me to meet my obligations to my creditors”.

7. In light of these developments MDM applied for a freezing injunction by summons dated 13 December 2019. The application was supported by an affidavit of Mrs Marshall dated 12 December 2019. The hearing of the application took place before Stoneham J on 13 December 2019 and at the conclusion of the hearing, Stoneham J made an order that “*the Defendant must not in any way dispose of, deal with, or diminish any funds held in any bank account in the Defendant’s name, whether held solely or jointly, save for funds in excess of the amount of \$242, 457.99.*”
8. By summons dated 18 February 2020, the Defendant sought an order that “*the Mareva injunction Order, granted by Stoneham PJ sitting as a judge of this Honourable Court, made in these proceedings on 14 December 2019 be set aside on the grounds set out in the First Affidavit of Andrew Crisson*”. It is apparent that Counsel for the Defendant, Mr Hill, appears to be under the impression that the Order of 13 December 2019 was made under the *Mareva* jurisdiction.
9. In his First Affidavit, the Defendant states in paragraph 59 that he is of the view that the application for the *Mareva* injunction is defective at its very core because it failed to disclose a cause of action, there having been no breach, or accepted breach, of the fee agreement dated 22 January 2019. In addition, the Defendant states, there is no allegation made that he has any intention of placing his assets beyond the reach of his creditors and he makes the point that the bare assertion that Mrs Marshall has such a relief, is not sufficient without providing any grounds for that belief.
10. On 3 April 2020, I received a 28 page letter from Mr Hill, setting out various administrative and substantive complaints in relation to the Defendant’s application to set aside the Order of Stoneham J on a timely basis. The letter complained, *inter alia*, that the *Mareva* order did not provide for the normal exceptions on account of living expenses and the payment of legal

fees by the Defendant. The letter is addressed for the attention of the Chief Justice. Having considered that letter I directed that all the matters raised in the letter, to the extent relevant to the application to set aside the injunction, should be raised at the inter parties hearing. I stated that the issues raised in the letter cannot be dealt with on an ex parte basis without giving the other side the opportunity to respond to the relevant evidence and legal submissions.

11. I further directed that the Court would be willing to consider an application for variation of the Order on account of living expenses and legal fees on the papers, and for this application the Court requires a summons, supporting affidavit and any written submissions. I gave that direction on the assumption, as represented by Mr Hill in his letter, that the Order of 13 December 2019 was indeed a *Mareva* injunction. At that time, it seemed to me, that an application for the *Angel Bell* exceptions should be determined on an urgent basis, and given the Covid 19 constraints, should be determined on papers only. Nothing said in this Ruling is intended to affect or prejudge the anticipated applications relating to (a) the removal of Mr Hill as Counsel for the Defendant; (b) Defendant’s application to set aside the Order of 13 December 2019; and (c) the Plaintiff’s application for summary judgment.

12. In light of the direction, the Defendant has filed a summons seeking to vary the Order dated 13 December 2019 so as to allow the Defendant to make the following payments and/or make provision for future expenditure or payments, and/or to meet necessary payments in the ordinary course of business or for his day-to-day living expenses, and or in fulfilment of a legitimate obligations to third parties:

a. Butterfield Bank (loan arrears)	\$25,000
b. HSBC Overdraft Production	\$20,000
c. Unpaid Condominium Expenses Arrears	\$6, 298.95
d. Legal Fees (accrued and to be accrued)	\$60,000
e. Personal expenses (four months’ salary)	\$32,000

f. Future Living Expenses

\$12,000 pcm

13. In his 96 paragraphs of written submissions, Mr Hill submits that the form of a *Mareva* injunction obtained ex parte without notice, is circumscribed by rules that seek to protect the competing interests of the conflicting parties. He points out that the affidavit contains no allegation of a risk of dissipation at all and in any event the payment of legitimate business debts would not amount to dissipation. He points to the well-rehearsed exception allowing an entity or individual to pay his or her ordinary expenses. He relies upon *Iraqi Ministry of Defence v Arcepey Shipping Co SA (The “Angel Bell”)* [1981] QB 65; *Atlas Maritime Co SA v Avalon Maritime Ltd (The “Coral Rose”)* [1991] 4 All ER 769.
14. Relying upon the *1999 White Book*, Mr Hill submits that *Mareva* injunctions addressed to natural persons should always make provision for the defendant’s living expenses and for the payment of ordinary debts as they become due, unless there is reason to believe that the defendant has other assets to which the injunction does not attach which would be available for that purpose. Mr Hill makes the point that living expenses and legal fees do not constitute dissipation in any dishonest sense and have been a recognised exception to the rule by which assets are frozen, including in the standard forms for decades. He says the *Mareva* jurisdiction should not improve the position of claimants. Rather, it should prevent the injustice of the defendant removing his assets from the jurisdiction which may have otherwise been available to satisfy a judgment.
15. In response, MDM challenge, Mr Hill’s characterisation that the Order made by Stoneham J on 13 December 2019 was made under the *Mareva* jurisdiction. Counsel for MDM contends that the Order of 30 December 2019 was in fact made pursuant to the jurisdiction set out in RSC O.29 r. 2(1) dealing with injunctions aimed at detention and preservation of subject matter of cause or action. O. 29 r. 2(1) provides that:

“On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject matter of the cause or matter, or as to which any question may arise

therein, or for inspection of any such property in the possession of a party to the cause or matter”.

16. As I noted in *Dawson-Damer v Lyndhurst Limited* [2019] SC (Bda) 8 Civ, there are important differences between a *Mareva* injunction and the freezing order under O. 29 r. 2(1). In particular, in making a preservation order, the Court is not seeking to restrain a party from dissipating its own assets so as to evade enforcement of the judgment, but is merely seeking to ensure that the subject matter of the claim is preserved pending identification of the rightful owner. Furthermore, as the English Court of Appeal noted in *Polly Peck International plc v Nadir and Ors. (No.2)* [1992] 4 All ER 769 a freezing order under O. 29 r. 2(1), it is not subject to the provisos enabling the use of money for normal business purposes, or for the payment of legal fees, or the like. As Scott LJ noted: *“There is, in general, no reason why defendant should be permitted to use money belonging to another in order to pay his legal costs or other expenses”.*
17. In the circumstances, it is clearly important to understand the nature and the jurisdictional base of the Order made by Stoneham J on 13 December 2019. The starting point of the review is the ex parte summons dated 13th of December 2019 which led to the Order on that date. The ex parte summons is headed: ***“EX PARTE SUMMONS: For freezing injunction pursuant to Order 29 Rule 2(1) of the Rules of the Supreme Court 1985”.*** The body of the ex parte summons refers to *“an application on behalf of the Petitioner [Marshall Diel & Myers Limited] for a freezing injunction pursuant to Order 29 Rule 2(1) of the Rules of the Sabine Court 1985 in the terms of the draft order attached hereto.”*
18. On the face of the ex parte summons it does appear that the application was indeed made under O. 29 r. 2(1). Mr Hill accepted that the ex parte summons does, indeed, suggest that the Order is being sought under O. 29 r. 2(1). Mr Hill says that no other document makes reference to the rule or the preservation of assets and that this formulation does not appear on the actual order. Mr Hill states that that he is tempted to assume that it is no more than a cut-and-paste inconsistency.

19. There is in fact a reference to this rule in the supporting affidavit of Georgia Marshall dated 12 December 2019. At paragraph 4, Mrs Marshall deposes:

“I make this affidavit in support of the Summons whereby Marshall Diel & Myers Limited (“MDM”) seeks a freezing injunction in accordance with the provisions of Order 29 Rule 2(1) of the Rules of the Supreme Court 1985. The full extent of the relief to which I am seeking is set out in the draft injunction which is exhibited to the Summons, but, in particular, includes the following:

- a. That until further order of the Court, the Defendant must not in any way dispose of, deal with, or diminish the funds in the sum of \$400,000 held in his personal HSBC savings account until the Plaintiff’s financial interest in the above-mentioned funds is resolved.” (Emphasis added)*

20. In paragraph 25, Mrs Marshall states that she believes that the Defendant communicated with the trustees to have the funds (\$400,000) transferred into his sole HSBC savings account to bypass the agreement made between the parties and to avoid payment of legal fees incurred by the Defendant that are due and owing to MDM. In paragraph 26, she states that she is concerned that the Defendant will seek to dissipate the same thereby “*undermining or defeating MDM’s ability to be paid from the said funds*”.

21. The purpose of the injunction is set out in paragraph 28, where Mrs Marshall states; “*I am bringing this application to preserve the funds transferred into the Defendant’s sole bank account in order to ensure payment of the outstanding legal fees in accordance with the Acknowledgement of Debt and Payment Agreement to Marshall Diel & Myers Limited dated 22 January 2018.*”

22. The Order dated 13 December 2019 states that it was made “**Upon** the application of the Plaintiff by EX Parte Summons dated 12 December 2019; **and upon** the Affidavit of Georgia

Marshall sworn 12 December 2019 and exhibits thereto". Considering the ex parte summons, the affidavit of Mrs Marshall dated 12 December 2019 and the Order dated the 13th December 2019, as one set of documents, it seems reasonably clear that the application for an injunction was indeed made under O. 29 r. 2(1) and its purpose was to preserve the funds which had been transferred into the Defendant's account, allegedly in breach of the agreement dated 22 January 2018. The fact that the draft order attached to the ex parte summons was not precisely in the same terms as the provision referred to in paragraph 4 of Mrs Marshall's First Affidavit, would appear to be a slip and should be remedied in due course.

23. Paragraph 51 and 52 of Mrs Marshall's Second Affidavit dated 18 February 2020, depose to the facts that the Defendant was aware that MDM's fees would have to be paid first before any other sum was paid from any award made to him under the Judgment to be delivered by Stoneham J. Mrs Marshall states that the sum required to pay off the Defendant's fees were not meant to touch his hands. The reason funds were paid into his account was due to the breach of the agreement dated 22 January 2018 and the co-ordination between the Trustees which resulted in the funds being released to him directly. The Trustees released the funds directly to the Defendant despite being on notice of MDM's equitable charge over the funds transferred.
24. The draft Amended Specially Endorsed Writ of Summons, which the Plaintiff intends to file after the application to remove Mr Hill as counsel has been determined, now expressly pleads that the Plaintiff asserts a solicitor's lien over the funds, being funds recovered in the ancillary relief proceedings pursuant to the principles confirmed by the Supreme Court in *Gavin Edmonds Solicitors Limited v Haven Insurance Company Limited* [2018] UKSC 21. In that case Lord Briggs summarised the relevant law at [36]-[37]:

36. *The authorities on the solicitors' equitable lien (including many of those summarised above) were recently reviewed by the Court of Appeal in Khans Solicitors v Chifuntwe [2014] 1 WLR 1185... Sir Stephen Sedley provided this summary, at para 33:*

In our judgment, the law is today (and, in our view, has been for fully two centuries) that the court will intervene to protect a solicitor's claim on funds recovered or due to be recovered by a client or former client if (a) the paying party is colluding with the client to cheat the solicitor of his fees, or (b) the paying party is on notice that the other party's solicitor has a claim on the funds for outstanding fees. The form of protection ought to be preventative but may in a proper case take the form of dual payment."

37. *I consider that to be a correct statement of the law. It recognises that the equity depends upon the solicitor having a claim for his charges against the client, that there must be something in the nature of a fund against which equity can recognise that his claim extends (which is usually a debt owed by the defendant to the solicitor's client which owes its existence, at least in part, to the solicitor's services to the client) and that for equity to intervene there must be something sufficiently affecting the conscience of the payer, either in the form of collusion to cheat the solicitor or notice (or, I would add knowledge) of the solicitor's claim against, or interest in, the fund. The outcome of the case also recognised that the solicitor's claim is limited to the unpaid amount of his charges. Implicit in that is the recognition that the solicitor's interest in the fund is a security interest, in the nature of an equitable charge."*

25. Subject to any further arguments to be advanced at the application to set aside Order of 13 December 2019 or the application for summary judgment, it certainly seems arguable that the Plaintiff's claim on account of unpaid fees is in the nature of an equitable charge over the sums which have been transferred by the Trustees to the Defendant, consistent with the Judgment of Stoneham J, and which appear to have been transferred in breach of the personal obligation undertaken by the Defendant under the agreement dated 22 January 2018. The

fact that MDM at one stage ceased to act for the Defendant does not lead to the conclusion that a solicitor's lien could never arise (See *Healy LLP v Partridge* [2019] EWHC 2471). Likewise, subject to further argument, the existence of alternative security does not necessarily preclude the existence of a solicitor's lien. As the decision of the UK Supreme Court in *Gavin Edmonds* makes clear it is not a necessary condition that the funds be in the possession of the solicitor before a solicitor's lien can arise. Possession of the funds is not a necessary precondition.

26. Leaving aside the reliance on the solicitor's lien, the thrust of what is said by Mrs Marshall in her First Affidavit (paragraphs 4, 17, 18, 21, 25, 26, 28); and her Second Affidavit (paragraphs 41, 47 to 53) is that the Defendant has acted in breach of paragraph 2 of the agreement dated 22 January 2018, which paragraph was intended, depending upon the Judgment of Stoneham J, to provide security to MDM in respect of the debt acknowledged by the Defendant in that agreement. In the circumstances, it appears to be suggested, that MDM have a proprietary interest in that sum up to the amount of the acknowledged debt. The precise route which gives rise to the proprietary interest is not articulated with any precision but it seems to me, that it is arguable that the conduct of the Defendant in diverting the funds to his personal account, in breach of the obligation undertaken by him in paragraph 2 of the agreement, is capable of giving rise to a remedial constructive trust in respect of the funds transferred up to the amount of the Defendant's indebtedness to MDM.
27. In the circumstances, the Defendant's application to vary the terms of the Order of 13 December 2019 so as to provide for the Defendant's living expenses, liability for legal costs and other liabilities set out at paragraph 8 above, falls to be determined on the basis that the Order of 13 December 2019 was made pursuant to the jurisdiction under O. 29 r. 2(1) and for the purposes of preserving the funds until the Plaintiff's interest in the funds could be determined by the Court. In particular, contrary to the submissions made on behalf of the Defendant, this application to vary the terms of the Order of 13 December 2019 is not to be determined on the basis that the Order was made under the Mareva jurisdiction. It follows, as noted by Scott LJ in *Polly Peck*, the Order of the 13 December 2019 is not subject to the provisos enabling the use of money for normal business purposes, or for the payment of legal

fees, or the like. In my judgment, Mr Hill's submissions based upon *The Angel Bell* exceptions are not applicable to a proprietary injunction and the facts of this case. Accordingly, the Order of 13th December 2019 will continue to apply to the funds transferred by the Trustees to the Defendant's bank account at HSBC up to an amount equivalent to the outstanding fees claimed in these proceedings or such other sum as agreed upon by the parties.

28. My provisional view is that MDM should have the cost of this application but will hear any application to the contrary if made by the Defendant within the next 21 days.
29. In relation to the issue of costs generally, I note the observations of the Defendant made in his First Affidavit dated 10 February 2020. At paragraphs 21 and 22, the Defendant complains that Mrs Marshall set about defending each and every application with aggression and in doing so paid little or no regard to the costs being incurred. He says that all understanding of proportionality was lost, and vast sums were expended in defending the claim that would never amount to more than a few hundred thousand. The Defendant states that the total bill to his lawyers eventually reached \$650,000 and he understands that his ex-wife incurred fees that exceed \$500,000 in respect of a combined asset pool that amounted to some \$900,000 at the time of the trial and mere \$800,000 at the time the judge rendered her Judgment. The Defendant expresses the view that the proceedings turned into a feeding frenzy for lawyers, paralegals and accountants and became an unedifying spectacle.
30. In relation to the current application the Defendant is seeking the sum of \$60,000 on account of Mr Hill's costs at this early stage of the litigation. No doubt similar legal expenses have been incurred by the Plaintiff. The anticipated applications include (a) the removal of Mr Hill as Counsel for the Defendant; (b) the application to set aside the Order dated 13 December 2019; and (c) the application by the Plaintiff for summary judgment. If the summary judgment is unsuccessful and the matter proceeds to trial, the Defendant has indicated that he anticipates producing expert evidence in relation to the legal representation provided to him by MDM. In these circumstances I am bound to state that unless there is a pause for some serious reflection, Mr Crisson appears once again to be embarking upon

litigation where there is a serious risk that his liability for legal fees is likely to exceed the amount which he presently owes to MDM.

Dated this 7 May 2020

NARINDER K HARGUN

CHIEF JUSTICE