COMMONWEALTH OF THE BAHAMAS **2022/CLE/gen/FP/00133**

IN THE SUPREME COURT

Common Law & Equity Division

BETWEEN

SIGNATURE PLANNING INVESTMENT LTD.

Plaintiff

AND

HARMONY MANAGEMENT LIMITED

Defendant

Before: **The Honourable Madam Justice Ntshonda Tynes (Ag.)**

Appearances: **Mr. Osman Johnson for the Plaintiff**

Mr. Paul Wallace Whitfield for the Defendant

Hearing Date: **7th November, 2022 (Plaintiff's Submissions November, 2022 and 14th December, 2022; Defendant's Submissions 2nd November, 2022)**

DECISION

Tynes, J (Ag.)

1. This Decision concerns an application by the Plaintiff for a mareva injunction pending the final determination of the action. The application is made by way of an Ex Parte Summons filed on the 12th September, 2022 initially supported by a single Affidavit filed on the 14th September, 2022. Notwithstanding the nature of the relief sought and

the ex parte summons filed, the Plaintiff served the Defendant with notice of the application. At the 7th November hearing the Plaintiff requested leave to respond to the Defendant's Affidavit which had been filed and served on the 1st November. The Defendant also sought leave to file further evidence. Leave was granted to both parties. The Defendant subsequently filed a second Affidavit on the 11th November, 2022. In response, two additional Affidavits were filed on the Plaintiff's behalf on the 18th and 25th November, 2022 respectively.

Background

2. The dispute between the parties centres around Kwan Yin Club, a four-storey 144 unit apartment complex centrally located on the The Mall Drive in Freeport, Grand Bahama. The Plaintiff is a company engaged in the business of property management. The Defendant is the Leaseholder of the property known as Kwan Yin and alleged owner of various units in Kwan Yin.

3. From the 6th March, 2015 the Plaintiff provided property management services for Kwan Yin until about the 17th March, 2022 when the President of the Defendant's newly elected Board of Directors terminated the agreement between the parties. The parties are in dispute as to the terms of the engagement of the Plaintiff's services and as to whether any and if so how much outstanding compensation is due to the Defendant.

4. According to the Plaintiff, on the 6th March, 2015, the parties entered into a written Contract whereby the Defendant agreed to engage the Plaintiff to provide various property management services relating to the day-to-day management of Kwan Yin. The purported written Contract expressly provides for various forms of remuneration to

be paid to the Plaintiff including a flat fee of $3,000.00 per month as management fees, 5% of the rents collected on each apartment, 50% of the brokers commission on the sale of an apartment unit authorised by the Defendant on behalf of any owner. Additionally, the contract includes a term whereby the Plaintiff would have a lien against the Defendant to secure the payment of the Plaintiff's compensation for services satisfactorily rendered and any advances the Plaintiff may make out of its own funds as approved by the Defendant.

5. The Defendant, for its part, denies that the terms of the Plaintiff's engagement are contained in the written Contract. The Defendant contends that the purported Contract was not properly executed by the Defendant and that it was not properly entered into on behalf of the Defendant as no resolution was passed by the Defendant's then Board of Directors approving the contract or the terms contained therein, nor were the terms of the written contract raised at a General Meeting of the Defendant. The Defendant contends further that as it is not the owner of Kwan Yin but a Lessee it could not have held itself out as the beneficial owner of Kwan Yin as stated in the written Contract and that it was not entitled to contract with the Plaintiff to provide a lien as insurance against unpaid compensation. The Defendant contends further that its obligation to compensate the Plaintiff was on a quantum meruit basis and that no sums are due the Plaintiff.

6. A week before filing its Ex Parte Summons in support of its application for mareva relief, the Plaintiff had on the 5th September, 2022 commenced this action by way of a specially endorsed Writ of Summons claiming inter alia damages for breach of contract, estimated to exceed $250,000.00, as well as specific performance. A Defence and

Counterclaim was issued on the 21st November and a Reply and Defence to Counterclaim was filed by the Plaintiff on the 1st December, 2022.

The Law

7. The jurisdiction of the Supreme Court of the Bahamas to grant mareva or "freezing" injunctions is derived from s 21(1) of the Supreme Court Act 1996. S 21(1) confers on the courts a discretion to grant injunctive relief "in all cases in which it appears to the court to be just and convenient to do so." The jurisdiction is similar to that of the courts of England.

8. In the 2002 Privy Council decision of ***Walsh and Others v Deloitte & Touche Inc.*** **[2002] 4 LRC 454 at p.**459, Lord Hoffman gave consideration to the jurisdiction of the Supreme Court of The Bahamas to grant mareva injunctions. He pointed out that the language of s 21(1) of the Supreme Court Act 1996 *"is the same as that of s 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925, which formed the basis of the creation of the Mareva jurisdiction in England before that section was replaced and amplified by s 37 of the Supreme Court Act 1981. The Bahamas legislature has not enacted the equivalent of s 37(3), which gives the court express power to grant Mareva relief in respect of assets within the jurisdiction whether or not the defendant is 'domiciled or resident or present' within that jurisdiction. Nevertheless, their Lordships consider that the jurisdiction to grant such relief in respect of assets within or without the jurisdiction and against residents or foreigners was well established in England before the 1981 Act was passed: see Third Chandris Shipping Corporation v Unimarine SA [1979] 2 All ER 972 and Barclay-Johnson v Yuill [1980] 3 All ER 190 (jurisdiction*

against residents) and Derby & Co Ltd v Weldon [1989] 1 All ER 469 (world-wide restraints).”

9. In practice, the court’s discretion to grant mareva relief is exercised in accordance with principles established at common law, the first being that the applicant must have a substantive cause of action. As stated by Lord Diplock in the 1979 House of Lords decision of ***The Siskina*****,** *“A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.”*

10. As further stated by Lord Hoffman in ***Walsh v Deloitte & Touche Inc.*** *“As the proceedings are interlocutory, it is not necessary for the applicant to show that he is likely to succeed in establishing such a cause of action. For the purposes of the threshold requirement it is sufficient if upon the material before the court, he appears to have a good arguable case: see Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH & Co KG [1984] 1 All ER 398. It is then a matter for the court to decide as a matter of discretion, taking into account among other matters the strength or otherwise of the applicant’s case, whether it is ‘just and convenient’ to grant an injunction.”*

11. The courts of England and the Bahamas have established that among the other matters to which the court is to have regard are whether the defendant has assets within the

jurisdiction (since equity will not act in vain) and the requirement that there is a real risk of dissipation of assets which would render the applicant's relief nugatory. Further, in the local decision of ***Sunset Equities Ltd v Sterling Asset Management Ltd et al* - 2020/CLE/gen/OO329** (delivered 4th November, 2020) Winder, J, as he then was, accepted that in addition to the factors cited above, the court is also to take into account, inter alia, whether the balance of convenience favours the applicant being granted the injunction.

12. Of course the above matters are to be considered with a view to achieving the ultimate goal of exercising the discretion where it is just and convenient and in the interests of justice to do so.

Analysis

13. Notwithstanding the dispute as to the validity of the written Contract purportedly entered into by the parties, it is common ground that for approximately seven years the Plaintiff provided various property management services relating to the administrative needs of Kwan Yin. While the Defendant contends that the written Contract is invalid and illegal, it admits to paying the Plaintiff a management fee of $3,00000 per month on a quantum meruit basis. The Plaintiff contends and the Defendant denies that management fees are but one of the forms of remuneration owed the Plaintiff. There is no doubt that the Plaintiff has a cause of action. Whether that cause of action amounts to "a good arguable case" is another issue.

14. The requirement that an applicant for mareva relief has "a good arguable case" is a higher test than the "serious question to be tried" test applied in ordinary interlocutory

injunction applications established by the House of Lord's decision in ***American Cyanamid Co. v Ethicon Ltd.*** **[1975] A.C. 396**.

15. In ***Ninemia Maritime Corporation v Trave Schiffahrgesselschaft m.b.H und Co. K.G. (The Niedersachsen)*** **[1994] 1 All E.R. 398** Mustill J stated that the expression "a good arguable case" means "*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 per cent chance of success"*. According to the 2022 Edition of *Blackstone's Civil Practice*, the test will not be satisfied if the applicant does not have the evidence to substantiate the case relied upon and may not be satisfied if there is an arguable defence. In other words, a plaintiff seeking mareva relief must show that it has a case of a certain strength before the question of any mareva relief can arise. (***Ninemia Maritime Corporation v Trave Schiffahrgesselschaft m.b.H und Co. K.G. (The Niedersachsen))***

16. In the instant case, the evidence needed to establish "a good arguable case" is lacking. For instance, no records or unpaid invoices from the Plaintiff to the Defendant or any similar probative evidence have been adduced to clearly demonstrate the Defendant's failure to pay even the monthly maintenance fee. Nor has the Plaintiff sought to establish the precise periods for which it claims it has gone unpaid or the specific transactions for which it claims commission is due under the alleged written Contract.

17. In my view, this lack of evidence is sufficient to justify the dismissal of the application. Nonetheless, I will consider other relevant matters.

Assets within the jurisdiction

18. In the instant case, the question of whether there are assets within the jurisdiction does not require much discussion. The Defendant is a Bahamian company operating in

Freeport, Bahamas. Although not specifically stated by either party, the evidence, including the Defendant's Articles of Association and the 10th January, 1969 Indenture of Lease between Kwan Yin Club Limited and the Defendant, suggests that the Defendant's business operations relate solely to its role as Lessee of the property known as Kwan Yin. It has at least one bank account in the jurisdiction. While there is dispute as to what the totality of the Defendant's assets are, their value and their extent, particularly whether they include units in Kwan Yin, the question of whether the Defendant has assets in the jurisdiction is not substantially in issue.

Risk of dissipation of Assets

19. Of perhaps greatest importance, is the question of whether there is a risk of dissipation of the Defendant's assets. Plaintiff Counsel placed much emphasis on this consideration, even going so far as to state more than once during the delivery of his oral arguments that the Defendant is likely to remove assets beyond the court's reach and out of the jurisdiction of the court. However despite the intense advocacy of Counsel, the evidence does not bear out the assertions.

20. The only evidence in support of the arguments is found in the 14th September, 2022 affidavit of Ms. Kelsie Ellington wherein she states that the Defendant is "marketing and selling apartment units which I assisted them in the repossession of from former delinquent unit owners during my tenure as property manager [of Kwan Yin]". She continues, "I am advised by my Attorneys and verily believe that the Defendant and/ or its representatives will take steps to either spend the sale proceeds, transfer the proceeds of these sales and/ or otherwise dispose of assets, so as to deny the Plaintiff's claim the relief to which it is entitled."(sic). She states further, "I am at risk of very serious and

irreparable financial harm if my company is not able to recover its damages from the Defendant in this action, and the Defendant is left free to liquidate its assets and transfer the said assets or proceeds of sale beyond the Court's reach."

21. As Defence Counsel has pointed out, the Plaintiff fails to explain what is meant by the assertion that the proceeds will be transferred beyond the Court's reach. The Plaintiff has not adduced any credible evidence whatsoever to support the allegation. There is no evidence of the Defendant having done anything nefarious. The bare assertion that the Defendant will transfer the assets or proceeds of sale beyond the Court's reach is not enough. Moreover, it is quite telling that Ms. Ellington's conclusion as to what the Defendant intends to do is based not on any evidence or her own independent fact-based beliefs or conclusions but on the "advice" of her Attorneys.

22. Given the history of Kwan Yin as described by Ms. Ellington, it is evident that the Plaintiff's concern about executing any future judgment is born of the known financial straits which Kwan Yin has faced for decades. However, being short of money is not tantamount to having an intention to dissipate assets. *(**Midas Merchant Bank plc v Bello [2002]EXCA Civ 1496**.)*

Balance of convenience

23. In the instant case, the balance of convenience is another important matter to which consideration should be given. Ordinarily the question of compensatablility through an undertaking in damages would be the starting point in assessing the balance of convenience (***American Cyanamid).*** However although the Plaintiff has indicated through its Counsel a willingness to give an undertaking, it has not provided any

evidence to suggest that such an undertaking would be of any value. As for the Defendant, no undertaking in damages has been given. Inasmuch as the question of compensatablility has not been sufficiently addressed, I move to the balance of convenience generally.

24. Mr. Gray, the President of the Defendant's Board of Directors, has averred that "the sale of leases of apartment units within [Kwan Yin] and the application of any sale proceeds to legitimate business purposes is part of the normal and ordinary business operations of the Defendant and to restrict the Defendant in its normal business operations would be unreasonable and unjust." He goes on to say that "an interlocutory injunction preventing the sale of the leases to apartment units already contracted to be sold would dramatically impede the defendant in the conduct of its normal business operations…".

25. On the other hand, as indicated above, while Ms. Ellington has averred that she herself is personally at risk of very serious and irreparable financial harm if the Plaintiff is not able to recover its damages from the Defendant, the bare assertion is made with no explanation as to why this is so. Furthermore, Ms. Ellington does not say that the Plaintiff is at similar risk and if so for what reason. The court is left to speculate.

26. Kwan Yin's long history of financial difficulty is particularly relevant. It has been plagued for years with high utility bills and costly maintenance expenses associated with the need for ongoing structural repairs including repairs to non-functioning elevators, leaking roofs and a leaking swimming pool among other things. I accept Mr. Gray's contention that any impediment to the acquisition and use of the Defendant's legitimately obtained funds would be detrimental to Kwan Yin and the Defendant's ability to carry out its ordinary business. I therefore consider that the balance of

convenience favours maintaining the status quo and not granting a freezing injunction which would severely damage if not entirely cripple the day-to-day operations of Kwan Yin.

Conclusion

27. I conclude by reminding the parties that mareva injunctions are draconian measures. The conditions which an applicant must fulfil in order to obtain mareva relief are justifiably burdensome. In the instant case, I do not find that the evidence adduced by the Plaintiff in support of its application is adequate or sufficient to satisfy the conditions which would justify the imposition of a mareva injunction. In particular, I am not satisfied that the Plaintiff has shown that the Defendant is engaged in the deliberate dissipation of its assets so as to deprive the Plaintiff of the fruits of a potential judgment should the Plaintiff successfully obtain judgment.

28. In my view, this is not an appropriate case for the grant of mareva relief. Nor do I consider that it would be just and convenient to grant the relief sought. The Plaintiff's application for a mareva injunction is therefore refused. The costs of the application are the Defendant's to be taxed if not agreed.

Dated this 9th day of January, A.D. 2023

Ntshonda Tynes
Justice (Ag.)