

12/12/17

BETWEEN: **GRAEME McLEAN WALLACE AND VALERIE
ISOBEL WALLACE**

Plaintiffs

AND: **LUCY ANNA TUPOU aka LUCY ANNA ILAIU**

First Defendant

**HER ROYAL HIGHNESS SALOTE MAFILE'O
PILOLEVU TUITA**

Second Defendant

**HER ROYAL HIGHNESS SALOTE MARILE'O
PILOLEVU TUITA and LUCY ANNA ILAIU as
trustees of the HRH SMPT FAMILY TRUST**

Third Defendant

BEFORE THE LORD CHIEF JUSTICE PAULSEN

Counsel: Mr L Niu SC for the plaintiffs
Date of Ruling: 11 December 2017

**RULING ON EX PARTE APPLICATION FOR MAREVA INJUNCTION AND
ANCILLARY ORDERS**

The application

- [1] The plaintiffs (the Wallaces) have sued the defendants for judgment in the sum of NZ\$2,104,822.89 and interest. This is what they say is owing under a term loan agreement entered into dated 24 May 2016. It is alleged that the first defendant was the borrower under the term loan agreement and

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that her obligations were guaranteed by the second and third defendants pursuant to Deeds of Guarantee and Indemnity of the same date. It appears that the term loan and guarantees were entered into in New Zealand and that security for the loan was taken over properties in New Zealand.

- [2] This ruling is concerned with an *ex parte* application by the Wallaces for a Mareva injunction against all defendants to restrain them until further order of the Court from dealing in any way with their real or personal property of every description.
- [4] The Wallaces also apply for an ancillary order that the defendants must disclose by affidavit the nature and whereabouts of any assets they may hold legally or beneficially or as controlling shareholders of any company within the Kingdom of Tonga.

The relevant principles

- [5] There is no doubt that this Court has jurisdiction to grant a Mareva injunction in an appropriate case. It also has power to make ancillary orders. (Order 22 Supreme Court Rules)
- [6] I have been referred to the seminal decision of the English Court of Appeal in *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's LR 509 and the New Zealand High Court decision in *Bank of New Zealand v Hawkins* (1989) 1 PRNZ 454 (HC) which is commonly cited in New Zealand as a convenient summation of the relevant legal principles (*Wellington Tenth's v Skiffington* [2017] NZHC 1646 per Clark. J).
- [7] An applicant for a Mareva injunction must show the following:
- (a) A good arguable case on its substantive claim. In this regard I note that in the *Hawkins* Gault. J accepted that this is a more onerous requirement than that normally applied in cases of interlocutory injunctions of a serious question to be determined.

- (b) That there are assets of the defendant within the jurisdiction to which the orders can apply.
- (c) That there is a real risk the defendant will dissipate or dispose of assets and render itself judgment proof. A mere assertion that the defendant will dissipate assets is insufficient. There must be evidence of a real danger of the dissipation of assets (*Hawkins* at pg 454)

[8] In addition to those requirements, the needs of a plaintiff to be afforded protection must be balanced against any prejudice or hardship to the defendant and third parties. In *Hawkins* Gault. J [at pg 452] said that

Generally this is a requirement that consideration must be given to the requirement for overall justice in the circumstances.

Discussion

[9] The Wallaces have failed to satisfy me that preconditions for the granting of a Mareva injunction have been made out in this case for the reasons that follow and accordingly their application is dismissed.

A good arguable case

[10] There is no evidence before me from which I could make an assessment that the Wallaces have a good arguable case. The affidavits of Mr. & Mrs. Wallace do not address the merits of their claim at all. In addition to the absence of evidence on the matter the Wallaces have not produced the term loan agreement, the guarantees or any of the other documents referred to in the statement of claim upon which the claim is founded. They have not produced either any correspondence with the defendants relating to their alleged defaults including any demands for payment. Issues of private international law that are almost certainly going to arise in this case are not acknowledged or addressed.

- [11] The affidavit of Mr. Wallace does say that without prejudice proposals have been made by the first defendant which have not come to fruition but nothing at all can be taken from that.
- [12] The statement of claim makes factual allegations as to the terms of the term loan agreement and the guarantee, the existence of a debt and the alleged defaults but the statement of claim is not evidence and the Wallaces do not even confirm the contents of the statement of claim in their affidavits.
- [13] For this reason the application fails at the first hurdle.

The existence of assets in the jurisdiction

- [14] The Wallaces have provided evidence that the defendants are the holders of registered leases in Tonga and accordingly this requirement is met.
- [15] However, I should note that I do not consider that the leasehold interest in Makaha'a Island Resort registered to Sun Island Tonga Limited could be made subject to a Mareva injunction in favour of the Wallaces. The evidence is that Sun Island Tonga Limited has been struck from the Register of Companies. The lease has vested in the Crown under section 333 of the Companies Act. It is not an asset of any of the defendants.

A real risk that assets will be dissipated

- [16] The evidence advanced on this issue is scant at best. I perceive that the Wallaces rely on just three matters.
- [17] First, the Wallaces have lodged caveats against the defendants registered leases. They do not say on what basis they were entitled to do so. Mr. Wallace says in his affidavit that they have been informed by their Counsel that the first defendant is investigating how to remove their caveats. This does not take the Wallaces' application very far. There is no evidence that the defendants have in fact taken any steps to remove the caveats. Even if the defendants do so, that does not mean that they intend to dispose of the

leases. The defendants are entitled to challenge the caveats and there are many reasons they might wish to do so. At the present time the Wallaces are protected by their caveats and are not at any risk that the leases will be disposed of unless and until the caveats are withdrawn. Before that can happen the procedures in section 137 of the Land Act must be followed. At best the Wallaces' application is premature. The granting of a Mareva injunction is therefore unnecessary and the Court will not make such intrusive orders against a defendant unless good reasons require it.

[19] Secondly, one of the caveats lodged against the registered lease of a property owned by the first defendant at 'Alaivahamama'o By-Pass Road (Lease 6314) has been withdrawn by the Wallaces. This is the subject of ruling of the Court on costs in *Australia and New Zealand Banking Group Limited v Wallace* (Unreported, Land Court, LA 38 of 2017, 27 November 2017 Paulsen LCJ). The caveat was withdrawn at the insistence of the ANZ Bank because the bank holds a first mortgage over the lease and wishes to exercise its power of sale. The steps taken by the ANZ (to insist on the withdrawal of the caveat) and the Wallaces (to withdraw it) are not evidence that the defendants intend to dispose of the lease. It is the bank that wants to dispose of the lease not the defendants. There is no evidence that once the bank sells the lease that there is likely to be any surplus and if so that the Wallaces have asked the first defendant to hold it following sale or that she has refused to do so and if so on what grounds.

[20] Thirdly, the Wallaces say that the second defendant is proposing to sell her leasehold interest in a house called Ocean Breeze. The evidence of Mr. Wallace on this matter is:

The plaintiffs have also recently become aware that the First Defendant, acting on behalf of the Second Defendant, is endeavouring to make a sale of the Ocean Breeze property to an Australian purchaser, named Beth Black, and that the purchaser's

Australian lawyer has recently visited Tonga to investigate the title situation to the property.

- [21] This evidence is entirely unsatisfactory because the Court is not provided with any information from which it can assess its probative value such as the source of the information, what step have been taken to verify it and what contact has been made with Ms. Black or her lawyer. In any event while the Wallaces have a caveat lodged against the lease it cannot be transferred or otherwise dealt with (section 137(4) Land Act).

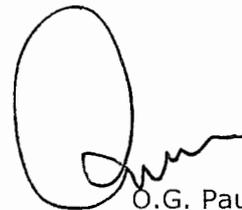
Other matters

- [22] The Wallaces have failed to satisfy me that they have a good arguable case against the defendants or that there is a risk of the defendants dissipating their assets. It is therefore unnecessary for me to consider the overall justice of the case or the further application for an ancillary order.

Result

- [23] The Wallaces application for a Mareva injunction and ancillary orders is dismissed.
- [24] I direct that the Wallaces are to serve this ruling on the defendants at the same time as the writ of summons and statement of claim.

NUKU'ALOFA: 11 December 2017



O.G. Paulsen
LORD CHIEF JUSTICE

