

**IN THE HIGH COURT OF THE COOK ISLANDS**  
**HELD AT RAROTONGA**  
**(CIVIL DIVISION)**

**PLAINT NO. 208/94**

**BETWEEN 515 SOUTH ORANGE GROVE**  
**OWNERS ASSOCIATION**, a California  
Non-Profit Mutual Benefit Corporation  
**First Plaintiff**

**JAMES E. LUDLAM** and **JANE H.**  
**LUDLAM**  
**Second Plaintiff**

**DEAN SCHNEIDER** as Trustee of the  
Schneider Trust  
**Third Plaintiff**

**GEORGE G. LANCASTER** and  
**FRANCES R. LANCASTER** as Trustees  
of the GG and FF Lancaster Trust  
**Fourth Plaintiff**

**FRANK J. NOBLE** and **LOIS D.**  
**NOBLE**  
**Fifth Plaintiff**

**JANE BURNHAM** as Trustee of the Jane  
D. Burnham Trust  
**Sixth Plaintiff**

**GERALD J. LYNCH** as Trustee of the  
Gerald J. and M. Romaine Lynch Family  
Trust  
**Seventh Plaintiff**

**RAY JUDSON** and **MARY L. JUDSON**  
as Trustees of the Judson Family Trust  
**Eighth Plaintiff**

**CONSTANCE J. CORNET**  
**Ninth Plaintiff**

**ROBERTA S. MACDONALD**  
**Tenth Plaintiff**

**AND** **ORANGE GROVE PARTNERS** a  
California Corporation  
**First Defendant**

**VICTOR ILLIG**

**Second Defendant**

**EVANGELINE ILLIG**

**Third Defendant**

**25/25 HOLDINGS, LLC** a limited liability company a corporation established in the State of Nevada

**Fourth Defendant**

**25/25 1993 INVESTMENT TRUST - VICTOR J. ILLIG** an international trust registered pursuant to the International Trusts Act 1984

**Fifth Defendant**

**SOUTHPAC TRUST INTERNATIONAL INC.** an international company incorporated under the International Companies Act 1981-82 as trustee of the 25/25 1993 Investment Trust - Victor J. Illig

**Sixth Defendant**

Mr Arnold for the Fifth and Sixth Defendants  
Mr Manarangi for all the Plaintiffs

Hearing : By Counsels' Submissions  
Date of Judgment : 10 March 1995

### **JUDGMENT OF DILLON J.**

On 24 December 1994 this Court issued a Mareva Injunction ex parte in favour of the ten Plaintiffs.

The Fifth and Sixth Defendants now apply for an Order to set aside that Injunction or in the alternative that these proceedings be stayed pending such time as security for costs has been paid by the Plaintiffs.

### **BACKGROUND**

The background to these proceedings may be summarised as follows :

1. The Second Plaintiff through to and inclusive of the Tenth Plaintiff are members of the 515 South Orange Grove Owners Association, the First Plaintiff. Between 30 December 1988 and 29 March 1991 the Plaintiffs purchased individual condominiums from the First Defendant, Orange Grove Partners, which is a California Corporation and the owner and developer of the condominium project known as 515 South Orange Grove.

Even before, but also subsequent to, the purchase of the various condominiums by the individual plaintiffs serious allegations of negligence arose concerning defective workmanship and negligent construction of the buildings. These allegations as to serious defects arose in late 1988 and early 1989.

2. The Plaintiffs filed proceedings against the First, Second and Third Defendants in the Superior Court of Los Angeles - Case No. GC 007021 on 16 April 1992.

Judgment in favour of all the Plaintiffs on a general jury verdict with a special finding was delivered on 13 April 1994. The Judgment made the following awards :

First Plaintiff	US \$5,755,450.40
Second Plaintiff	US \$77,200.00
Third Plaintiff	US \$86,850.00
Fourth Plaintiff	US \$56,000.00
Fifth Plaintiff	US \$56,000.00
Sixth Plaintiff	US \$56,000.00
Seventh Plaintiff	US \$68,600.00
Eighth Plaintiff	US \$56,000.00
Ninth Plaintiff	US \$68,600.00
Tenth Plaintiff	US \$68,600.00

The Plaintiffs acknowledge that after deducting all payments made by the First, Second and/or Third Defendants, the balance still due and owing in respect of all those Judgments is US \$5,703,379.16 together with interest from the date of Judgment at the daily rate of US \$1,383.79.

3. The First, Second and Third Defendants have appealed that Judgment referred to above.

They have avoided all efforts to trace them and the Second and Third Defendants are believed to be now living in Mexico.

### **THE PLEADINGS**

The first Statement of Claim filed in this Court alleged that :

"5. **THE** Plaintiffs have vigorously attempted to enforce their judgment for full satisfaction thereof against the First, Second and the Third Defendants but have been unable to do so for reasons that the First and/or Second and/or Third Defendants did embark upon a scheme to fraudulently dispose of their assets."

Details of that alleged fraudulent scheme were then detailed in Clauses 6, 7 and 8 of the first Statement of Claim. As a result the Plaintiffs allege that the First, Second and Third Defendants with intent to defraud divested themselves of those nominated properties to the intent that the Judgment in favour of the Plaintiffs cannot now be satisfied.

The first Statement of Claim alleged that the Fifth Defendant was established in December 1993; that the Fourth Defendant was incorporated on 14 January 1994; and that the property transfers referred to in Clauses 7 and 8 of the first Statement of Claim were arranged between 14 January 1994 and 27 January 1994.

The Plaintiffs allege that the cause of action relied upon are the dispositions alleged to be fraudulent and made to the Fifth and Sixth Defendants in January 1994.

Based on that information the Mareva Injunction was issued on 24 December 1994.

### **THE AMENDED PLEADINGS**

On 15 January 1995 the Plaintiffs filed a second Statement of Claim. The question immediately arises - if it is established that the original pleadings cannot support the injunction that was granted, can the Plaintiffs now rely on the second Statement of Claim which pleads a cause of action substantially different to that alleged in the original Statement of Claim upon which the Mareva Injunction was granted?

It will be convenient to defer consideration of that question till later in this Judgment when the

comprehensive and detailed submissions prepared by both Counsel have been considered.

By Memorandum dated 7 February 1995 both Counsel agreed that this application to set aside the injunction be dealt with on the written submissions. These have all now been filed and I shall proceed to consider them.

Both Counsel agree that the issues for this Court's consideration are limited to the interpretation of Sections 13B and 13K of the International Trust Act 1984.

I believe it would be useful to consider first Section 13K since this sub-section deals with the procedure applicable in such proceedings :

"13K - Commencement of Proceedings - (1) No action or proceedings whether pursuant to this Act or at common law or in equity to -

- (a) set aside the settlement of an international trust; or
- (b) set aside any disposition to any international trust,

shall be commenced, unless such action or proceedings is commenced

- (c) in the High Court of the Cook Islands; and
- (d) before the expiration of 2 years from the date of -

- (i) the settlement of the international trust that is sought to be set aside; or
- (ii) the disposition to the international trust that is sought to be set aside,

as the case may be."

#### Comment

Counsel are agreed that the Fifth Defendant was established and settled in December 1993, and that the dispositions to the Fifth Defendant were effected in January and April 1994. Mr Goldman's affidavit has deposed to those issues.

In any case the proceedings in this Court filed on 22 December 1994 complied with those time limitations.

"(3) No action or proceeding to which subsections (1) or (2) of this section or section 13B shall apply, whether substantive or interlocutory in nature, shall be determined and no order shall be made, or granted by the High Court (including any injunction

that shall have the effect of preventing the exercise of, or restoring to a person any rights, duties, obligations or powers or preserving, granting custody of, detaining or inspecting any property) unless, the applicant shall first satisfy the High Court by affidavit, filed therein, that :

- (a) The action or proceedings has been commenced in accordance with subsections (1) or (2) of this section; and
  - (b) Where the action or proceeding shall allege fraud or be founded upon some other action or proceedings alleging fraud, the determination or order sought would not be contrary to the provisions of section 13B;
- (4) Every affidavit required to be filed pursuant to subsection (2) shall be made by the person on whose behalf the action or proceedings is brought or, in the case of a body corporate, an officer thereof, and every such person or officer as the case may be, shall depose as to :
- (a) the circumstances of the cause of action in respect of which the action or proceedings are brought;
  - (b) the date upon which the cause of action shall have accrued;
  - (c) the date upon which the property, in respect of which the action or proceedings is brought, was settled on or disposed to the international trust;
  - (d) whether an action or proceedings have been commenced in respect of the cause of action and if so, the date upon which that action or those proceedings were commenced."

#### Comment

Mr Joel A. Goldman, a member of the State Bar of California and a co-Counsel of record for all the Plaintiffs at the original trial in Los Angeles, filed an affidavit in support of the original application for the Mareva Injunction. That was the only affidavit filed.

The questions now arise as to whether that affidavit satisfactorily complies with the requirements of Section 13K (3) and (4). Certainly there is no reference to due compliance of subsections (1) or (2) as required by subsection (3) of Section 13K. Further there is no reference to certifying that the proceedings are not contrary to the provisions of Section 13B.

Turning to subclause (4), the requirement here is that the affidavit is to be made by certain specified persons. Mr Goldman, certainly from the affidavit, does not appear to be the appropriate officer to have made the affidavit.

However of more importance subclause (4) requires the deponent to depose to four specific issues. Mr Goldman has deposed to the issues required by (c), i.e. the date when the property was disposed to the international trust.

As to compliance with the matters referred to in (a), (b) and (d) Mr Goldman has deposed to all the details associated with the proceedings in the Superior Court at Los Angeles. He has explained in detail his part in the Court process; attached a copy of the Court Judgment; detailed the causes of action on which the proceedings were based; and explained at length the efforts made to trace the First, Second and Third Defendants in order to enforce the substantial judgment that had been awarded.

Mr Arnold, in his submissions, says the Plaintiffs have not complied with Section 13K (4). I believe they have. Mr Goldman's affidavit sets out very clearly the circumstances of the cause of action; the date upon which it accrued; and whether proceedings have been commenced. All those matters refer to the causes of action upon which the successful judgment was based. Mr Goldman's affidavit upon which the Plaintiffs must rely for compliance with the requirements of Section 13K (4) clearly establishes, in my opinion, that the causes of action on which these pleadings are brought are those upon which the judgment in Los Angeles succeeded. Those causes of action arose in 1988 and 1989.

I turn now to consider Section 13 B.

**"13B Fraud - (1)** Where it is proven beyond reasonable doubt by a creditor that an international trust settled or established or property disposed to an international trust :

- (a) was so settled, established or disposed by or on behalf of the settlor with principal intent to defraud that creditor of the settlor; and
- (b) did at the time such settlement, establishment or disposition took place render the settlor, insolvent or without property by which that creditor's claim (if successful) could have been satisfied,

then such settlement, establishment or disposition shall not be void or voidable and the international trust shall be liable to satisfy the creditor's claim out of the property which, but for the settlement establishment or disposition, would have been available to satisfy the creditor's claim and such liability shall only be to the extent of the interest that the settlor had in the property prior to settlement, establishment or disposition and any accumulation to the property (if any) subsequent thereto."

### Comment

The affidavit of Mr Goldman filed in support of the application for the Mareva Injunction alleges a disposition to an International Trust by the First, Second and Third Defendants; with a principal intention to defraud the Plaintiffs; and which has rendered the First, Second and Third Defendant insolvent.

Based on that affidavit of Mr Goldman alone and without further consideration of the additional requirements the Court must take into consideration in dealing with these cases, it could be said that the Plaintiffs have satisfied the requirements of Section 13B (1).

"(8) For the purposes of this section :

- (a) The date of the cause of action accruing shall be, the date of that act or omission which shall be relied upon to either partly or wholly establish the cause of action, and if there is more than one act or the omission shall be a continuing one, the date of the first act or the date that the omission shall have first occurred, as the case may be, shall be the date that the cause of action shall have accrued.
  - (b) In the case of an action upon a judgment, the date of the cause of action accruing shall be the date of that act or omission or where there is more than one act or the omission shall be a continuing one, the date of the first act or the date that the omission shall have first occurred, as the case may be, which gave rise to the judgment itself.
- (9) The provisions of this section shall apply to all proceedings by every creditor alleging fraud against a settlor or an international trust, or against any person who shall settle property upon, or dispose of property to, or establish, an international trust on behalf of that settlor, to the exclusion of any other remedy, principle or rule of law whether provided by statute or founded in equity or common law."

### Comment

The Plaintiffs in these proceedings have brought "... an action upon a Judgment ..."; the cause of action accruing is that date in 1988 or 1989 upon which that Judgment was founded. The Statement of Claim filed clearly establishes that it is the Judgment that is relied upon. The prayer for relief confirms this fact by reference to the award in that Judgment. Most significant however is the affidavit of Mr Goldman in support.

I have no difficulty in finding that the cause of action in these proceedings was either 1988 or



1989 at the latest. It is not necessary in the present circumstances to be more exact.

"(3) An international trust settled or established and a disposition to such trust shall not be fraudulent as against a creditor of a settlor :

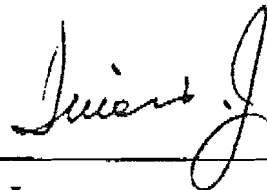
- (a) if settled, established or the disposition takes place after the expiration of 2 years from the date that creditor's cause of action accrued; or
- (b) where settled, established or the disposition takes place before the expiration of 2 years from the date that the creditor's cause of action accrued, that creditor fails to commence such action before the expiration of 1 year from the date such settlement establishment or disposition took place."

The Plaintiffs acknowledge that the dispositions to the trust took place in January 1994. That is some five years after the causes of action arose upon which the successful judgment was obtained.

These proceedings simply do not comply with the time constraints specified by Section 13B (3). This failure to comply with that requirement is in my opinion fatal. For that reason it is not necessary for me to consider the lengthy arguments presented by both Counsel on constructive and resulting trusts upon which the second or amended Statement of Claim was based.

The Mareva Injunction issued on 24 December 1994 is therefore cancelled and discharged.

The question of costs is reserved.



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Dillon J.