

Judgment 38/2003

**R. Durtnell & Sons Ltd
v Kaduna Ltd and Bank of
Bermuda (Guernsey) Ltd
Royal Court
(Civil Action File 716)
7th May, 2003**

Freezing order – subsequently lifted by consent – respondent's application for full indemnity costs – whether the original order should have been granted – principles to be applied.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 7th day of May, 2003 before Alan Robin Winston Hancox, Esquire, E.G.H., C.B.E.
Lieutenant Bailiff; sitting alone

R. DURTNELL & SONS LIMITED

Original Applicant/
Respondent

and

KADUNA LIMITED

Original Respondent/
Applicant

and

BANK OF BERMUDA (GUERNSEY) LIMITED

the Bank

WHEREAS on the 27th day of December, 2002, the Bailiff granted an *ex parte* Application by the Original Applicant and Respondent herein for a freezing injunction restraining the Original Respondent and Applicant herein from removing from the jurisdiction or otherwise dealing with the funds held to its account at the Bank, and restraining the Bank from drawing on, charging or otherwise dealing with the funds in the said account, save and insofar as they exceeded £1,324,106.67, until Judgment or further Order of the Court, AND directed that the Application for Disclosure sought therewith should be heard *inter partes*

AND WHEREAS on the 24th January, 2003, the Original Respondent and Applicant herein APPLIED to discharge the said *ex parte* Order

AND WHEREAS on the 7th day of February, 2003, the said limit was reduced to £621,484.56 by a Consent Order

AND WHEREAS on the 16th, 17th and 29th of April, 2003, the Lieutenant Bailiff heard Cross Applications by the said parties respectively to continue and to discharge the said Order of the 27th day of December, 2002, (as subsequently amended)

AND WHEREAS on the 29th day of April, 2003, a Consent Order discharging the *ex parte* Order of 27th December, 2002, was filed in the Court

The Lieutenant Bailiff, having heard Advocate A. D. Laws, Counsel for the Original Applicant and Respondent herein and Advocate G. S. Dining, Counsel for the Original Respondent and Applicant herein, Delivered Judgment in the terms attached hereto and;

- (1) HELD that the *ex parte* Order of 27th December, 2002, was properly granted
- (2) DISMISSED the Original Respondent/Applicant's Application for full indemnity costs arising out of and relating to the grant of the said *ex parte* Order.

S. M. D. ROSS
Her Majesty's Deputy Greffier

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY
ORDINARY DIVISION**

BETWEEN:

R.DURTNELL & SONS LIMITED

**Original Applicant/
Respondent**

-AND-

KADUNA LIMITED

**Original Respondent/
Applicant**

-AND-

BANK OF BERMUDA (GUERNSEY) LIMITED

The Bank

Judgment.

1. R. Durtnell & Sons Ltd (Durtnell) are an old established company going back, it is said, to 1591. They specialise in restoration and rebuilding of mature properties, mainly in the Home Counties. Laverstoke House situated in Laverstoke Park in Whitechurch, Hampshire is one such property. Kaduna Ltd (Kaduna) is and was at all material times the legally registered owner of the freehold of the land, the farmhouse and buildings and main house which are together referred to as 'Laverstoke Park Estate', which is also a limited company. On or about the 18th May, 1999, the parties entered into a contract whereby Durtnell were appointed as contractor to carry out certain works on the main house for just under £5.9 million. In the event, by 2002, works had been carried out to the value of over £11.6 million, nearly double the original sum. It seems that Kaduna have paid a total of this amount in compliance with the appropriate Certificates issued.

2. In 2001 and 2002 various disputes arose between the parties, and on 14th November of 2002 a notice of referral to Adjudication was served. On 18th November Mr. M.D.J. Wilkey, a member of the Royal Institute of British Architects embarked on the first Adjudication. This is a recognised form of Alternative Dispute Resolution (ADR) procedure followed in the United Kingdom. The distinction between that and the Arbitration process (which was unsuccessfully invoked by Durtnell in relation to an attempt to extend the Bank Guarantee in September, 2002) is explained by Mr. Stevenson in paragraphs 3 to 7 of his Affidavit of 24th December, 2002. There are fairly narrow time limits for an adjudication, according to the Affidavit of 24th December, 2002, sworn by Mr. Chandler, Durtnell's Managing Director, so Mr. Wilkey's decision was supposed to be given on the 18th December, but Durtnell agreed to a five day extension, which extended the period to 23rd December.

3. An error in the award resulted in Mr. Wilkey delivering a corrected decision shortly before midday on Christmas Eve 2002. He determined that the amount which he found to be due by Kaduna to Durtnell was £1,228,313.50, and, further, that the parties had agreed that the sum so adjudicated should be paid 'forthwith'. I observe that there then remained three working days in the old year, namely Friday 27th December, Monday 30th and Tuesday, 31st December. 1st January, being a public holiday, the next working days were Thursday and Friday, 2nd and 3rd January, 2003. I have referred to these dates in detail because of the explanation contained in the Affidavit of 28th March, 2003, of Mr. Jonathan Dudman, who is closely involved with the administration of Kaduna, as to the reasons why payment was not effected 'forthwith', and in particular, his contention, as well as the authorities produced on behalf of Kaduna, as to the true meaning of that word. Those authorities show (see page 821 of Jowitt's Dictionary of English Law at Tab E 45 of the Consolidated Bundle, and Stroud's Judicial Dictionary 4th Edn. pages 1086 to 1088) that on

occasion it can mean ‘instantly’ or ‘immediately’, depending on the provision being interpreted at the time, but that, more frequently, it means ‘as soon as reasonably possible’.

4. For the reasons stated in paragraph 12 of Mr. Chandler’s second Affidavit sworn on 17th January (which are set out by Judge Seymour Q.C in his Judgment of that date, to which I shall later refer) Durnell clearly apprehended that Kaduna would default in payment of the sum so adjudicated by Mr. Wilkey. In this connexion I refer to paragraph 3 of Mr. Stevenson’s second Affidavit of 17th January, 2003, in which he mentions the ‘very real and grave concern’ of his clients that the sums due under the contact would not be paid unless security for them was obtained. This led Durnell to seek freezing orders in England and Guernsey to prevent Kaduna disposing of its property in England (which specified all that which I understand to comprise the Laverstoke Park Estate) and the funds in its account with the Bank of Bermuda in Guernsey, limited to £1,324,106.67. The principal factor which caused alarm to Durnell was the expiry at the end of December of the Bank’s Guarantee to pay the Builder (meaning Durnell) £1 million dated 18th May, 1999, and that Durnell would thenceforth be unsecured. When I refer to Durnell and Kaduna in this context I mean those involved in administering and running those two companies.

5. The Guernsey Application was heard *ex parte* by Carey B. on Friday, 27th December. He granted the freezing Order sought, but directed that the disclosure Order applied for simultaneously should be heard *inter partes*. As the Courts in England were closed on 27th December, the matter did not come before Keith. J. until Monday, 30th December, when the freezing Order sought was granted, with the return date set at 2 p.m on 17th January. The English Order was discharged by Judge Seymour Q.C. on that day. According to Leading Counsel’s note of his Judgment, Judge Seymour drew attention to several matters which he said should have been brought to the attention of Keith J., including, in particular, the principle that the purpose of a freezing order was not to provide security for Durnell’s claim but to prevent the dissipation of Kaduna’s assets, the burden being on the applicant to establish an arguable case that there existed a real risk thereof.

6. In the result Judge Seymour Q.C declined to continue the English freezing Order, and, on 19th March, 2003, dismissed the summary judgment application which Durnell had brought on 30th December, 2002, to recover the Adjudicator’s award, (this being the appropriate method of enforcement according to Mr.Stevenson’s first Affidavit, paragraph 6) the amount of the Architect’s Certificate No. 41 and Value Added Tax, totalling £1,325,239.50. An application for Leave to Appeal against the later decision is now pending before the Court of Appeal. There had been, *inter alia*, a dispute as to whether Mr. Wilkey lacked jurisdiction to make some of the findings that he had made on the first Adjudication.

7. Accordingly, a second Adjudication was initiated before Mr. Wilkey on 12th March, 2003, as to which Mr. Fryer, the partner dealing with this case in Masons, who are Kaduna’s solicitors, having said in his letter of 24th March, 2003, that both aspects of the Adjudicator’s [first] decision, where he had exceeded his jurisdiction, were void *ab initio*, continued:

“However our clients are keen to have this adjudication resolved and without pre-judice to our contention that the Adjudication Notice’ [of 12th March] ‘is not valid our clients will continue with this adjudication since they see much merit in Mr. Wilkey being appointed since he is familiar with the issues in dispute.”

Mr. Wilkey was aware of the jurisdictional point for he said in his letter of 2nd April, 2003:

“I firstly deal with the submissions of the parties in respect of the point raised by Masons in their letter dated 21 March, 2003, alleging that the Adjudication Notice of 12 March and my appointment were not valid. I have considered Mr. Bowdery’s opinion submitted by Knowles Legal Services and find that:

1. I am satisfied that on the basis of the conclusion of legal proceedings as at 19th March 2003, with the issue of HHJ Seymour’s judgment, that the parties are agreed that that

part of my decision dated 24th December, 2003, is valid as my appointment arises from that Notice.

2. I therefore decide that the Adjudication Notice dated 12 March 2003 is valid as is my appointment arising under that Notice.”

8. After an interim decision, Mr. Wilkey’s final decision on the second Adjudication was delivered on 16th April, and reached Advocate Laws, now appearing for Durnnell, who then sought the continuance of Carey B.’s Order of 27th December, on that day. The Court was immediately apprised of the result. After corrections it came before the Court on the second day of the hearing, 17th April.

9. Despite Mr. Fryer’s earlier reservations the second adjudication award, under which Kaduna were adjudged to pay £743,693.93, plus V.A.T. on that amount to Durnnell, mercifully seems to have been accepted by both sides because, when the hearing of the cross-applications on the freezing Order resumed on 29th April, 2003, a consent Order lifting the injunction as from that date was presented to the Court. As Kaduna have paid this amount, including £79,632.42 in respect of Architect’s certificate Number 43a (which became due as a result of Mr. Wilkey’s second award) making (I was informed) approximately £846,000 in all, on 22nd April, significantly, in the context of this case, the first working day after the Easter Holiday, the parties are now at issue only on Kaduna’s costs arising out of and relating to the initial granting of the injunction.

10. The Respondent to the original Application now seeks these costs on a full indemnity basis. Advocate Dinning, who represents Kaduna, (the Bank not being represented in these proceedings) has strenuously argued (A) that the Guernsey Order should never have been granted in the first place, and (B) that it should now be lifted according to her Application of 24th January, 2003. She maintains also that the Order was so clearly inappropriately granted that her clients should have all the costs occasioned by it. In view of the consent Order that has just been recorded head (B) of Miss Dinning’s argument has now fallen away. The only other relevant matter in this context is that on 7th February the limit of the assets frozen in Guernsey was reduced by consent to £621,484.56.

11. Advocate Laws in his submissions traced the correspondence from the inception of the disputes until the present hearing. He said it was clear from this that, viewed objectively, Kaduna’s financial position in the United Kingdom had changed radically since it made the contract with Durnnell in 1999. He referred to paragraphs 23 and 24 of Mr. Chandler’s first Affidavit of 24th December, which was in support of the Application for the Guernsey freezing Order, which state that when Durnnell made their initial enquiries about Kaduna these revealed that all the legal titles relating to the components of Laverstoke Park Estate were unencumbered. However it appears from paragraphs 31 and 32 that extensive charges were created against the House and farmland belonging to the Estate in November, 2001, in favour of HSBC Republic Bank with the restrictions being registered on 28th February, 2002, and that other properties in Hampshire were transferred to a company called Organic Investments Ltd. These various encumbrances are shown in the chart appearing at page 264(a) of Exhibit JJC 1 to Mr. Chandler’s first Affidavit.

12. In addition to the foregoing it was revealed by Mason’s letter of 15th January, 2003, that Kaduna had transferred the beneficial interest in Laverstoke Park Estate to the Imimark Trust Corporation, and that consequently Kaduna’s interest in the legal title to Laverstoke Park Estate had become of no value. Mr. Chandler says in paragraph 14 of his second Affidavit this was unknown to Durnnell until then, and, presumably unknown to them at the time of the parallel applications for the Freezing Orders in Guernsey and in England. This information only served to add fuel to the fire of suspicion ignited in the Durnnell camp that Kaduna had all along intended to default on the first adjudication award, and in Mr. Chandler’s Second Affidavit, paragraph 19, he invites the Court’s attention to the correspondence passing between Durnnell and Masons from January to March of this year.

13. Clearly the contents of Mason’s letter of 15th January, which he set out in some detail, was an important factor which led Judge Seymour Q.C to conclude, as he did in the penultimate paragraph of his Judgment of 17th January, that as there were no worthwhile assets within the jurisdiction (of the English Court) that the Order of Keith J. on 30th December should not have been made. The Judge did not appear to regard the various transfers of assets that Kaduna had made in the same light as Mr. Chandler, for he said, at paragraph 42:

“Kaduna being a company controlled by the Imimark Trust Corporation in its capacity as trustee of the Arthur Trust and therefore being bound to give effect to the financial instructions of the Arthur Trust it seems to me that the affairs have simply been rearranged so that there is more direct connection between the Trust and the beneficiaries.”

14. The other aspect of Mr. Laws’ submissions in support not only of the granting, but of the continuance of the injunction was the position regarding the Guarantee. This was given by the Bank almost contemporaneously with the original contract which, it will be remembered, was for a duration of 60 weeks, or just over one year. According to the Particulars of Claim filed in England, by the end of November, 2002, Durnell had been on site for 180 weeks, which assumes that they entered upon it prior to the contract date. This, presumably, was due that which Mr. Chandler says at paragraph 11 of his first Affidavit was

“...to the massive amount of additional work that was instructed by the employer.”

15. Accordingly, on the 17th August, 2001, Mr. Chandler wrote to Kaduna in Monaco, requesting it to agree to an extension of the Guarantee, but this was met by the curtest possible refusal in Mr. Dudman’s letter of 4th September. This led a year later to the Arbitration proceedings before Mr. John Uff Q.C. He stated the issues between the parties as follows:

“Although the parties are in issue as to responsibility for delay under the contract, it is common ground, and indeed obvious, that the Final Certificate or alternatively any substantive arbitration award in relation to matters in dispute will not be available before 31 December, 2002. Consequently the Claimant’ [Durnell] ‘faces the prospect of its security becoming inoperative before it is in a position to call on it, should this be necessary. In these circumstances, the Claimant contends that there was an implied term of the building contract that, if the contract period was extended, then the guarantee would be extended for a commensurate period. The Respondent denies that any such term is to be applied and contends that the guarantee provided was that which the parties agreed to.”

As it is relevant to a point I raised in the course of the argument, I venture to quote this further passage from Mr. Uff’s Award:

“Whether or not the Claimant could have objected to the massive increases which have occurred is no longer a relevant consideration since no such objection has been taken and the work has been carried out. There is, therefore, a strong argument against the Claimant to the effect that the Claimant has received precisely what it bargained for, no more and no less.”

16. The Arbitrator, after extensive consideration of the Substantive Issue, which formed head 3 of his Award, and which was whether a term should be implied for the extension of the guarantee in the event of the contract over-running, concluded that no such term could be implied into the contract.

17. Nevertheless Mr. Laws sought to lay much emphasis on Kaduna’s unwillingness to re-schedule the Guarantee, and claimed that it was capable of only one interpretation, namely that the actions and course of conduct adopted by Kaduna showed that it would default if the result of the [first] Adjudication was not to its liking. In this connexion I have referred to paragraph 2 of Mr. Fryer’s Second Affidavit of 17th January, 2003, in which he states that he was confident, and so

advised his clients, that a monetary decision would be made in favour of Kaduna relating to the outstanding liquidated damages when the Adjudication was issued on 23rd December. Mr. Fryer also pointed out in his Affidavit sworn a day earlier, [by implication] that there was no excuse for Berrymans Lace Mawer, Durnell’s solicitors, rushing to the Guernsey and English Courts for *ex parte* injunctions without notification to him thereof, since they well knew that he was, and had been since August of 2002, the partner in Masons who was dealing with the long running disputes between them and Kaduna. This is relevant to the passage in The P (infra) where Evans J. said:

“Evidence directed towards what is called ‘the risk of dissipation’ will often support the plaintiff’s belief. But here, the parties were already locked in dispute and were communicating through solicitors.”

My emphasis.

18. This leads me to head (A) of Miss Dinning’s case, which is that the Guernsey Court should not have issued this freezing Order on 27th December, without notice to her client because, given the history of the matter, and the payments already made by Kaduna, it was wholly wrong on the part of Durnell’s advisers to have imputed a nefarious intention to the Respondent, and, had Kaduna been heard at that time the result would have been different.

19. The Judgment of Judge Seymour Q.C. shows that the reasoning behind his conclusion to this effect in the parallel English proceedings was that the underlying principles governing the granting or otherwise of *Mareva* Injunctions, and in particular that

- (i) It did not necessarily follow from non-payment by a party that there was a serious risk of dissipation of his assets.
- (ii) That the function of a freezing Order is not to provide security for claims.
[See The Niedersachsen [1983] 1 WLR 1412 at page 1422.
- (iii) The Respondent Company is in a foreign jurisdiction

were not properly drawn to the attention of Keith J when he made the Order of 30th December. It was also suggested that he had not been properly reminded of some of the material facts, for example that some of the charging of the Estate had been effected in November, 2001, some thirteen months before the Application. Had the Judge been so informed and reminded then Judge Seymour Q.C took the view that he would not have granted the freezing and disclosure Order of 30th December.

20. Advocate Dinning has submitted that similar considerations apply to the Order made by the Bailiff in Guernsey. First, the application should not have been made, or heard, *ex parte*. The respective solicitors for the parties in London were in touch with each other, so that Babbe Le Pelley Tostevin must have known it would be a simple matter for Kaduna to instruct Advocates in Guernsey (or at least they should have given Kaduna the opportunity to do so), (again see The P (infra) the guarantee still had four more days to run, and the leading authority on that which has to be established regarding risk of dissipation of assets, namely Ninemia Maritime Corpn v.Trave Schiffahrtsgesellschaft m.b.H. und Co.K.G [The Niedersachsen] [1983] 1 W.L.R 1412, was not cited to the Bailiff.

21. Miss Dinning then referred to The ‘P’ [1992] 1 Lloyd’s Reports 270, which concerned the sale of a ship, in which an earlier *Mareva* Order granted by Gatehouse J. *ex parte* was discharged. Evans J (as he then was) held that the previous *ex parte* application had been inappropriate on the grounds that the applicants had not fulfilled their strict duty of disclosure. Evans J. cited Donaldson M.R.’s words in Bank Mellat v. Nikpour [1985] F.S.R 87 at page 92 as to the practice of making *Mareva* applications, to which he had referred as ‘a Draconian weapon’, without notice when he said:

“If access to the weapon’ [of a Mareva Order] ‘is obtained without the fullest

and frankest disclosure I have no doubt at all that it should be revoked.

Evans J. then cited this passage from Hoffmann J. in In re First Express Ltd [1991] The Times October 8:

“It is a basic principle of justice that an order should not be made against a party without giving him an opportunity to be heard. The only exception was when two conditions were satisfied:

First, that giving such an opportunity appeared likely to cause the applicant injustice, by reason either of delay or action which it appeared likely the respondent or others would take before the order could be made.

Second, when damage to the respondent was compensatable under a cross-undertaking or when the risk of uncompensatable loss was clearly outweighed by the risk of injustice to the applicant if the order were not made.”

[See also Miss Dinning’s Skeleton Argument paragraphs 12 and 13].

22. Finally, Miss Dinning invited my attention to Newman L.B’s Ruling of 20th November, 2001, in Pavlos Vardinoyannis v. Ansol Ltd & 8 others which deals with the duties of an Applicant for an *ex parte* injunction, which in that case was also a freezing and disclosure Order which had been issued by the Bailiff on 4th April, 2001. I have paid particular regard to the nine principles which Newman L.B has extracted from the decided cases appearing at paragraphs 96 and 97 of her Judgment. Newman L.B highlighted several inaccuracies in the Applicant’s supporting Affidavit at which criticisms had been levelled by the opposite side to the effect that these consisted of two false allegations of fact, two instances of failure to disclose material documents, four failures to draw the Bailiff’s attention to relevant parts of material documents and six instances of misrepresentation.

23. After close analysis Newman L.B held as regards the allegations of fact that one had been corrected and one was a mistake which was not intentional, but that the applicant had failed to go through his Affidavit with sufficient care to avoid making the mistake. As regards the failures to disclose, she held that the failures did not create a false impression in the mind of the Bailiff. As to head three, she held that one of the omissions was serious, two were, in effect, immaterial, and one added little to the criticism already made, and finally that the alleged misrepresentations had not been made out.

24. All of the foregoing were material in considering whether the applicant in that case had complied with the heavy obligation which rests on an *ex parte* applicant, whether it be for an injunction or any other discretionary relief from the Court, to make full and proper disclosure of all the facts, and not to conceal, omit or mislead. As Newman L.B. said, at paragraph 96 of her judgment, a high degree of candour is required and, at paragraph 99, that careful preparation is essential to all applications without notice and that it is incumbent on an applicant to read his own Affidavit with the greatest care.

25. Newman L.B. also cited Hulme v. Matheson (Channel Islands) Ltd [1997] 24 GLJ 60, in which Southwell J.A, did not mince matters in his crystal clear statement of the consequences of not making proper disclosure at page 16 of the Judgment, which include the immediate discharge of the injunction depending on the importance of the undisclosed fact or facts. There is a line of cases on this point, and I am content to refer to the judgment of Warrington L.J in R v. Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac [1917] 1 KB 486 at page 509 as follows:

“It is perfectly well settled that a person who makes an ex parte application to the Court-----that is to say, in the absence of the person who will be affected by that which the Court is asked to do-----is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does

not make the fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may already have obtained by means of the order which has thus wrongly been obtained by him.”

26. To my mind none of these factors are applicable to the granting of the *ex parte* Order by the Bailiff in the instant case. Indeed the transcript of the proceedings before the Bailiff shows that he probed Counsel as to the reasons for seeking the Order, that he was at pains to ascertain all the material factors which were conditions precedent to the granting of such an order, that he put to, and received replies from, Advocate Ayres (who then appeared for Durnell) with a view to satisfying himself that it was proper to do so. Had he not so thought he would not then have declined to grant that part of the application which related to disclosure (which Keith J. had granted) and directed an *inter partes* hearing to ensure a proper consideration of both sides’ submissions before so intrusive an order was given. An additional factor is that, as of then, Kaduna had no legal representation in Guernsey, which was not the case in London.

27. Furthermore when the Bailiff heard the Application on 27th December he had before him Mr. Chandler’s first Affidavit, to which was exhibited as part of J.J.C.1 Mr. Uff’s Award of 21st November, which contained a full statement and analysis of all the material facts which made up the history of the passage of this contract, and, since the Bailiff expressly said, see page 1 of the transcript, that he had read the Affidavits, he could not have failed to have been seised of all the factors which would be relevant to his decision to grant the first limb of the Application *ex parte*. This Court is not entitled to pierce that statement and, in the absence of definite indications that there was any material non-disclosure, misstatement or omission, or breach of the principles stated by Newman L.B, by Counsel for Durnell in the proceedings on 27th December, it is difficult to see how it can be said that the decision which the Bailiff reached was wrong.

28. The foregoing is not, to quote Mustill J.’s words in The Niedersachsen (which were reproduced by Kerr L.J at page 1424) unconsciously, or even consciously, to reverse the burden of proof which must rest on an applicant to establish that the matter is sufficiently urgent, and the danger of dissipation such, that an Order must be granted *ex parte* so as to avoid injustice to himself, *a fortiori* to continue it (the latter aspect having now fallen away in the instant case). But once an Order is given then it is upon the party seeking to show that it should not have been given to establish that it was a wrong decision, either because the Judge was misinformed, relevant material was omitted or not drawn, or sufficiently drawn, to his attention, or that he acted *per incuriam*, or that any of the principles set out by Newman L.B. were breached.

29. Last but not least, a factor which weighed materially with Judge Seymour was the revelation (if that be the correct word) that there were no worthwhile assets in the United Kingdom on which to fasten the freezing Order of 30th December, whereas there clearly were such assets, albeit monetary assets, situated in Guernsey. The Bailiff also had before him the information in paragraphs 36 and 37 of Mr. Chandler’s first Affidavit that he believed that the Guarantee (which was shortly to expire) was backed by funds deposited by Kaduna with the Bank of Bermuda in Guernsey (this was later confirmed by Mr. Fryer in paragraph 2 of his letter of 9th January, 2003) which Kaduna could freely transfer out of the reach of the Royal Court on the expiry of the Guarantee. In view of the Bailiff’s statement that he was quite happy to make the freezing Order it is to be assumed that he accepted that statement as *prima facie* justified.

30. I now turn to The Niedersachsen (*supra*), which is the leading case on the criteria of which the Court has to be satisfied on a Mareva application. It draws the distinction between the objective of providing plaintiffs with security for claims, when the jurisdiction ought not to be invoked, and when there is a good arguable case that there is a real risk of dissipation of assets, when it can. The correct test is reflected in Stephen Gee’s Mareva Injunctions and Anton Piller Relief at page 190, citing Kerr L.J in The Niedersachsen at page 1422 of the report, as follows:

“We also consider that the distinction mentioned by the Judge in the present case.....between ‘object’ and ‘effect’ is not the right basis for providing the appropriate test. In our view the test is whether, on the assumption that the plaintiffs have shown at least ‘a good arguable case’, the court concludes,

on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied.”

31. It is perfectly true that The Niedersachsen was not cited to the Bailiff on 27th December. The situation with which he was faced on the Application was that relationships between the parties had soured, and it was plain from Mr. Dudman’s letter of 4th September, 2001, that Kaduna were not going to cooperate in enlarging the guarantee. Mr. Uff’s decision upholding their contention was not promulgated until 21st November, 2002, at which time the first adjudication was under way. Both sides knew that the award of Mr. Wilkey was due on 18th, then the 23rd, December. In the event it was delivered on 24th December.

32. It is equally true that Mr. Chandler’s Second Affidavit relating, in paragraph 11, the fact that he had been given the veritable ‘run-around’ when trying to contact Mr. Dudman and Mr. and Mrs Scheckter by telephone on that day, was not then before the Bailiff, though his Affidavit of 24th December was before him. But the Bailiff knew that the guarantee was about to expire, for his initial impression that the expiry date was 31st January was instantly corrected by Mr. Ayres. Neither can he have continued to harbour that initial impression for that date is clearly stated in paragraph 35 of Mr. Chandler’s first Affidavit. Moreover, it is obvious that the Bailiff had a clear idea of the background and circumstances, for he described this long running building contract as

‘.....a horrific contract which has gone way over quotations, as I understand it, though variations throughout changes of architects.”

33. It seems to me that the pattern of Kaduna’s officers’ conduct at that time had the effect of playing on and exacerbating the fears that Durnnell entertained. To my mind the subsequent strictures of Mr. Fryer in the correspondence about freezing the very funds from which Kaduna intended to satisfy the award were intended to turn the situation around from that which it really was, which was that Durnnell were about to become unsecured, that certain transactions had taken place regarding Kaduna’s property, and that the latter were unconcerned that these factors would tend to heighten the Applicants’ fears regarding the satisfaction of their claim.

34. Again, it is true that Kaduna’s record of payment until then, apart from that which was genuinely in dispute, was satisfactory but the relationship had deteriorated to the point at which, far from panic or paranoia, the Applicant genuinely entertained fear that the Guernsey funds would be moved and I consider that this fear was based on reasonable, not fanciful, grounds. It was in my view entitled to take the precaution of seeking an *ex parte* Order in Guernsey. It is also true, as I have just said, that The Niedersachsen had not, in so many words, been cited to the Bailiff, but it is evident from the transcript that he had all the correct principles in mind when he granted the first limb of the Application. Moreover, a subsequent Court should not lightly assume that a Judge experienced in dealing with this type of application did not have all those principles in mind unless this can clearly be demonstrated to be the case. As I have said, it has not been established that there was any material non-disclosure, misstatement or omission, or breach of the principles stated by Newman L.B, by Counsel for Durnnell on the *ex parte* hearing.

35. For these reasons I am unable to say that the Royal Court’s Order of 27th December should not have been granted, and, consequently, I refuse the Respondent’s application for costs.

A.R.W.Hancox.
Lieutenant Bailiff
7th May 2003.