IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS NIGERIA
ON FRIDAY THE 24TH DAY OF MARCH, 2017
BEFORE THE HONOURABLE JUSTICE
M.B. IDRIS
JUDGE

SUIT NO : FHC/L/CS/88/17

BETWEEN:

UNITY BANK PLC ..... PLAINTIFF/RESPONDENT

AND

1. **DEAN SHANGER PROJECTS LIMITED**
2. **ALHAJI UMARU MUTALLAB**
3. **MOHAMMED ABUBAKAR AUDU**
4. **SHEU ADAMU DIKKO**
5. **FEDERAL MINISTRY OF FINANCE**
6. **ATTORNEY GENERAL OF THE FEDERATION**
7. **FEDERAL CAPITAL DEVELOPMENT AUTHORITY (FCDA)**
8. **FBN TRUSTEES NIGERIA LTD**

DEFENDANTS/ APPLICANTS

RULING

This is a Motion on Notice dated 8th March, 2017 in these terms:-

"MOTION ON NOTICE
BROUGHT PURSUANT TO SECTION 6(6) AND 36 OF THE 1999 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA AS AMENDED, ORDER 26 RULE 11 OF THE FEDERAL HIGH (CIVIL PROCEDURE RULES) 2009 AND UNDER THE INHERENT JURISDICTION OF THIS HONOURABLE COURT

TAKE NOTICE that the Honourable Court shall be moved on the ..... day of ..... 2017, at the hour of 9 0' clock in the forenoon or so soon thereafter as Counsel for the Defendants/Applicants may be heard on behalf of the Applicant praying for:-

(1) AN ORDER of this Honourable Court setting aside and/or vacating and/or discharging the order of Mareva injunction granted by His Lordship Hon. Justice M.B. Idris on 2nd February, 2017 against the 1st, 2nd, 3rd and 4th Defendants/Applicants.

AND FOR other Orders as this Honourable Court may deem fit to make in the circumstance.

GROUNDS UPON WHICH THE APPLICATION IS BROUGHT:

(a) That the Plaintiff misrepresented facts leading to the grant of the mareva injunction.

(b) That the Plaintiff/Respondent did not disclose material facts which would have led to the refusal of the application for mareva injunction.

(c) That the Plaintiff/Respondent did not exhaust all administrative remedies open to *it* before applying for mareva injunction against the assets of the 1st - 4th Defendants/Applicants.

(d) That the order for mareva injunction was made exparte and should not have been made pending the hearing and determination of the substantive suit without hearing from the 1st - 4th Defendants/Applicants

(e) That the nature of the order of mareva injunction granted by this Honourable Court to last till the hearing and determination of the substantive suit has denied the 1st–4th Defendants/Applicants their right to fair hearing as constitutionally entrenched.

(f) That given the FGN sovereign guarantee and escrow account coupled with the fact that the 1st - 4th Defendants/Applicants are Nigerians and are resident in Nigeria, that there is no imminent risk or danger of the 1st- 4th Defendants/Applicants transferring or dissipating their assets outside Nigeria to warrant granting an order of Mareva Injunction."

The application was supported by an affidavit, several exhibits and a written address.

The Respondent filed a Counter affidavit, some exhibits and a written address in opposition.

At the hearing, Learned Counsel for the parties relied on the processes filed and adopted their respective written addresses.

In the Applicants' written address, the issue formulated for the determination of the Court was whether the Applicants had made out a case to warrant the Court to set aside the order made by the Honourable Court on 2nd February, 2017.

It was argued that the Respondent misrepresented facts leading to the grant of the mareva injunction, and

that the Respondent refused to disclose material facts including the fact that there are sufficient assets to settle any judgment debt, the fact that there was no real or imminent risk that the Applicants would remove their assets from the jurisdiction of this Court or dissipate same, and the fact that the Applicants were not the type of persons to avoid their liabilities.

It was further argued that the order of injunction was made ex-parte and should not have been made pending the hearing and determination of the substantive suit without hearing from the Applicants, and that the nature of the mareva injunction last till the hearing and determination of the substantive suit the Applicants were denied the right to fair hearing.

It was contended that given the FGN Sovereign guarantee and escrow account coupled with the fact that the applicants were Nigerians and resident in Nigeria, there was no imminent risk or danger of the Applicants transferring or dissipating their assets outside Nigeria to warrant granting an order of mareva injunction.

The Court was urged to grant the application. These cases were relied on:-

(1) **R.BENKAY NIG LTD VS. CADBURY NIG PLC (2006) 6 NWLR (PT. 976) 317**

(2) **GALLAHER LTD VS. B.A.T NIG LTD (2015) 13 NWLR (PT. 1476) 325**

(3) **SOTUMINU VS. OCEAN STEAMSHIP NIG LTD (1992) 5 NWLR (PT. 239) 1**

(4) **ODUTOLA VS. LAWAL (2002) 1 NWLR (PT. 749) 633.**

In the Respondent's written address, it was argued that where a case of debt is shown against a Respondent with assets within jurisdiction, and the assets are likely to be disposed of, the Courts can grant an order of mareva injunction ex parte. That the facts alledgedly withheld were not material to the grant or otherwise of the mareva injunction. That the alleged facts are neither relevant nor material in this case and that same would not have affected the discretion of the Court in making the mareva order, and that for a fact to be relevant or material the suppressed facts must be relevant to a grant of the application and must be one which presence would have moved the Court to refuse the application.

It was argued that the recovery of the Applicants' indebtedness to the Respondent via FGN Sovereign Guarantee (EXLD) and empty escrow account was neither contemplated in exhibits B,C, nor UT1 and UT3. That mareva injunctions are anticipatory in nature and made against assets within jurisdiction, and against a party either within or outside the Country.

The Court was urged to dismiss the application. These cases were relied on:-

(1) AZUH VS. UBN (2014) 11 NWLR (PT. 1419) 586

(2) KOTOYE VS. CBN (1989) 1 NWLR (PT. 98) 419

(3) IFC VS. DSNL OFFSHORE LTD (2008) 7 NWLR (PT. 1087) 592.

(4) SOTUMINU VS. OCEAN STEAMSHIP NIG LTD (SUPRA)

(5) UTB LTD VS. DOLMETSCH PHARM NIG LTD (2007) NWLR (PT. 1061) 520.

(6) AMCON VS. GENESISCOPR LTD & ORS (2000) LPELR-12050 (CA)

(7) KUFEJI VS. KOGBE (1961) ALL NLR 122

(8) R. BENKAY NIG LTD VS. CADBURY NIG PLC (2006) 6 NWLR (PT. 796) 338

(9) TRADE BANK PLC VS. BARILUX NIG LTD (2000) 13 NWLR (PT. 685) 492

(10) DANGABAR VS. FRN (2012) LPELR-19732 (CA)

(11) AKINGBOLA VS. EFCC (2012) 9 NWLR (PT. 1306) 475.

I have read the written addresses filed and I have considered the submissions made in writing and orally in open Court. Should this application be granted in the light of the facts and the law?

What is the law?

The word "mareva" came into legal circles in 1975, following the decision of English Court of Appeal in **MAREVA COMPANIA NAVIERA SA. VS. INTERNATIONAL BULKCARRIERS S.A. (1975) 2 LLR 509**. The word "mareva", therefore, was lifted from the first name of the appellant company in the case. The injunction granted by the English Court of Appeal in this case was unique, because it was not one of the forms of injunction known then to the common and statutory law. The injunction granted by that Court was to the following effect:-

"In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him even before he has established his right by getting judgment for it. If it appears that the debt is due and owing - and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment - the Court has jurisdiction in a proper case to grant an interlocutory Judgment so as to prevent him disposing of those assets. It seems to me that this is a proper case for the exercise of this jurisdiction. There is money in a bank in London which stands in the name of these time Charters. The time Charters have control of it, they may at anytime disposed of it or remove it out of this country. If they do so, the ship owners may never get the charter hire, the ship is on way to India, It will complete the voyage and the cargo discharged. And the ship owner may not get their charter hire at all, In face of this danger 1 think this court ought to grant an injunction to restrain the defendants from disposing of these monies now in the bank in

London until the trial or judgment in this action.

Nigerian courts have, since the promulgation of this rule in England, been applying same willy-nilly. The Supreme Court, for instance, considered this injunction in the case of **SOTUMINU VS. OCEAN STEAMSHIP (NIG) LTD (1992) 5 NWLR (PT. 239) 1 S.C**. Commenting on the origin and nature of this injunction, Nnaemeka-Agu, J.S.C., on page 25, held, regarding the *Mareva case supra* as follows:

> *Such injunctions are novel and came on the firmament of injunctions only in* 1975 *in the case relied upon. The granting of such injunction was a fundamental departure from the erstwhile general rule that a plaintiff would take his queue with other creditors of the defendant and if he obtained a judgment against the defendant he would simply, subject to the rules on priorities of debts, execute it on the defendant's available assets or on the person of the defendant. In* 1975 *the Court of Appeal (of England) in the judgment cited above introduced a more ubiquitous feature into the practice of injunctions. This introduced a limited exception to*

the general rule by granting ex parte injunctions restraining defendants from disposing of or dealing with any other assets within the jurisdiction of the court or removing or disposing out of the jurisdiction monies standing to the credit of the defendant even before a judgment against him, See Nippon Yusen Kaisha vs. Karageoris (1975)1 *WLR 1093, But as the case itself says, such will be granted only if it appears that the debt is due and owing."*

His lordship, Omo, J.S.C., on the other hand, held on page 29 at a mareva injunction is ordered before the action between the parties is heard and determined, because of the urgency usually attached to this type of application.

The Court of Appeal, in ***E.S & C.S. Ltd. vs. N.M. B. Ltd (2005) 7 NWLR (PT. 924) 215 C.A*** also held as follows:

This is a novel injunction that came on the firmament of injunctions only in 1975. It is an ex parte injunction that restrains the

defendant from disposing of or dealing with any other assets within jurisdiction of the court or removing/disposing out of the jurisdiction monies standing to the credit of the defendant even before a judgment is entered against him. Such injunction would, however, only be granted if it appears that the debt is due and owing

Before it could be granted, the Applicant must fulfill all of the following conditions, which that Court lifted from SOTUMINU's case, Supra namely:-

(i) *That he has a justiciable cause of action against the Defendant;*

(ii) *That there is a real and imminent risk of the defendant removing his assets from Jurisdiction. thereby rendering nugatory any judgment which the plaintiff might obtain;*

(iii) *That he has made a full disclosure of all material facts relating to the*

application;

(iv) That he has given full particulars of the assets of the defendant within jurisdiction;

(v) That the balance of convenience is on his said and

(vi) That he is prepared to give an undertaking as to damages.

There must be a threatened invasion of the plaintiff's legal rights. Mere expression of speculative fear of dissipation of assets is not enough to justify granting of the order. Per Ogunbiyi, J.C.A., lead judgment, on pages 258-259:

From all deductions the plaintiff at the lower court set up a claim of debt owed from the defendant, the exact figure [of] which was vehemently disputed and there was also no evidence adduced to support the defendants refusal to pay the alleged sum, In the same authority of Sotuminu's case supra, at p. 27 par. H his Lordship Nnaemeka-Agu JSC on the

question of serious risk of disposal or dissipation of assets emphasized among others the necessity of the proof:-

.....that there is an imminent danger of very substantial damage or further damages and show extreme probability of irreparable injury to right or property of the Applicant .... Mere expression of unsubstantiated fear is not enough"

It follows that the respondent's argument of the need to show only that the defendant might deal with the assets to defeat the ends of justice proposition cannot find proper placement within the concept of Sotuminu's case supra,

- *Not all non-disclosures would automatically lead to discharge of a mareva order: the fact not disclosed must be material "to the issues on which the Learned trial Judge ought to have been informed at the time of the application. "per Ogunbiyi, JCA, lead judgment on page 259*

- *Because of its very draconian and repressive nature, a mareva order, being an equitable relief, requires the applicant to come with clean hands. Per Ogunbiyi, J.C.A on pages 259-260'*

In other words, the more draconian the relief sought the greater the obligation of cleanliness. Lord Denning, MR in Bank Mellat v. Nikpour (1985) FRS 87 at 89 for instance held and said:-

> *"I would like to repeat what had been said on many occasions when an ex parte application is made for a mareva injunction, it is of first importance that the plaintiff should make full and frank disclosure of all material facts. He ought to state the nature of the case and his cause of action. Equally in fairness to the Defendant , the Plaintiff ought to disclose, as far as he is able any defence which the defendant has indicated in correspondence or elsewhere. It is only if such information is fairly before the*

court that a mareva injunction can be properly granted. ... The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know..."

It is trite therefore that the duty to make full and frank disclosure also requires the plaintiff to make sufficient enquiries before filing the application for a mareva injunction.

The principle underlying the grant of a mareva injunction is to prevent the plaintiff from being cheated out of the proceeds of an action, should it be successful, by a defendant transferring his assets within jurisdiction; hence the need to arrest those assets. ***PCW (UNDERWRITING AGENCIES) LTD VS. DIXON (1983) 2 ALL ER***

Although a mareva order is for all intents and purposes a special order, it should be made in very exceptional circumstances and should not be applied in utter disregard to due consideration for laid down principles of fair hearing, justice

and fairness. That was why stiff conditions were laid down in *Sotuminu's case.*

In the earlier case of **EFE FINANCE HOLDINGS LTD. VS. OSAGLE, OKEKE, OTEGBOLA & CO. (2000) 5 NWLR (PT. 658) 536 CA**, the Court of Appeal had held in respect to this type of injunction as follows:

- A mareva order is in reality a security for judgment. Its purpose is not only merely to preserve the res as in ordinary injunctions but also to secure assets for execution of anticipated judgment. Thus, it can be likened to the procedure for the arrest of a ship and the related concept of the sister ship action.

- A mareva order operates in rem and takes effect from the moment it is pronounced on every asset of the defendant in relation to which it is granted.

- A mareva injunction is aimed at restraining the defendant (anticipated judgment debtor) from removing or dissipating any of his assets within jurisdiction, which may be utilised to satisfy the judgment debt should the judgment go against him.

- Mareva injunction is an established feature of English Law, which should be granted where it appears likely that the plaintiff would recover judgment against the defendant for a certain or approximate sum and there is reason to believe that the defendant has assets within the jurisdiction to meet the judgment wholly or in part, but might deal with them so that they would not be available or traceable when judgment is eventually given against him.

- A Mareva order extends to any asset of the defendant within the jurisdiction of the Court. Thus, any attachable asset of the Defendant can be restrained by a mareva order. Such asset need not be the subject matter of the dispute in court. The rationale for this is that judgment debts are ordinarily satisfied by attaching all assets of the defendant within jurisdiction, whether or not they are part of the litigation process.

- A mareva order also has the effect of restraining the defendant from disposing out of the jurisdiction monies standing to the credit of the defendant even before a judgment is given against him. Reliance on Sotuminu's case at 26.

The Court of Appeal again, in this case, restated the six conditions laid down on *Sotuminu's case;* and further

held that the Lagos High Court, being vested with power generally to grant interlocutory injunctions, has power to grant mareva injunctions. Finally, although the Court of Appeal agreed that grant of this injunction is discretionary, which power must be exercised judicially and judiciously, it held on pages 548-549 that the 3rd Respondent's application for mareva injunction was rightly granted, the 3rd Respondent having fulfilled the conditions laid down in *Sotuminu's case.*

It can be gleaned from the decisions above, therefore, that although unique in nature, a mareva injunction is a form of an interlocutory injunction, which can be granted either on notice or ex parte, depending on the circumstances of any given case. Indeed, the Court of Appeal, in **I.F.C. VS. DSNL OFFSHORE LTD (2008) 7 NWLR (PT. 1087) 592 AT 603** held that it "should be applied for ex-parte." This means before it could be granted, all the established conditions for the grant of either an interlocutory injunction on notice or one upon an ex parte application, as the case might be, must be fulfilled. Thus, in Sotuminu's case supra, His Lordship, Nnaemeka-Agu, J.S.C., on page 27, dealt with the issue of undertaking to pay damages as follows:-

Also the appellant did not offer or give any undertaking as to damages, In view of the high risk and hardship that are usually involved in an order of Mareva injunction. Such an undertaking is the price and sine qua non to the grant of it

His lordship further held, in respect to the issue of balance of convenience, on pages 27-28, as follows:

But above all, the greatest weakness to the appellant's case was the balance of convenience. Now, if the appellant had succeeded in showing that he had a cause of action against the respondents he would have been obliged to show inter alia, like in an interlocutory injunction, that the balance of convenience was in his favour before he would be entitled to the grant of a Mareva injunction.... In a case like this where the question is not whether any party could be adequately compensate for its loss for the order being made or refused, it will, of necessity, involve a consideration of a wide

range of matters depending on the facts of the particular case, which go to make up the general balance of convenience. In this case, on applicant's side of the balance is his mere expression of fear that the 3rd Respondent, a German, may take the funds of the 1st Respondent out of the Country..... He has not deposed to any steps being taken by the 3rd Respondent to take the funds out of the country. The danger is merely feared. It is a quia timet ground for the injunction... He must prove that there is an imminent danger of very substantial damage or further damage and show extreme probability of irreparable injury to the right or property of the applicant.... The applicant in the instant case never even attempted to establish any imminent danger of the funds being siphoned out of the country. Mere expression of unsubstantiated fear is not enough.

An Applicant for this type of injunction must, therefore, supply to the Court all the necessary material facts, to enable the Court exercise its discretion in his

favour. If the order sought is interim - based on an ex parte application - suppression of material facts will, as shown in **E. S. & C.S. LTD. VS. N.M.B. LTD,** *supra* make the Court to discharge the interim order, upon application by any affected party.

Instructively the Supreme Court in **7UP BOTTLING CO. LTD VS. ABIOLA & SONS LTD (1995) 3 NWLR (PT. 383) 257** has held that an ex parte order is not per force unconstitutional and does not violate the ought to fair hearing.

Let me add that the contemporary view is that mareva order is regarded as security for judgment, its purpose being mainly to secure assets of the Defendant for the execution of the anticipated judgment. It is no longer a prerequisite that the assets that are the object of a mareva injunction are at risk of being removed from the jurisdiction. It suffices that the assets are being dissipated or that the value of the assets are being diminished or that the assets are at risk of being dissipated or that the value of the assets are at risk of being diminished within the jurisdiction. See **EFE FINANCE VS. OSAGIE (2000) 5 NWLR (PT. 658) 539**.

Did the Respondent satisfy the conditions for the grant of mareva injunction at the time it was granted? Yes, it did. See paragraphs 4- 56 of the affidavit in support of the Motion Ex-parte dated 17th January 2017. See also paragraphs 4-14 of the affidavit of urgency dated 24th January, 2017. The Court was in my respectful view, right in granting the order.

The facts allegedly attached by the Respondent herein is not in my view material for the grant or otherwise of an order of mareva injunction. The fact that the Applicants are not foreigners is not a material fact, or the fact that they are highly placed individuals within the country. What mattered at the point of the grant of the order of mareva injunction were, among other factors that the Applicants herein are indebted to the Respondent in the sum of N5,416,192,722.81 as at October 2016, and this fact was admitted by the Applicants herein. See paragraphs 26 (n) 26(s), 26(t) and 26(v) of the affidavit in support of this application and exhibit H attached thereto. What also mattered to the Court were the deposition in paragraphs 50-56 of the affidavit in support of the motion ex-parte for mareva injunction, and paragraphs 6-12 of the affidavit of Urgency on the imminent risk of the Applicants herein dissipating their assets within jurisdiction.

It is in the totality of the above, and other facts contained in the aforementioned affidavits that the order of mareva injunction was granted.

I must mention that the existence of the Sovereign Guarantee was mentioned in paragraph 9, 10, 11 and 12 of the affidavit in support of the motion for the grant of mareva injunction. See also paragraphs 21(a)-(c) and 36- 40 of the said affidavit.

It is important to state that a mareva injunction could be granted ex-parte pending the determination of the substantive suit. It should be mentioned that this is an action commenced by Originating Summons and it is therefore expected that it is not hostile and should be heard and determined within a short period of time. A preservatory order can be made to operate until the determination for the civil rights and obligations of the parties. See generally **IFC VS. DSNL OFFSHORE LTD (2008) 7 NWLR (PT. 1087) 592; DUROJAIYE VS. CONTINENTAL FEEDERS (NIG) LTD (2001) 10 NWLR (PT. 722) 657; ESAI DANGABAR VS. FRN (2012) LPELR-19732 (CA); AKINGBOLA VS. CHAIRMAN EFCC (2012) 9 NWLR (PT. 1306) 475; NWUDE VS.**

CHAIRMAN EFCC (2005) ALL FWLR (PT. 276) 740.

In arriving at the above conclusion, I have avoided dealing with any issue that might arise while hearing the substantive application.

It must be understood that it is not the intention of the Court to cripple the Applicants herein and their families financially. The order of Court can always be varried upon proper application to allow the Applicants withdraw funds to enable them meet urgent and necessary financial needs. This order can only be made by the Court upon an application by the Applicants herein.

Overall, I hold that this application lacks merit and it is hereby dismissed. Cost shall be in the cause.

M.B. IDRIS
JUDGE
24/3/17