[2012] JMSC Civ. 113

IN THE SUPREME COURT O F JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2011 HCV 08015

BETWEEN	**RAZIEL OFER**	**CLAIMANT**
AND	**GEORGE C. THOMAS**	**1ST DEFENDANT**
AND	**GEORGE C. THOMAS & CO.**	**2ND DEFENDANT**
AND	**CECIL ANTHONY BIRD**	**3RD DEFENDANT**
AND	**RON STANECKEY**	**4TH DEFENDANT**
AND	**DAVID LEIBOVITZ**	**5TH DEFENDANT**
AND	**JOHN B. CHUCK**	**6TH DEFENDANT**
AND	**THE VILLAS-NEGRIL LIMITED**	**7TH DEFENDANT**
AND	**FROLIC RESORT LIMITED**	**8TH DEFENDANT**

IN CHAMBERS

HEARD: 11TH, 21ST, 22ND, 30TH May, 7th, 8th, 12th, 18th, 22ND June, 6th, 16th, 17th and 31st July 2012.

Mr. Maurice Manning and Mr. Weiden Daley instructed by Hart, Muirhead Fatta for the Claimant.

Mrs. M. Georgia Gibson-Henlin instructed by Jacqueline Samuels-Brown for the 1st and 2nd Defendants.

Mr. Keith Bishop instructed by Mr. Austin Francis of Banjoko, Francis & Co for the 3rd Defendant.

Mrs. Nicole Foster-Pusey for the 6th, 7th and 8th Defendants.

FREEZING ORDER – WHETHER GOOD ARGUABLE CASE – WHETHER COGENT EVIDENCE OF REAL RISK OF DISSIPATION OF ASSETS – RELEVANCE OF

ALLEGATIONS OF DISHONESTY – IMPORTANCE OF APPLICANT COMING TO COURT WITH CLEAN HANDS AND MAKING FULL AND FRANK DISCLOSURE THROUGHOUT

MANGATAL J:

[1] On the 7th of March 2012 my learned sister Ms. Justice Straw, upon the ex parte application of the Claimant Raziel Ofer, "Ofer", granted, amongst other orders, the following freezing order:

> 1. *The Defendants/Respondents, George C. Thomas, Cecil Anthony Bird (….), Ron Staneckey, David Leibovitz, John B. Chuck, The Villas-Negril Limited and Frolic Resort Limited (together hereinafter referred to as " the Respondents"), are hereby restrained and an injunction is hereby granted restraining each of them until 13th March 2012 or further order in this action whether by themselves or otherwise howsoever from disposing of or transferring, charging, diminishing or diminishing the value of or in any way howsoever dealing with any assets of any of them or any asset in the name or names (* of) *any of them, wheresoever the same may be situate, up to the value of One Hundred Thousand United States currency ($100,000.00) in the case of the first Respondent (George C. Thomas) and the sum of Three Hundred and Fifty Thousand Dollars United States currency (US$350,000.00) in the case of each of the 3rd, 4th, 5th,6th, 7th and 8th Respondents (Cecil Anthony Bird, Ron Staneckey, David Leibovitz, John B. Chuck, The Villas-Negril Limited and Frolic Resort Limited).'*

[2] There were a number of provisos to the order, dealing with matters such as the respondents reasonable living expenses and reasonable legal costs. Straw J's order has been extended upon numerous occasions, up until today, the date for delivery of judgment, after many days of hearings. Further, as regards the 1st Respondent George C. Thomas "Thomas", on the 17th of July, the last date of hearing and submissions, the order was varied by consent so as to be limited to a particular property registered in the name of Thomas.

[3] I trust that the parties will know that I mean no disrespect in referring to them by their surnames. However, because of the number of parties and the numerous times that I will need to make reference to them, or some of them, I think it is easier and lends itself to clarity for me to refer to them in this way.

[4] Ofer by way of application filed April 17 2012, mainly seeks the following order:

1. *Paragraph 1 of the orders of the Honourable Ms, Justice Straw made herein on 7th March 2012 and extended to 1st May 2012 by the Honourable Mr. Justice Campbell on 13th March 2012, be further extended until trial or sooner order upon the Claimant's undertakings as set out therein.*

[5] The stated grounds of the application are as follows:

(1) CPR 17.1(1)(a),(f) and (g) provides that the Court may grant an interim injunction;

(2) there are serious questions to be tried and the Claimant has a good, arguable case against the Respondents;

(3) the balance of convenience is in favour of the grant of the injunction sought;

(4) the Claimant claims in these proceedings, inter alia, substantial damages for conspiracy, fraudulent misrepresentation and moneys had and received, and the Claimant is likely to obtain judgment against the Respondents in respect thereof;

(5) the said judgment is likely to be frustrated by dissipation of the Respondents' assets in their own names and/or to which they (are) *beneficially entitled, if the said freezing order is not extended as sought; and*

(6) the above orders are just and convenient in the circumstances, and are necessary for the just, fair and effective disposal of these proceedings and the protection of the Claimant's interests.

[6] A freezing order is an order restraining a Respondent from dealing with his assets in a certain way, restraining their removal from the jurisdiction, and preventing their dissipation. It is an exceptional jurisdiction and the applicant bears the burden of satisfying the Court that the basis for making such an order exists, and that the Court should exercise its discretion in the applicant's favour. The purpose of a freezing order, or what used to be called a mareva injunction, is not to give a preferred position to any particular creditor of a defendant. It is not meant in any way to affect the law of insolvency as regards the priority of creditors. The remedy is in personam and is available to a Claimant only if the evidence satisfies the necessary pre-conditions and the justice of the case requires it- per Rattray P. in the Court of Appeal's decision **Jamaica Citizen Bank Ltd. V. Yap** 31 J.L.R. 42, at page 49.

[7] It is now well-established that before a Court will grant a freezing order:

(a) The Claimant must establish a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success. –see per Mustill J. in the **Ninemia Maritime Corp v. Trave** decision, as approved by the English Court of Appeal, reported at [1984] 1 All E.R. 398, at page 404.

(b) There must be solid evidence that there is a real risk that the assets will be dissipated, whether by removal from the jurisdiction, or otherwise dissipated, before a judgment in favour of the Claimant can be satisfied.-see per Mustill J. at page 406 of **Ninemia** and per Rattray P in **Jamaica Citizens Bank v. Yap** at pages 8-9. There must be cogent evidence- see per my learned brother Rattray J. in **Kingston Telecom Limited v. Zion Dhari** 2003, HCV 2433, delivered July 27, 2004. The Court has to guard against the danger that a defendant may dispose of his assets so as to avoid payment of any judgment which the Claimant may obtain. – see **Mareva Compania Naviera SA v. International Bulk Carriers SA, the Mareva (1975)** [1980] 1 All E.R. 213 at page 215 per Lord Denning M.R., this being the case from which the Mareva jurisdiction derives its name.

WHETHER THERE IS A GOOD ARGUABLE CASE

[8] The Claim herein makes very serious allegations. The Particulars of Claim reveal that amongst several other claims, the claim is against all of the Defendants for damages for conspiracy and fraudulent representation. The more serious the allegations, the more cogent must be the evidence to show a good arguable case.

[9] In **R (N) v. Mental Health Review Tribunal (Northern Region)** [2006] QB 468, the English Court of Appeal, discussed the civil standard of proof. In the leading decision of the Privy Council in **Sharma v. Brown-Antoine** [2007] W.L.R. 780 in relation to judicial review and concepts of arguability, the Privy Council made certain comments which in my view are pertinent here. This is insofar as one is examining the question of whether the Claimant can demonstrate a good arguable case. The case

must be more than barely capable of serious argument, although not necessarily one that has a better than 50% chance of success. At page 787(4), of the joint opinion of Lords Bingham and Walker, the Board stated:

> *…..But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in* ***R (N) v. Mental Health Review Tribunal (Northern Region)****[2006] QB 468, paragraph 62, in a passage applicable mutatis mutandis, to arguability:*
>
> > ***"the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on a balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on a balance of probabilities."***
>
> (My emphasis)

[10] At paragraphs 44 and 45 of Ofer's well-formulated skeleton submissions, prepared by Mr. Manning and Mr. Daley in consultation, the Attorneys submit that the affidavit evidence, including from some of the Respondents, fully supports the following as being the obvious "ingenious scheme of fraud":

(1) *Staneckey, Bird, Leibovitz and Thomas fraudulently and dishonestly represented to Ofer that the Vendors were selling the Hotel to the Investors for US$7,100,000.00.*

(2) *However, Staneckey, Bird, Leibovitz and Thomas well knew and know that representation was false or reckless and not caring whether same was true or false, and that the purchase price was in fact US$3,000,000.00. Thomas now contends that the purchase price was in fact US$3,000,000.00, but does not even pretend he told Ofer this;*

(3) *Staneckey, Bird, Leibovitz and Thomas fraudulently and dishonestly represented to Ofer that before Ofer had made any payment to Thomas and/or the Firm, Staneckey, Bird Leibovitz had paid in the aggregate the sum of US$1,500,000.00 to Thomas and/or the Firm on account of the purchase of the Hotel by the Investors for the sum of US$7,100,000.00;*

(4) *However, Staneckey, Bird, Leibovitz made no payment to Thomas, the Firm, the Vendors or otherwise in respect of the purchase price of the Hotel;*

(5) *Chuck and/or Villas-Negril and/or Frolic fraudulently and dishonestly wrote the aforesaid letter dated 6th September 2006 to Thomas stating that Staneckey, Bird, Leibovitz had paid in the aggregate the sum of US$1,500,000.00 to Chuck and/or Villas-Negril and/or Frolic on account of the purchase price of the Hotel of US$7,100,000.00. However, Staneckey, Bird, Leibovitz made no payment to Chuck and/or Villas-Negril and/or Frolic on account of the purchase price of the Hotel;*

(6) *Staneckey, Bird, Leibovitz and Thomas and/or the Firm fraudulently and dishonestly represented to Delroy Chuck and the Mortgagee that the purchase price for the sale of the Hotel to the Investors was US$3,000,000.00. However, the sum which Staneckey, Bird, Leibovitz and Thomas and/or the Firm fraudulently and dishonestly represented to Ofer as the purchase price was US$7,100,000.00 with intent that:*

> (a) *The Mortgagee would not realize and receive the sum of US$4,500,000.00 then secured by the aforesaid mortgage, but rather only up to the sum of US$3,000,000.00 being the purchase price which Staneckey,Bird, Leibovitz and Thomas and/or the Firm represented to the Mortgagee and to Ofer was the purchase price to be paid by the Investors;*
>
> (b) *In consequence, Chuck and/or the Vendors would dishonestly and wrongfully receive from the sale of the Hotel the balance purchase price of US$4,100,000.00 which was to be fraudulently and dishonestly concealed from the Mortgagee;*
>
> (c) *Ofer would pay substantially more of the actual purchase price than the share, if any at all, paid by Staneckey, Bird, Leibovitz.*

[11] There are a number of matters that cause me to have grave concerns about the arguability of Ofer's case. It is very strange that in the Particulars of Claim Ofer makes no mention whatsoever of a promissory note in favour of John and Donna Chuck. At paragraph 43 of the Particulars of Claim, Ofer alleges that Staneckey, Bird, Leibovitz and Thomas fraudulently and dishonestly represented to Ofer that the vendors were selling the Hotel to the Investors for US$7,100,000.00, whereas Staneckey, Bird, Leibovitz and Thomas well knew and know that the said representation was false or reckless because the purchase price was in fact US$3,000,000.00. The first time Ofer mentions the promissory note, which he in fact admits he signed, is in his Affidavit filed February 23 2012. However, that promissory note Ofer admits he was told was for the balance of the purchase price of US$7,100,000.00, remaining over and above the US$3,000,000.00 covered in the Agreements for Sale of Land and Chattels.

[12] In paragraph 36 of the Particulars of Claim and in paragraph 35 of his said Affidavit, Ofer indicates that he was aware that it was part of the mortgagee's terms of consenting to the sale of the Hotel to the Investors that the Mortgagee would deem the Mortgage fully satisfied and discharged upon receiving the net proceeds of sale from the aggregate purchase price of US$3,000,000.00. That this was even though at the time of the Agreements the vendors owed the Mortgagee approximately US$4,500,000.00.

[13] This suggests to me that all of the parties, including Ofer, knew of the, for want of a better term, I will use that used by Mrs. Foster Pusey in her submissions on behalf of the 6th – 8th defendants, "the split nature of the contract". Yet Ofer is now insisting that the price was US$3,000,000.00 only. In any event, it shows that he knew of the promissory note, indeed he signed it, which was to cover a sum in excess of the purchase price stated in the Agreements for Sale. Thus it is difficult to see how the two different fraudulent and dishonest representations can be made out, i.e. representing to Ofer that the purchase price was US$7,100,000.00 when the purchase price was "in fact US$3,000,000.00", as well as, the intent that "Chuck/and or the Vendors would dishonestly and wrongfully receive from the sale of the Hotel the balance purchase price of US$4,100,000.00 which was fraudulently and dishonestly concealed from the Mortgagee".

[14] What is even more strange is that, although he alleges that all the Defendants were part of this massive conspiracy, it is Ofer and Bird alone, as astutely pointed out by Mr. Bishop, Counsel for Bird, that signed the three Agreements for Sale of the Land and Chattels, totaling the US$3,000,000.00. Staneckey and Leibovitz did not even sign; Ofer purported to sign for Leibovitz, and Bird for Staneckey. Curiously, the promissory note, which is dated November 2006, is purportedly signed by all four investors, though none of their names are printed, and the place on the document for signing indicating signing in the presence of a witness is left blank. All of this does appear to suggest that Mr. Ofer knew more about this transaction than he has let on to the Court. In my judgment, it is also hard to make the link between the alleged co-conspirators in relation

to all the different aspects, twists and terms of this very complicated multi-faceted allegation of conspiracy.

[15] Then there is the fact that, upon the signing of the Agreements in November 2006, the Investors, including Ofer, entered into possession. Caribbean Sunset Resort Limited was incorporated in December 2006 and the four purchasers/Investors were the shareholders. This claim was not filed until the 10th of December 2011. What accounts for this long period of delay and inaction?

[16] Further, in the Particulars of Claim, although Ofer is claiming rescission of what he refers to simply as an agreement dated the 13th August 2007 between Bird and Ofer, and he states, in paragraph 53 of the Particulars of Claim, that he will rely upon all documents referred to "for their full meaning and effect", Ofer never once describes the material aspects of the Agreement that deal with the releasing of claims as between Ofer and Bird. Mr. Manning has sought to argue that Bird's Affidavit of February 28 2012 which exhibits the Agreement, which is headed "Release", was before Justice Straw on the ex parte hearing. Indeed Mr. Manning has argued that by the document (curiously in my view) being there, Bird had an advantage that most Defendants don't have on an ex parte application for a freezing order, which is that his Affidavit was before the Court. However, Ofer refers to this Agreement as being part of an alleged conspiracy. Yet when one reads the Document, which is Headed "Release", it states as follows in paragraph 1.1:

NOW IT IS AGREED as follows:

1. *That (OFER) and* (BIRD) do hereby completely, mutually and reciprocally release, discharge, acquit and forgive each other from all claims contracts, demands, agreements, liabilities and proceedings of every description that either party has or may have against the other, arising from the beginning of time to the date of this agreement, including but not necessarily limited to an incident or claim described as follows:

   1.

   a) All matters relating to Caribbean Sunset Resort Limited

b) All matters relating to Johnny Chuck (Chuckles Resport Limited) Villa Negril Limited and Frolic Resort Limited

c) All matters relating to Ian Levy and Chuckles Resport Limited.

[17] This Release or Agreement certainly gives me pause in considering whether Ofer has a good arguable case in respect of Bird. What exactly were Ofer and Bird forgiving each other for and releasing? What is it that has now made such a difference to Ofer ? Why has he sued the parties at this late stage, over 5 years after the initial discussions and transactions?

[18] I agree with Mrs. Gibson-Henlin, who argued the case on behalf of the 1st and 2nd Defendants, that there is nothing specific in the pleadings or Affidavit of Ofer which shows what aroused Ofer to come to Court to deal with the fraud of which he speaks. He has not for example said that as a result of seeing the letter of September 6, 2006, or learning that Chuck admitted that on the 6th of September 2011, in a meeting with Ofer's Attorneys, that the representations in the letter of 6th September 2006 that Staneckey, Bird and Leibovitz had paid in the aggregate the sum of US$1,500,000.00 was false, he was prompted to action. Mr. Manning argued that the relevant time line is not from 2006, but rather is from September 2011 when the meeting was held. However, I really do not think that there is any adequate explanation put forward by Ofer. After paragraph 47 of his Affidavit of February 23 2012 where Ofer says that Chuck made the admission at the Meeting, he goes on to say in paragraph 48 that "Throughout, with the exception of Chuck and/or Villas Negril and/or Frolic (on account of the admission referred to in paragraph 47 above), **the Defendants have concealed** and continue to conceal from me the matters set out in paragraph 41 above. .." (My emphasis). I am not at all convinced that Chuck's admission or the meeting is what has accounted for Ofer's filing of this law suit. In any event, this does not adequately account for his delay, particularly because of all of his countless actions and involvement in the matter over the years, and all the aspects of the matter that he must be taken to have known about, on all the evidence, including his own. Mr. Manning has argued that in the alternative, if I do find that Ofer has been guilty of delay or tardiness,

guidance is to be had from the **Grupos Torras SA v. Sheik Fahad Mohammed Al-Sabah** case, a decision of the English Court of Appeal (Civil Division), 16 February 1994 (which I will be referring to in more detail in relation to the issue of the risk of dissipation of assets later in this judgment). Mr. Manning submitted that in this case, a similar argument about delay was raised but that this did not prevent the Court from coming to the assistance of the Applicant. However, I think that the instant case is quite distinguishable from the **Grupo Torras** case, where the Shiek Fahad was considered to be the prime mover among the fraudsters and a party to an elaborate coverup of misappropriations. The Sheik was viewed as a sophisticated fraudster, capable of using a myriad of accounts to move assets from jurisdiction to jurisdiction in what was considered to be a case of great size and complexity. This is not such a case. The real complexity here is not the web of conspiracy, but in trying to decipher what exactly is Ofer's complaint about each Defendant, and what is it that he is really saying he did not know and was deceived into. I am satisfied that there has been delay on the part of Ofer such as to dissuade a Court of equity from exercising its discretion in his favour. I rely upon the dicta of Harrison J., as he then was, in **Osmond and Thelma Hemans v. St. Andrew Developers** (1993) 30 J.L.R. 290, at 296, cited by Mrs. Gibson-Henlin.

[19] In the Particulars of Claim at paragraph 25, the Particulars of Claim having been signed by Mr. Ofer with the requisite Certificate of Truth required by the CPR, it is stated:

> *25. By a letter dated 6th September 2006 from Chuck and/or Villas-Negril and/or Frolic to Thomas, Chuck represented to Ofer and confirmed that "we have received One Million Five Hundred Thousand (US$1.5 Million) United States Dollars from Messrs. David Leibovitz, Ron Staneckey, Cecil Bird. This leaves a balance of Five Million Six Hundred Thousand (US$5.6 Million) United States Dollars.*
> (My emphasis)

[20] In their written submissions, Counsel for Ofer describe Chuck as the *causa sine qua non*, stating that his role was critical. However, the letter was not even written to Ofer and it is now obvious, only after queries raised by Counsel for the 6th-8th

defendants, and for the 1st and 2nd Defendants, that Ofer did not know about about this letter until after his Attorneys Hart Muirhead Fatta received the file from Thomas, which was after the date of the meeting on September 6 2011. Further, that Mr. Ofer says he did not know that the contents of the letter were false until that admission was made- see Ofer's Affidavit filed July 20 2012.

[21] What is difficult to understand also is why Ofer was busy paying the mortgage payments through the nominee company pursuant to the consent terms which Ofer has referred to. This does put his case in a different light. It does tend to show that not only was Ofer aware of the overall deal, or at any rate main aspects of it, but he also was involved in it. It would also appear that in more recent years, there has been correspondence between Ofer and the mortgagee, in particular in November 2010, which show that Ofer was not meeting the mortgage payments, had engaged in renegotiating payments due as well as even trying to sell the Hotel. These correspondence are exhibited to the Affidavit of George Thomas filed April 11 2012. At paragraph 41 of his Affidavit Mr. Thomas makes a statement which I consider very significant:

> *41. Further, the Affidavit of Raz Ofer failed to disclose that he attempted to renegotiate the outstanding amount owed to the mortgagee due to his inability to make interest payments on the mortgage and that it was at this stage, five years after the execution of the Agreements for Sale that he alleged that he was misrepresented as to the purchase price and the deposit required for the payment of the said Hotel.*

[22] The relevance of these matters is that it is not only the discovery which Ofer claims to have made after the meeting in September 2011 that has occurred since the entry into the Agreements from as far back as 2006.

[23] In my judgment, it cannot fairly or with conviction be said that on a balance of probabilities the Claimant has demonstrated a good arguable case against any of the Defendants. The evidence lacks the strength and quality that would be required to make out a more than barely seriously arguable case.

[24] In addition, and very importantly in the circumstances of this case, the jurisdiction to grant a freezing order is within the exercise of the Court's equitable jurisdiction. It seems plain to me that Ofer has not come to this Court with clean hands. As submitted by Mrs. Gibson-Henlin, I need not at this stage go into any examination of whether any aspect of the transactions were illegal. I simply find that Ofer's involvement with the structuring of the transaction, and his knowledge of facets of the interactions between the parties is material to the issues at hand. He failed to disclose these relevant matters both at the ex parte hearing and overall throughout this application. I agree with Mrs. Gibson-Henlin that Ofer did fail to disclose certain facts, and appears to have simply thrown the structure of the deal at the Court in a quite confusing way, in order to make out his case of a grand conspiracy on the part of the Defendants to defraud him. As Mrs. Foster-Pusey submitted, Ofer did in applying for the freezing order simply cast a net to pull in all of the Defendants. I must say that it is clear that none of the parties in this matter, at any rate, certainly those who have placed Affidavit evidence before the Court, meaning Ofer and the 1st, 2nd, 3rd, and 6th-8th Defendants, could be said to have emerged from the various transactions "smelling of roses" or with any halos intact.

RISK OF DISSIPATION OF ASSETS

[25] It is only if I am wrong upon the question of whether Ofer has made out a good arguable case that the question of the risk of dissipation needs to be examined. I think that a useful starting point in deciding whether there is any solid or cogent evidence that there is a real risk of dissipation of assets is to examine what was before Straw J. when the ex parte freezing order was first granted. So far as I have seen, the main evidence of Ofer in relation to this issue, is set out in paragraphs 47-52 of Ofer's Affidavit filed on February 23 2012. At paragraphs 49 to 52, Ofer states:

> *49. I should point out that discussions (by me personally and through Attorneys) with the Defendants herein with a view to settling the subject matter of this action have failed, hence this claim.*
>
> *50. There is a real risk that notice of the application may defeat the protective* (purpose) *of this application. Further, without immediate action, my interests are likely to be severely prejudiced.*
>
> *51. In view of the matters set forth in this affidavit, I do verily believe it is likely that any judgment I obtain in this action is likely to be frustrated by*

dissipation of the Respondents' assets in their names and/or to which they are beneficially entitled, if the orders sought in the application are not granted.

52. I should point out that in other proceedings on the application of a company of which I am the ultimate shareholder (Global Hotels Inc), on 17th January 2012 the Honourable Mr. Justice M. Gayle made a freezing order against Bird, and on 10th February 2012 the Honourable Mr. Justice E. Brown extended the freezing order to 14th March 2012. Bird has indicated he intends to challenge the freezing order made on the inter partes hearing set for 13th March 2012….

[26] As it turns out, the application for freezing order in the law suit referred to by Ofer in paragraph 52 of his Affidavit came up for hearing before me upon several occasions, that Claim being Claim No. HCV 08040 of 2011, **Global Hotels Inc v. Cecil Anthony Bird**. Several extensions of time for Bird to comply with the order of Gayle J. were granted. My learned brother F. Williams J. in that Suit, on the application of the Claimant's Attorneys for Committal of Bird for contempt, in judgment delivered June 11 2012, found Bird to be guilty of contempt in relation to the orders of Gayle J. As the learned Judge succinctly records in his written judgment, which was passed up to all of the parties in this case during these hearings, on April 27 2012, I made the following rulings and orders, amongst others:

The Court rules on the Affidavit evidence and material before it that the Defendant (Bird) *is in breach of paragraph 2 of the orders of the Honourable Mr. Justice Gayle made on 17th January, 2012 as extended by the order of the Honourable Mr. Justice E. Brown made on 10th February 2012.*

...

Unless and until the Defendant complies with this order, no application to the Court or submissions on his behalf shall be heard.

[27] In my judgment, there was no specific evidence demonstrating objectively a real risk of dissipation of assets, subject to Ofer's reliance upon the alleged dishonesty of the Defendants. As pointed out in **Third Chandris Shipping** [1979] 2 All E.R. 972 at 987, and in **Ninemia** at page 405, affidavits stating belief in or fear of dissipation have no probative value without solid evidence. Mere unsupported statements are not enough, and can be of very little, if any, evidential weight. As regards Bird, I do not think that the matters in the other Suit amount to specific evidence of a real risk.

[28] However, Ofer's Attorneys refer to and rely upon the following extract from **Stephen Gee Q.C. Commercial Injunctions**, 5th Edition, paragraph 12.040:

> *Good grounds for alleging that the defendant has been dishonest is relevant. Dishonesty is not essential to the exercise of the jurisdiction and there is no need to show an intention to dissipate assets. But if there is a good arguable case in support of an allegation that the defendant has acted fraudulently or dishonestly (e.g. being implicated in an ingenious scheme for the misappropriation of funds belonging to the claimant), or with an unacceptably low standard of commercial morality giving rise to a feeling of uneasiness about the defendant, then it is often unnecessary for there to be any specific evidence on risk of dissipation for the court to be entitled to take the view that there is a sufficient risk to justify granting Mareva relief. Once the risk of dissipation is shown, the limit of the Mareva relief will take into account claims for which the claimant has a good arguable case, including those which do not involve such an allegation. The fact that a defendant is experienced in intricate, sophisticated, international transactions involving movements of large sums of money may also indicate that there is a real risk of dissipation. Past convictions may also be taken into account. The fact that the defendant has provided evidence about his assets and affairs which is mutually inconsistent may permit the inference that he is not being straightforward with the court and that there is a real risk of dissipation of his assets.*

[29] Ofer's Attorneys also rely upon Mustill J, as he then was, in **<u>Niedersachsen</u>** [1984] 1 All E.R. 398, at 406 h-j, put it this way:

> *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.*

[30] Ofer's Attorneys have relied upon the case of **<u>Grupo</u>** Torras on this issue. In my judgment, Mrs. Foster-Pusey is correct in her submission that in that case there was other evidence of a risk of dissipation of assets, separate and apart from the question of whether there was a good arguable case in relation to dishonesty. At page 5 Steyn LJ stated:

> *The confidential file contains cogent testimony to Sheik Fahad's capacity to move assets from jurisdiction to jurisdiction using a myriad of accounts. He is undoubtedly an international financial operator. If Sheik Fahad is indeed a sophisticated fraudster, as Grupo Torras' Points of Claim and evidence prima facie show, any delay in enforcing the disclosure order will give Sheik Fahad ample opportunity to protect himself against a possible*

judgment in a claim for US$450 million by moving his assets to safe havens….

[31] Further, I agree that even if it is possible to infer a risk of dissipation from an arguable case of dishonesty, the nature of the dishonesty that is alleged must be one which supports such an inference.

[32] In my judgment, the allegations of dishonesty against the Defendants is not such as to support such an inference. As regards, the 6th-8th Defendants in particular, the nature of the dishonesty relates to an admission of receipt of money which was not in fact received. This occurred over 5 years ago. I cannot find that it would be reasonable to draw an inference of a present risk (which I consider to be part of assessing whether there is a real risk), of dissipation of assets.

[33] As regards the other allegations of dishonesty, in particular in relation to Thomas and Bird, and their conduct in the course of the proceedings, including the disclosure of assets and other matters, I must confess that I really cannot see my way fit to assist the applicant Ofer who has not come to the Court with clean hands. He has made no attempt whatsoever to explain what was going on when he entered into an agreement to Release Bird from as far back as 2007 from any claims "from the beginning of time", expressly and unarguably having to do with the transactions in respect of which he now mounts his complaints. It is clear that Ofer has not been frank with the Court, and whilst the Court in its experience has to be astute to identify whether Defendants are likely "debt dodgers", I really cannot say that I find the Defendants, on the evidence before me to be any more "dodgy" than Ofer.

[34] In all the circumstances, I am satisfied that the correct exercise of the discretion and jurisdiction should lead to a refusal of the relief sought by the Applicant Ofer.

[35] Before leaving this matter, I wish to express my gratitude to Counsel for the clarity and comprehensiveness of their submissions. It should be noted that I have not referred to all of the many cases cited, or submissions made because I considered that

the matters herein discussed deal with the gravamen of the issues and are sufficient to justly dispose of the application.

[36] The Claimant's Notice of Application for Extension of Freezing Order, filed April 17 2012, is therefore dismissed with costs to the 1st, 2nd, 3rd, and 6th - 8th Defendants to be taxed if not agreed.