IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

Action no: CL 57/09

BETWEEN
KLAUS HOFFMANN, DAVID ROCHEFORD, NORMAN SORENSEN and STEVE THOMPSON
Plaintiffs

AND

1. EMI SUN VILLAGE INC
2. EMI COFRESI DEVELOPMENTS INC
3. SUN VILLAGE JUAN HOLDINGS INC
4. ELLIOTT MICHES HOLDINGS INC
5. ELLIOTT REGENT HOLDINGS INC
6. EVSG TOSCANA HOLDINGS LTD
7. LANDMARK LENDING CORPORATION
8. BERTUS MANAGEMENT INC
9. COFRESCO HOLDINGS INC

Defendants

J Carrington and N Coleman for the plaintiffs
C Griffiths for defendants

Hearing: 9 April 2009
Ruling: 9 April 2009
Reasons for decision: 20 April 2009

Reasons for decision

1.On 9 April 2009, on the defendants' application, I discharged a Mareva injunction I had ordered ex parte on 6 March 2009. I also revoked the appointment of a receiver made at the same time with an order that he, forthwith, return any documents he had been given by the defendants in obedience to the order. The ground for the discharge was that I considered there had been a material failure by the plaintiffs/applicants to disclose relevant information.

2. I stated that I would give brief reasons in writing and I now do so.

3. The affidavit in support of the ex parte application was filed by Carlos Gonzalez, an attorney in Florida, and described the background to the application. The defendants are companies incorporated in the Turks and Caicos Islands and which, it was deposed, are ultimately owned by Frederick and Derek Elliott who are father and son and resident in the Dominican Republic. It was stated that, from 2001 onwards, the defendant companies have been used by the Elliotts to acquire, develop, sell and operate resorts in the Dominican Republic, in particular, the Sun Village Resort and Treasure Bluff in Puerto Plata and a former Sheraton hotel in Juan Dolio.

4. The plaintiffs are stated to have contracted with the defendants to acquire time share and fractional interests in those resorts and claim to represent a number of others holding similar interests.

5. It is now clear that the admissibility of much of Mr Gonzales' affidavit is challenged but the picture that was painted in the ex parte proceedings was described in my note of those proceedings and can conveniently be repeated in part. I noted:

" The affidavit of Carlos Gonzales, an attorney in Florida, deposes that :

'The Elliotts have operated and continue to operate under a maze of corporations including the defendants and other as yet unidentified companies acting in active concert with, and as agents for, the Elliotts. These companies were used at times interchangeably by the Elliotts, as part of carrying out their scheme which has lead to the losses suffered by the plaintiffs and the stated purpose of the complex structure is to render the defendants and the Elliotts 'judgment proof'. In fact the companies owned or controlled by the Elliott's changed corporate structures and names on numerous occasions – all as part of what the Elliot's themselves have admitted was intended to make it impossible for them to be held accountable for their wrongful conduct.

As a result, the plaintiffs are unable to state with any certainly at this time until full discovery has been effected which specific conduct is attributable to each entity. This is made further complicated by the fact that the Elliott's used the defendants as one collective 'piggy bank', taking funds from one company indiscriminately to pay the obligations of another, such that the defendants and the other Elliott companies have a unity of interest with the Elliotts and each other to an extent that the separate identities of each no longer exist or should not be recognised independently of one another. Thus I verily believe that the defendants should in fact be treated as mere alter egos and agents for the Elliotts and each other. ...'

It is not necessary to go through the contents of the affidavit but they refer to various changes in the structures and he points out that the Elliotts have advised the purchasers of Residence Products that they should convert to fractional ownership as this 'is the only way to fully preserve their asset and that such fractional interests could be offered for resale'. However, although some interests have been resold the proceeds of sale have not been paid over to the purchasers. The purchasers have also been warned by the Elliotts that if they do not convert but attempt to assert their legal rights, their interests would be forfeited. During the course of 2008, the professional sales team employed by the defendants severed their relationship with the defendants."

6. It was also stated by counsel for the applicants at the ex parte hearing that the defendants were solely holding companies but it has been pointed out in a subsequent hearing concerning the plaintiffs' undertaking to pay damages, that in the case of two of the defendants, that is not correct.

7. Service was ordered to be "forthwith" and the injunction had a return date of 13 March 2009. The ex parte order was made on a Friday and the following Monday was a public holiday. On 13 March, Mr Griffiths for the defendants, told the Court that the order had been sent to his office by facsimile on the Sunday and the originals served only on Tuesday10 March. Despite the apparent difficulty in serving the defendants, the Court has been advised that the injunctive order was published on the internet by the plaintiffs the same day and within hours of it being made. There is no dispute that this is correct.

8. The possibly devastating effect of a Mareva order means that the court may consider whether publicity from the ex parte order could cause irreparable harm and, if so, may order the ex parte hearing to be in camera. I do not know how much Mr Carrigton knew of the intention to publish the result on the worldwide web but, had I been advised of the likelihood of such a step, I would have considered an order to prevent it at least until the defence had an opportunity to be heard. In this case the speed of the publication and the delay in serving the defendants effectively robbed the defence of any timely opportunity to seek to restrain publication.

9. On 13 March and 18 March, to which the hearing of an application to fortify the plaintiffs' undertaking as to damages was adjourned, the original order was amended in a number of important aspects and the work of the receiver stayed until and an inter partes hearing fixed for 9 April 2009. The relatively long adjournment was because of the difficulty Mr Griffiths had in obtaining lengthy and detailed affidavits from the Elliotts. That difficulty was amplified by the fact that some of the same plaintiffs had filed proceeding against the Elliotts' companies in Florida to which the Elliotts had to direct urgent attention at that time.

10. On 9 April, the plaintiffs applied to continue the interim relief and also, as no statement of claim had been filed, to extend the time for filing one. The defendants applied to strike out the claim for failure to file a statement of claim in time and to set aside the ex parte order on the grounds of material non-disclosure and failure to present a fair application. Further affidavits have been filed by both parties.

11. I do not need to go into the evidence in detail. The principal thrust of Mr Griffith's submission is that the affidavit of Mr Gonzalez failed to disclose matters which must have been in his knowledge and which were such that, had the court been informed at the ex parte hearing, the injunction would not have been ordered.

12. As I have stated, the admissibility of much of the affidavit is challenged on the principal grounds that there have been material statements which are, the defendants suggest, clearly untrue and that there are frequent statements of opinion rather than fact and assertions seriously detrimental to the Elliotts unsupported by any evidence.

13. The draconian nature of a Mareva injunction makes it essential for the plaintiff to make full and frank disclosure of all relevant matters especially as most such applications are made ex parte. Failure to do so will be strong grounds for revocation of the order.

14. The ex parte application was supported solely by the first affidavit of Mr Gonzalez. Affidavits subsequently served by the plaintiffs included one from the former Chief Financial Officer of the Elliott Group of Companies, Mr Clark. He was removed from that position in mid 2008 and his salary substantially reduced. He resigned in November 2008 and Frederick Elliott deposes in his affidavit that Mr. Clark took with him a company laptop containing confidential company information. The defendants suggest that much of the information about the affairs of those companies came from him.

15. I consider it is highly likely that much of the information in Mr Gonzalez's affidavit came from this source and not, as he swears in paragraph 2, "The statements made herein are, unless otherwise stated, derived from my written and oral instructions from the Plaintiffs/Applicants, Rocheford, Sorensen and Thompson. I believe these statements to be true and correct."

16. Frederick Elliott also deposes to the fact that, since then, Mr. Clark has brought a claim in the Dominican Republic for "labor dismissal" and, very shortly before he swore his affidavit, Mr. Clark had sought a "repayment proposal" from the Elliotts.

17. Mr Carrington suggests that Mr. Gonzales may not have appreciated Mr. Clark's background when his first affidavit was sworn. The present evidence is against him in that suggestion. Colourful phrases used by Mr Gonzalez in his affidavit such as the "maze of corporations" and the "one collective piggy bank" are used in Clark's affidavit and although it was sworn later are likely, I believe, to be his words.

18. However, Mr Gonzales's duty to make full disclosure requires him to take every precaution to ensure he does so. Even if he had not heard of Mr Clark before he swore his affidavit, the nature of the information he says he received from the three named plaintiffs was such that it demanded further investigation as to its source and there is no explanation of how or why they would have had such knowledge either of the Elliotts or of the admisntraitve details of their companies. Even if, as he swears, Mr Gonzalez did receive it from them, I cannot understand how he could, without further inquiry, have decided it was true and correct. It was a situation which demanded further inquiry which was patently not made.

19. Had I been advised of the true source of that information and Mr Clark's relationship with the Elliotts and their companies, I would not have granted this application without an inter partes hearing.

20. In his second affidavit Mr. Gonzales also exhibits declarations from the Florida Court proceedings the makers of which are part of the professional sales team referred to in Mr. Gonzales's first affidavit as having terminated its agreement with the defendants. Those declarations and the correspondence exhibited by the defendants show that the plaintiffs are part of an action group which has, for over six months, been preparing for these court actions. Over that period, it is also clear that there have been statements and open discussions, largely by email, between the Elliotts and all purchasers including the plaintiffs and the exhibited email correspondence shows that the defendants were clearly aware of the intentions of the action group and had openly corresponded with the purchasers about it.

21. That shows the background in a very different light to that described by Mr Gonzalez. The failure to deal with that in his affidavit is a serious failure by the plaintiffs and, again, would have been sufficient in itself to lead the court to hear the application inter partes. The granting of a Mareva order ex parte is done because of the urgency of the need to freeze assets of the defendant. If the court had been advised of the action group and the defendants' knowledge over the preceding months of the possibility of impending legal action, the inevitable conclusion would have been that there was insufficient reason to suggest there was a risk of immediate dissipation of assets and so the application would have been ordered to be heard inter partes.

22. The overall picture painted by the applicants at the exparte stage was of substantially incomplete resorts owned by developers who were acting fraudulently both to obtain further finance and to avoid the debts arising from previous dealings. The evidence of the Elliots shows that, whilst the resorts are not complete, they are substantial developments and, where they are incomplete, musch is close to completion.

23. It is clear at this stage that there are substantial challenges to the affidavits now before the Court. This is not he time to resolve those. That is for the substantive hearing. The defendants' challenge to the interim order is based on the facts as presented to the Court at the ex parte hearing. The subsequent affidavits are relevant in determining whether at that time there had been full disclosure. I am satisfied there was not and the result is that the order must be discharged.

24. This case causes me some disquiet. The timing of an application of this nature at the same time as a similar action in Florida, the failure to mention so many clearly important material facts in an affidavit prepared by an attorney specifically for an ex parte application, the subsequent manner in which the order was publicised and the failure to take similar action to advise of the amendment to the original order all add to that disquiet.

25. The order is, as I have stated, discharged.

20 April 2009

Gordon Ward
Chief Justice