THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2008

CLAIM NO. AXAHCV/2007/0053

BETWEEN:

(1) FIRST MONTANA SERVICES LLC
(2) FIRST MONTANA CAPITAL CORPORATION
(3) ROBERT G. MULLENDORE

Applicants/Claimants

AND

(1) BEST CONCRETE CORPORATION
(2) ANGUILLA ASPHALT CORPORATION LTD
(3) DERRICK ROMNEY
(4) CLAIRE ROMNEY
(5) ROMNEY & ASSOCIATES DEVELOPERS LTD.

Respondents/Defendants

APPEARANCES:

Mr. Gerhard Wallbank for the Applicants/ Claimants
Mr. Saul Froomkin Q.C, Ms. Jean Dyer and Mr. Patrick Thompson for the Respondents/ Defendants.

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Date: 2008 : 15th January
29th April
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JUDGMENT

[1] **GEORGE-CREQUE, J.:** The Applicants/Claimants ("the Claimants"), prior to the filing of their claim, made application without notice on 14th November, 2007, for an order appointing on an interim basis, a receiver of the Respondents'/Defendants' ("the Defendants") property and assets and also ancillary orders including an order restraining

the Defendants from dealing with their assets and bank accounts to the detriment of the the Claimants.

[2] The basis for moving the court without notice as summarized in the Application and further contained in the affidavit of the Third Claimant ('RM') was that it was in the interest of justice to do so and that to commence a claim before making the application and to give notice would give the opportunity to the Defendants to place their property and assets beyond reach of the Claimants. Further, that the matter was urgent as the Claimants had learnt on 7th November, 2007, that the Defendants had terminated the commercial relationship between them in breach of contractually agreed termination procedures and were resorting to informal self help to safeguard their interest.

[3] The claims contemplated against the Defendants are in contract for relief for breach of and to enforce outstanding contractual obligations owed by the Defendants to the Claimants and for an accounting to the Claimants of sums said to be properly payable to them as well as for repossession of plant and machinery by the Defendants over which the Claimants have a charge. These claims are said to arise out of six (6) contractual agreements between the parties, namely:

(i) A Bill of Sale dated 12th April, 2001, between the Second Claimant (FMCC) and the First Defendant (BCC) in respect of a concrete pumping unit;

(ii) A Bill of Sale dated 12th April, 2001, between FMCC and BCC in respect of a hydraulic wheel loader;

(iii) A promissory Note Agreement/ Revolving Line of Credit from FMCC to BCC for up to US$200,000.00 and dated April 25th, 2001;

(iv) A promissory Note Agreement / Revolving Line of Credit from FMCC to BCC for up to US$100,000.00 and dated February, 14th 2003;

(v) A personal Agreement dated March 21st, 2004, between the Third Claimant ("RM") and the Third Defendant (DR) providing for a profit split between them based upon a formula specified therein (the Personal Agreement); and

(vi) A Services Agreement and Addendum (the Services Agreement) effective as of October 1st, 2005, between the First Claimant (FMS) and the Defendants.

The Parties

[4] RM is the president and sole owner of both FMS and FMCC both corporations registered and doing business in Montana USA. BCC and the Second Defendant (AAC) are Anguillian companies solely owned by DR. DR and the Fourth Defendant (CR) are husband and wife and both are directors of BCC and AAC. Mr. Keithley Lake, a lawyer practicing in Anguilla of the firm of Keithley Lake & Associates (KLA), is also a director of AAC. At the time when this matter came on for hearing exparte on 20th November, 2007, it was not clear as to whether the Fifth named Defendant was in existence although such an entity bearing that name was contemplated and when such came into existence, was said to4be bound by the terms of the Services Agreement. DR, CR, BCC and AAC will hereinafter together be referred as "the Defendants."

The background

[5] I set out in summary a background to the current proceedings so as to place this matter within context:

(a) RM and DR have known each other for some twenty plus years. During that period they entered into a commercial relationship. This is notwithstanding that DR and CR along with their company CNA Enterprises, Inc. had run afoul of the US Government in respect of their business dealings in the USVI and had pleaded guilty to a criminal charge of conspiracy to defraud the US government in 1999.

(b) RM and his companies supply raw materials for construction projects as well as business management services and played a role in the development of the business of DR and his companies who are or were customers of RM and his companies. DR and his companies inter alia, supply ready mixed concrete, other construction materials and heavy equipment services to contractors in Anguilla including the Government of Anguilla.

(c) Under the Bill of Sale in respect of the Schwing Concrete pump, a sum of US$598,022.00 was advanced by FMCC to BCC. This sum was secured by the said pump. The loan carried interest at the rate of 10% declining per annum and

was payable by monthly instalments of $11,078.86 for 71 successive months commencing on 1st June, 2001.

(b) Under the Bill of Sale in respect of the Wheel Loader, a sum of US$130,000.00 was advanced by FMCC to BCC. This sum was secured by the said Wheel Loader and bore interest at the rate of 10% declining per annum and was payable in monthly instalments of $2,408.36 over a period of 71 successive months commencing 1st June, 2001.

(c) The first Promissory Note/ Revolving Line of credit granted by FMCC to BCC in the sum of US$200,000.00, was dated April 25th, 2001. Interest accrued at the rate of 10% on each advance from the date of same. The due date under this Note was May 1st, 2002.

(d) The second Promissory Note granted by FMCC to BCC was in the sum of US$100,000.00 and carried interest also at the rate of 10% with the due date as August 14th, 2003.

(e) DR and RM then entered into the Personal Agreement. This agreement provided inter alia, for the sharing of cash distributions from the income earned in the use and operation of equipment owned by DR. It goes on further to state that RM was to have a perfected interest in all such equipment to secure a 'settlement payment' upon termination of the agreement calculated as per the formula set out in Clause 5 of the Agreement.

(g) The Defendants[1] entered into a Services Agreement with FMS whereby FMS in essence was to install maintain and operate accounting systems for the Defendants' "Business Operations"[2] by installation of computers and accounting systems and produce inter alia, statements of account, cash flow reports and projections. All books and records were to be open for inspection by each party and all information relating to the Business Operations were to be made available. Business Accounts were also to be set up for the deposit of Operating Revenues derived from the Business Operations. This Agreement also provided for compensation to be paid for the provision of these services by FMS based upon a

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[1] Save for the 5th named Defendant

[2] "Business Operations" under Clause 1.1 the Services Agreement is said to encompass the Romney Parties' *'concrete and asphalt operations, construction activities and sales of construction material'.*

formula set out in Clause 2 thereof and also provision for immediate payment out to FMS on termination of the agreement pursuant to the provisions contained in Clause 3.

(h) An addendum to the Services Agreement effective as of 1st October, 2005 was entered into between the Defendants and FMS in which real estate and home building activities were added to the Business Operations and said to be covered by the Services Agreement.

(i) Until November, 2005, there was no formal accounting system in place in respect of the Defendants' Business Operations. A Quickbooks system was installed at FMS' expense but the Defendants were the primary overseers of the accounting function. The Claimants were not happy with the manner in which the Defendants were conducting this function as they saw many bank overdrafts, and learnt of creditors with excessive unpaid bills or that debts were being paid selectively. But no payments were being made to the Claimants by the Defendants as DR asserted that the business was not making sufficient money.

(j) The result was that the Claimants took over the accounting functions of BCC in December, 2005. They then paid a number of BCC's creditors from income earned by BCC and also used some of the income earned to pay down on the Bills of Sale and Promissory Notes. Some $450,000.00 was said to be applied in this manner towards accrued interest owing to the Claimants with the result that some 1.7 million dollars is now said to be outstanding in respect of the Bills of Sale and Promissory Notes.

(k) The Defendants took issue with this approach by the Claimants. The result was that the Defendants took back primary control of the accounting function in July, 2007. The relationship between the parties became further strained. Correspondence was then being exchanged between the parties' solicitors. Even though the Defendants were apparently acknowledging their indebtedness to the Claimants, this was being tied to a request for an accounting by the Claimants in respect of that period during which the Claimants carried out the accounting functions for the Business Operations.

(l) By the first weekend of September, 2007 the electronic data files containing all the accounting data of the Defendants including data for the Claimants on the computer server hosted in Montana by the Claimants, was either deleted or could no longer be accessed with the result that the accounting information in respect of the Defendants was no longer accessible or visible to the Claimants save for dealings on some bank accounts which gives limited information only. The Claimants accused the Defendants of data theft in this regard and demanded a return of the data.

(m) By October, 2007, the strained relations between the Claimants and the Romney Parties had spilled over into other third party contractual relations such as the one with KOR Realty Management/Barnes Bay Development Ltd. ("KOR/BDD") said to be a substantial customer of the Parties. RM had personally negotiated the supply contracts with KOR/BBD on behalf of BCC. KOR/BDD ceased their direct dealings with the Claimants allegedly at the requests of the Defendants. BCC also ceased placing orders with the Claimants for the supply of raw materials.

(o) By November 7th, 2007, the Claimants learnt that the Defendants were treating their contractual relations as being at an end. This is not accepted by the Claimants. This action by the Defendants served as the catalyst for the launching of these proceedings by the Claimants as all trust and friendly relations formerly existing between the parties had by then apparently evaporated.

[5] The Claimants' complaints against the Defendants are in effect a failure to make payments under the Bills of Sale and Promissory Notes and also the failure to make any payments by way of cash distributions under the Personal and Services Agreements or the Defendants failure or refusal to provide a proper accounting so as to determine if and what amounts are due to the Claimants under the said agreements, as well as lack of information regarding the Defendants' Business Operations involving third parties. This is against a background of complaints by the Claimants of instances where monies have been withdrawn or diverted or otherwise used by the Defendants for purposes which are unclear or otherwise for personal purposes by the Defendants without an accounting to the Claimants or payment to them as per the terms of the Personal and Services

Agreements. They also complain of side deals, delay or refusal to collect receivables, inadequate documentation in respect of payables and receivables, and generally the lack of proper accounting and supporting documentary records for the purpose of determining what cash distributions may be properly due to the Claimants under the Agreements despite their requests.

[6] The Claimants also contended that the Defendants have the means to remove their assets out of the jurisdiction and so defeat the Claimants' real and substantive claims under their various contractual arrangements. They expressed the fear that there is a real risk that the Defendants are likely to place their assets out of reach, presumably in the USVI, where they are said to be engaged in developing a business and that it is highly likely that they have diverted monies properly due to the Claimants to their own use in the development of such business in the USVI. They base this fear of dissipation given their conduct and their prior criminal record referred to earlier. They say that notwithstanding their contractual claim for damages, such damages would not be recoverable if the Defendants place their assets beyond the reach of the Claimants or otherwise dissipate them. Further, they contended that the balance of convenience favoured the granting of the orders sought in that consideration had to be given to preserving the Claimants' substantial financial investments in the Respondents' business and furthermore, also for maintaining the status quo. With regard to the Claims on the Promissory Notes and the Bills of Sale, it was submitted that the Defendants could not conceivably have an arguable defence thereto and in that regard the court needed not consider the balance of convenience for the purpose of granting the relief sought.

[7] On 20th November, the court made an order for the appointment of a receiver, as well as for freezing orders ancillary to the receivership order ("the exparte Order"). No receiver was therein named and further orders were made that until then the Defendants would continue their Business Operations save that disbursements related thereto must be with the approval of the Claimants. This requirement was not substantially different from the provisions contained in Clause 1 of the Services Agreement. The Application was made returnable inter partes on 12th December, 2007. On 29th November, 2007, the

Defendants applied for the discharge of the exparte Order. The matter finally came on for a full hearing inter partes on 15th January, 2008, after a flurry of affidavits and applications in the interim.

[8] The Defendants contend the following:

(a) No good case was advanced for invoking the exparte procedure. Further, there was delay which suggested that there was no real urgency to the matter.

(b) The appointment of a receiver ex parte was a draconian remedy and their seeking the exparte Order reeked of bad faith as they had failed to disclose that the parties were then engaged in private mediation commenced at the suggestion of the Claimants;

(c) There was no evidence of real risk of dissipation of assets warranting the ancillary freezing orders;

(d) They had failed to show that damages were an inadequate remedy or that the Defendants would be unable to pay were the Claimants to succeed; and that other less draconian measures would have been inadequate to protect their interests;

(e) The exparte Order is oppressive:

(i) as all the personal assets of the individual Defendants have been frozen and are subject to the exparte Order;

(ii) there is no evidence of the value of the properties injuncted and thus whether their value exceed the value of the alleged debt;

(iii) it would lead to significant economic losses to the Defendants for which the Claimants would not be able to compensate were the Defendants to prevail;

(iv) the exparte Order gives the perception that the Defendants are bankrupt or insolvent and thus injures their business reputation.

(f) There is no evidence of the Claimants' ability to satisfy its undertaking in damages;

(g) There was no credible evidence of previous malpractice or nefarious intent as regards the Defendants;

(h) The Claimants are in breach of their duty to make full and frank disclosure of all material facts in that, apart from those matters specifically referred to above, they also failed to disclose:

(i) that there is a live issue as to whether or not the Claimants are in fact creditors;

(ii) That the Promissory Note Agreements, the Personal Agreements and the Services Agreement had not been stamped in Anguilla in accordance with the Stamp Act section 20 and thus was not admissible evidence before the court;

[9] The Application is supported by the 1st and 2nd Affidavits of the DM as well as the affidavits of Mr. Peter La Montagne, a chartered public accountant in the employ of the BCC and AAC as their Chief Financial Officer as of September 11th 2007, and those of Mr. Karle T. Smith, a BCC customer; Mr. Keithley Lake, legal adviser and a director of AAC and Mr. Derek Gumbs, a nephew of DR. The Claimants also filed further affidavits in the form of a 2nd and 3rd affidavit of RM, a 1st and 2nd Affidavit of Mr. Harry Wiggin, a solicitor to the Claimants and an Affidavit by one Javier Guadayol, an attorney licenced to practice in Florida, USA, representing various persons said to be creditors of DR, BCC and/or AAC.

[10] There is a considerable amount of conflicting evidence at this stage before the court. The existence of the six (6) agreements on which the Claimants rely as the agreements which govern or governed their relations is not in dispute. There is a live issue as to whether or not the Personal Agreement and Services Agreement have been terminated.

The Law on the appointment of a Receiver

[11] An appropriate starting point for consideration of the issues raised is with a statement as to the applicable legal principles. CPR 17.1 sets a non exhaustive list of interim remedies which the court may grant. CPR.17.3 expressly recognises that the fact that a particular type of interim remedy is not listed does not affect any power the court may have to grant such remedy. CPR 17.2 empowers the court to grant an interim remedy before a claim has been made only if: (i) the matter is urgent or (ii) it is otherwise necessary to do so in

the interest of justice and CPR 17.3 allows the court generally the power to grant interim remedies without notice if satisfied that: (i) in a case of urgency no notice is possible; or (ii) that to give notice would defeat the purpose of the application. The appointment of a receiver and the grant of an injunction by way of interim relief are discretionary. CPR 51 however, specifically deals with the appointment of a receiver including the appointment of a receiver to obtain payment of a judgment debt and recognises the power of the court in CPR 51.2 (3) to grant such relief on a 'without notice' basis. Moreover, 51.2.(2), recognising that on the appointment of a receiver an injunction restraining the Respondent from dealing with the assets identified in the application is invariably a necessary companion order to give teeth to the receivership, says in essence that the applicant in applying for the appointment of a receiver may also apply for such an injunction. It is not surprising that the notion evolved and appears to be now well settled that the appointment of a receiver attracts a consideration of the same principles as for the grant of an injunction.

[12] Apart from the provisions in CPR, the Eastern Caribbean Supreme Court Act[3] specifically states, in effect, that a receiver may be appointed as well as an injunction by an interlocutory order where it appears to be just or convenient that the order should be made.

The appointment of a receiver.

[13] In **Audubon Holdings Limited –v- The Treasure Island Company Ltd. et al.**[4] also a case where a receiver was appointed without notice, Rawlins J., (as he then was) considered whether the same principles applicable to the grant of an injunction were equally applicable to the appointment of a receiver. Referring to the case of **Cummings –**[5]**v- Perkins** which was cited as the authority for this statement after summarising the facts of that case and the statement therein made by Lindley M.R., where he said that if a person can receive an injunction it followed on principle that he could also obtain a receiver, had this to say at paragraph 32 of his judgment:

[3] R.S.A. c. E15 section 23
[4] BVIHCV 2002/0227 (unreported)
[5] [1899] Ch.16

"I do not think that the case established that the same principles apply to the appointment of receivers as to the grant of injunctive relief. It makes perfectly good sense however, that the tests should be equated in one (1) regard; that is that the Applicant for the appointment of a receiver should also be required to show that there is a serious issue to be tried."

In **Danone Asia Pte Limited et al –v- Golden Dynasty Enterprise Limited et al** [6] a case in which the appointment of a receiver and freezing orders were sought, Hariprashad-Charles J., in her judgment delivered on 14th November, 2007, referred at page 8 to **Norgulf Holdings Limited and Incomeborts Limited -v- Micheal Wilson & Partners Limited**[7]**,** a decision of the Court of Appeal, where the Court of Appeal held that the threshold test to justify the appointment of a receiver should be at least equal to that required for obtaining a freezing injunction and that the minimum threshold test for appointing a receiver requires the applicant to have a good arguable case. That decision is binding on this court.

[14] I entertain no doubt that the appointment of a receiver is a draconian and intrusive remedy as it takes the assets of a company out of the control of its directors and managers and places them in the hands of the receiver whose task it is to get in and preserve them until determination at trial. This impinges upon the ability of the company to effectively trade as a commercial concern. It also involves considerable expense as a receiver's remuneration must also be met and such becomes a first charge on the company's assets. BCC and AAC are commercially trading concerns in Anguilla. I am mindful however, that in respect of the Bills of Sale and Promissory Notes as between FMCC and BCC where it is said that they have failed to comply with their payment obligations contained therein their legal position would be equivalent to that of an equitable mortgagee and in such circumstances a receiver may be appointed as a matter of course. In other words, danger to property need not be alleged as the appointment would be for the purpose of enabling the applicant to obtain that to which he is entitled. I will revert later to this aspect of the matter.

[15] Rawlins J., at paragraphs 27 and 28 of his judgment, helpfully and succinctly set out the principles as stated in **Kerr on the Law and Practice as to Receivers and**

[6] BVIHCV 262/2007 (unreported)
[7] Civil Appeal No. 8/ 2007 (29th Oct. 07) [BVI]

Administrators[8] as to the object for the appointment of a receiver and the bases on which one would be appointed, the primary object being to safeguard or preserve property for the benefit of those who are entitled to it. He set out the two identified bases thus:

" ***The first are cases in which the Applicant already has an existing right. This is, for example, at the instance of a mortgagee where the principle on the mortgage is due or is in arrear. This may also be in cases of equitable execution to enable a judgment creditor who already has a judgment to obtain payment out of property, which cannot be reached by legal execution. In these cases, the appointment is to preserve property pending realization and to facilitate the enforcement of existing rights over such property. The authors remind us that in such cases the appointment is usually made as a matter of course as soon as the applicant's right is established. It is unnecessary to allege any danger to the property."***

".... The second class of cases. These are cases in which a receiver is appointed to preserve property to ensure its proper management pending litigation to decide the rights of the parties. This includes cases in which there is a danger of the property being damaged or dissipated, for example by a person who has a partial interest. In such cases it is necessary to allege and prove some peril to property. In these cases the court is enjoined to exercise its discretion to appoint a receiver with caution. The court should consider the probability of the Applicant succeeding without deciding on the merits of the case. A decision on the merits properly belong to the trial. … The discretion of the court is to be exercised with a view to all the circumstances of the case."

[16] Rawlins J. also cited **Kerr** at pages 7 and 8 in referring to the guiding principles informing the exercise of the court's discretion, which quote I also adopt and set out given its relevance to the case a bar:

"If the Court is satisfied upon the materials it has before it that the party who makes the application has established a good and prima facie title and that the property the subject matter of the proceedings will be in danger if left until the trial in the possession or under the control of the party against whom the appointment of a receiver is asked for, or at least that there is reason to apprehend that the party who makes the application will be in a worse situation if the appointment of a receiver be delayed the appointment of a receiver is almost a matter of course. If there is no danger to the property and no fact is in evidence to show the necessity or expediency of appointing a receiver, a receiver will not be appointed. The duty of the court upon a motion for a receiver is merely to protect the property for the benefit of the person or persons to whom the court, when it has all the materials necessary for a determination, shall think it properly belongs. On a motion for a receiver,

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[8] 17th Ed.

the court will not prejudice the action, or say what view it will take at the trial. Indeed the court will not appoint a receiver at the instance of a person whose rights is disputed, where the effect of the order would be to establish the right , even if the court be satisfied that the person against whom the demand is made is fending off the claim."

[17] Counsel, Mr. Froomkin QC, contended that having looked at the material before the court, there was no basis on which the exparte Order should have been made and relied on the the general principles enunciated in the following cases:

(a) **American Cyanamid Co.-v- Ethicon Ltd.**[9]

(b) **Behbehani et al -v- Salem et al**[10]

(c) Fourie -v- Le Roux et al[11]

[18] The **American Cyanamid** case is widely considered as the watershed authority encapsulating the legal principles governing the exercise of the court's discretion on the grant of injunctive relief which may be summarised as follows:

(i) Firstly, whether there is a serious question to be tried;

(ii) Secondly, where the balance of convenience lies; this may entail a consideration of many factors, some of which may be peculiar to the circumstances of a particular case. However, the issue of the adequacy of damages is a central one involving a dual consideration, namely: (a) whether were the Claimant to succeed at trial, he would be adequately compensated in damages for the loss sustained in the interim between the application for the injunction and the trial. If damages would be an adequate remedy and the Defendant is able to pay them, no injunction will normally be granted; and (2) the countervailing consideration where damages would not be an adequate remedy and the Claimant fails at trial, whether the Defendant would be adequately compensated by an award of damages under the Claimant's cross-undertaking in damages which he would be able to meet in respect of the loss suffered by the Defendant as a result of the grant of the injunction. If so, then a grant of an injunction on this ground would

[9] [1975] AC 396
[10] [1989] 1 W.L.R. 723
[11] [2007] 1W.L.R. 320

not be open to objection. If not then this would be one of the factors weighing against the Claimant.

(iii) Where the factors appear to be evenly balanced then the maintenance of the status quo becomes a very important consideration.

[19] The **Behbehani case** approves the principles governing the court's treatment of non disclosure of material facts, citing extensively from passages in the judgments of the learned law lords in the case of **Brinks Mat Ltd. –v- Elcombe[12] [1998].** I need cite only the passage from the judgment of Ralph Gibson L.J., where the principles are encapsulated at pg 1356:

"***In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486, 514, per Scrutton L.J.***

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see Rex v. Kensington Income Tax Commissioners, per Lord Cozens-Hardy M.R., at p. 504, citing Dalglish v. Jarvie (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in Thermax Ltd. v. Schott Industrial Glass Ltd. [1981] F.S.R. 289, 295.

(3) The applicant must make proper inquiries before making the application: see Bank Mellat v. Nikpour [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an Anton Piller order in Columbia Picture Industries Inc. v. Robinson [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 92-93.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure . . . is deprived of any advantage he may have derived by that breach of duty:" see per Donaldson L.J. in Bank Mellat v. Nikpour, at p. 91, citing Warrington L.J. in the Kensington Income Tax Commissioners' case [1917] 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:" per Lord Denning M.R. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure

[12] [1998] 1W.L.R. 1350

which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.

"when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant . . . a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" per Glidewell L.J. in Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc., ante, pp. 1343H - 1344A."

[20] In **Fourie,** a decision of the House of Lords in England, Lord Scot of Foscote at paragraphs 33 and 34 of his judgment reiterated the importance of the duty to make full disclosure and counsel's duty to the court. I recite those paragraphs:

At para.33: "***Whenever an interlocutory injunction is applied for, the judge if otherwise minded to make the order, should as a matter of good practice, pay careful attention to the substantive relief that is, or will be, sought. The interlocutory injunction in aid of the substantive relief should not place a greater burden on the Respondent than is necessary. The yardstick…. 'just and convenient' must be applied having regard to the interests not only of the claimant but also of the defendant. This is particularly so in the case of freezing orders applied for without notice. Assets to which the Defendant has no proprietary claim whatever, are to be frozen so as to constitute a source from which the claimant can hope to satisfy the money judgment that in the substantive proceedings he hopes to obtain. The frozen assets are removed for the time being from any beneficial use by their owner, the Defendant. This is a draconian remedy and the strict rules relating to full disclosure by the claimant are a recognition of the nature of the remedy and its potential for causing injustice to the defendant."***

At para.34 he quoted this passage from Mummery L.J., in **Memory Corpn plc-v- Sidhu (No.2)**[13] : ……. "***It is the particular duty of the advocate to see that the correct legal procedures and the forms are used … and that at the hearing the court's attention is drawn by him to unusual features of the evidence adduced , to the applicable law, and to the formalities and procedure to be observed"***

The facts and circumstances

[21] I return to the facts and circumstances of the instant case and the grounds raised by the Defendants for the discharge of the exparte Order. The Claimants on their evidence rely on the six agreements. In respect of the Bills of Sale and Promissory Notes they say that the Defendants have failed to make a single payment of their own volition. Despite formal demand letters 22nd October, 2007, no payments have been made. RM places the amounts owed under the Bills of Sale and Promissory Notes to be in excess of 1.6 million dollars. This does not include amounts to be assessed in respect of the Claimants' share of cash distributions from the Business Operations. Furthermore, they say that the Defendants in early September, 2007 wrongfully removed electronic data from the computer server located in Montana which contained financial and accounting data information regarding BCC and AAC as well as FMS and in so doing incapacitated the server which has resulted in their being unable to access the live accounting information of

the Defendants. They also allege that the Defendants have been engaging in side deals, or otherwise diverting cash from the Business Operations or otherwise converting same to their own use without the requisite pro rata distribution to the Claimants, as provided for in the Personal Agreement and Services Agreement; and that they are also engaged in forestalling collections in respect of substantial customers with a view to reducing cash revenues which would be available for cash distributions under the said agreements to the Claimants. The Claimants also say that the Defendants have the means to divert assets to other business enterprises outside of the jurisdiction and are aware of their involvement in the development of at least one business in St. Croix, USVI. The affidavit of RM[14] speaks to various sums of money withdrawn either in cash or cheques and used by the Defendants or to the use of other members of their family and in various instances with little or no supporting documentation as to its purpose as well as speak to large customer collectibles remaining uncollected for long periods in instances where such customers are friends of the Defendants. It is also alleged that monies have been diverted from BCC as well as sums loaned by the Claimants and used in improvements to the M/V Lady Romney. They complain of the Defendants' failure to provide them with information which would give to the Claimants a view as to the amount of business being conducted and transactions being entered into, which they say hamper them in being able to determine the amounts available for cash distributions under the Personal and Services Agreements. Control of the accounting systems have been taken back from the Claimants and with the lack of information they are unable to determine, in essence, that all transactions are being accounted for. Furthermore, RM also says that the Defendants have ceased placing orders for raw materials through the Claimants and that DR had told BBD not to have further contact with RM after the business relationship between the Claimants and the Defendants became strained. This is borne out by an email of 26th September, '07 from KOR to RM.[15]

[22] At paragraph 18 of RM1, he stated in part thus: ***"I became aware of a considerable number of personal side deals between the Romney Parties and their customers, as well as a blurring of***

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[13] [2001] 1 W.L.R 1443 @ pg. 1460
[14] See RM1 paras 50 -55
[15] See; Exhibit RM1 pg 28

distinctions between operational and personal expenditure. ... In addition I witnessed countless bank overdrafts, learned of creditors with excessive unpaid bills and experienced an apparent resistance to the Romney Parties properly carrying out an inventory accounting system ... agreed upon. Derrick Romney's excuse for the accounting failures was that the business was not making sufficient money to pay both operational expenses and debts. When FMS took over the accounting function this turned out not to be true."

At paragraph 19 of RM1, RM went on further to say, in essence, that when they (the Claimants took over the accounting functions they paid a number of the Defendants' creditors in excess of $500,000.00 and about $450,000.00 was used to pay down on the debts to the Claimants under the Bills of Sale and Promissory Notes which sum went towards reduction in the arrears of interest and did not affect the principal owing.

[23] DR in his First Affidavit admits that RM or his entities FMS or FMCC purchased the concrete pump unit on the Mack Truck and the Wheel Loader and that RM also advanced to him US$200,000 shortly after the purchase of that equipment. DR also acknowledged entering into the Bills of Sale in the sums of $598,022.00 and $130,000.00, and subsequently the two promissory Notes in the sums of $200,000.00 and $100,000.00 but says that the understanding was that he would repay RM/FMS/ FMCC and commence making payments once BCC started making a profit.[16] This understanding is refuted by RM. DR further stated that their business relationship became strained around 2005 when RM took the view that BCC and AAC were making a profit and that they (the Defendants) were diverting funds from BCC and AAC to their own personal use rather than fulfilling their agreement to make payments when the business started turning a profit. At paragraph 12 [DR1] DR says: ***"Notwithstanding the installation of new accounting ... systems, the 3rd Applicant [RM] still persisted in the erroneous belief that BCC and /or AAC was operating at a profit and that the Romney Parties were diverting monies.... for their own personal benefit. We denied this.... ."*** DR then goes on to say that they became aware that during the period that the Claimants were in control of the accounting functions, various sums were collected by the Claimants, for example, a sum totaling some $1, 456,325.36 collected from BDD which had not been recorded in BCC's or AAC's accounts and that a sum of $481,960.05 was transferred from BCC's accounts at FCIB to the Claimants. They expressed concern

[16] See: DR1 paras. 8-10

in a letter of 13th June, 2007. Further, in a letter from their solicitors dated 4th September, to Claimants' solicitors it was stated inter alia, that '***until the records are in some acceptable shape discussions over either buy out or repayment of debt [could] not proceed."***[17] In the said letter, the Defendants' solicitors wrote in the second paragraph: ***"Mr. Romney does not for one moment dispute that Mr. Mullendore paid for a concrete pump and front loader and he will be repaid."*** The Claimants were also told that BCC had hired a CFO who was charged with the daily financial operations of BCC and that he was in the process of establishing ***a proper accounting and reporting mechanism so that the financial operations are fully transparent."*** At best it may be inferred that proper accounting in respect of the financial affairs of the Business Operations was not being carried out and is thus one of the key factors giving rise to this dispute.

[24] DR's letter to RM of 13th June, 2007, (exhibit DR1) also bears note. Having registered his concerns over the lack of receipt of financial statements from the Claimants in the penultimate paragraph he stated as follows: ***"Finally, I do need to make sure that the business is profitable. Under my watch the business did have cash flow problems at certain times due to collection issues. However, all things considered, it was a profitable venture."*** (my emphasis). When this statement is taken in conjunction with the Defendant's assertion that the Claimants' view of the business being profitable was erroneous coupled with the denial that it was not profitable, raises to my mind the spectre of something amiss in respect of the Business Operations as being conducted by the Defendants given the admitted indebtedness of the Defendants to the Claimants and the profit sharing arrangements under the Personal Agreement and Services Agreement. Both states of affairs cannot be correct.

Delay

[25] The Defendants contend that there was no urgency and that there was delay by the Claimants not warranting the 'without notice' application before the claim was made. Further, they contend as at 17th September, 2007, the Claimants spoke of applying for the appointment of a receiver.[18] The Application without notice was not made until November

[17] See: DR1 para. 21 and DR 2.
[18] See; Exhibit DR3

14th, 2007, some two months later. They point to the continuing breakdown of relations as set out in RM1 paragraphs 18 to 23. By July, 2007, the Defendants had taken back the accounting functions; In the Claimants' letter of 29th August, 2007 (Exhibit RM1) they spoke of the Claimants being excluded from involvement in the business; The letter of September 7th from the Claimants' solicitors regarding the missing data files from the computer server and the criminal convictions of DR and CR obtained on 10th October, 2007. All of these factors Counsel contend point to delay in taking any steps for which no explanation is given and thus demonstrate a lack of urgency warranting a 'without notice' Application. They submit that the delay is egregious and thus the exparte Order ought to be discharged.

[26] Counsel rely on the following authorities

(a) **Adanac Industries Ltd. –v- Black** [19]

(b) **A.G. of Anguilla –v- Hansa Bank et al**[20]

(c) **Bates –v- Lord Hailsham of St. Marylebone**[21]

(d) **Street-v- Combes**[22]

In **Adanac,** Wooding CJ., at page 234 of his judgment noted that the applicant had filed his affidavit on 7th November, did not file his writ until 3 days after and did not seek the exparte injunction until five days after that and concluded as follows: ***" How, in view of such lapse of time, it could possibly be made to appear ... that there was need for prompt and immediate action passes our comprehension."*** In **Hansa Bank,** Edwards J., concluded at paragraph 28 of her judgment that the fact that the applicant took 10 days [after becoming aware of the event of taxation of costs] to make application for the freezing order compelled the conclusion that the applicant could not have considered that prompt and immediate action was necessary. In **Bates,** the court spoke of knowing of the event for 4 weeks prior to the exparte application and, in essence, said that in the absence of a most cogent explanation or unless the Applicant had a overwhelming case on the merits the injunction ought to be refused as apart from other considerations an inference to be drawn from

[19] (1962- 1963) 5 W.I.R 233
[20] Suit No. 7 of 1998 and Suit No. 6 of 1994 (Anguilla – unreported)
[21] [1972] 1 W.L.R. 1373
[22] (July 28th 2004 - unreported UK Ch. Div.)

insufficiently explained tardiness is that the urgency and gravity of the Applicant's case are less than compelling. In **Street,** the delay spanned some 8 months. The explanations went some way towards explaining the delay but nevertheless was a factor against the Applicant in deciding whether the freezing orders ought to be continued.

Risk of dissipation of Assets.

[27] In the Application without notice the Claimants advanced two (2) reasons for not giving notice namely, (i) the risks of the Defendants dissipating assets and (ii) that they had learned unequivocally on 7th November, that the Defendants considered that they had terminated the commercial relationship between them and that up to that point the parties were in essence 'still talking.' The second reason does not, in the circumstances, carry much weight since it took another seven (7) days to make the application, and also in light of the factors to which counsel for the Defendants alluded as regards delay. It is the first reason to which I turn my consideration. RM[23] at paragraphs 39, 40 and 41 – 55 seek to address this. They:

(a) express a fear of dissipation and mention that the equipment which is the collateral under the Bills of Sale would be substantially depreciated since their acquisition and thus would not cover the amount of the Defendants' indebtedness;

(b) say that the Defendants have the means to do so by virtue of their connections with a business being developed in St. Croix, USVI and that they have used monies generated by the Anguillian businesses for this purpose;

(c) speak to DR's and CR's criminal convictions in the USVI in 1999 for fraud;

(d) electronic data theft from the computer server in Montana on 3rd September, 2007;

(e) the questionable withdrawals and use of funds for private purposes, delays in debt collections, and side deals of which they had become aware since November 2005; In RM's second affidavit [MR2] paragraphs 14 to 23 sets out with more specificity various instances of alleged diversion or misappropriation of funds and 'side deals' and other cash transactions not brought into account- some referred to in RM1 and others coming to light they said after service of the exparte

[23] See: RMI

Order. Some of these instances of 'side deals' or cash diversions are refuted by the Defendants. For example, Mr. Lake and Mr Karle T Smith both swore affidavits refuting these allegations in respect of transactions involving them. Mr. Derek Gumbs who RM said told him of diversions of large cash sums by DR also swore an affidavit in effect denying what RM said he told him and otherwise stating that what he had in fact said to RM had been mischaracterized.

[28] Counsel for the Defendants cite the following authorities in relation to risk of dissipation of assets:

(a) **Spectrum International Holdings Limited-v- Modern Perfect Developments Limited & Anr.**[24]

(b) **Orwell Steel (Erection and Fabrication) Ltd –v Asphalt and Tarmac (UK) Ltd.**[25]

(c) **Z Ltd -v- A and others**[26]

(d) **Street & Anr –v- Coombes and others.**

From these authorities the well established legal principle is reiterated as being equally applicable to the appointment of a receiver on the second basis referred to above, as to the grant of a freezing order; that is, that it must be shown that there is a real risk of dissipation of the assets. In other words, there must be grounds for believing that there is a risk of the assets being removed or disposed of to avoid execution. Rawlins J., at paragraph 24 of his judgment in Spectrum said: ***"It would be an abuse of process for a party to apply, and a misuse of discretion for a court to appoint receivers to preserve property, when prima facie the applicant has no interest in it or when the interest of the party is not being diminished or compromised."***

In **Z Ltd.** Kerr LJ., in relation to the jurisdiction to grant Mareva injunctions opined that such jurisdiction would not be properly exercisable against the majority of Defendants generally being ***"persons or concerns who are established within the jurisdiction in the sense of having assets [here] which they could not or would not wish to dissipate merely in order to avoid some judgment which seems likely to be given against them… because they have an established business or other assets which they would be unlikely to liquidate simply in order to avoid a judgment. It is***

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[24] BVIHCV 2005/0071 (unreported)
[25] [1985] 3 All ER 747
[26] [1982] 1All ER 556

impossible to categorise such situations. In each case the court will have to form a view when the application is made, on which side of the line each.. case falls, but bearing in mind that the great value of this jurisdiction must not be debased by allowing it to become something which is invoked simply to obtain security for a judgment in advance, and still less as a means of pressuring Defendants into settlements."

[29] At this juncture, portions of the Claimants' solicitor's letter of 17th September, exhibited as DR3 bears reference. In the second paragraph thereof, they spoke of the various positions they would be advising their client to take in the absence of *'a meeting of the minds.'* At item 4, after stating various options including the leasing and operation of the business by RM, they stated: ***"If the option is not acceptable to your client, we are instructed to apply without delay for the appointment of a receiver of Best Concrete, so that the value of the business can be realized as soon as possible to raise cash and repay all creditors."***
The Defendants contend that this letter demonstrates that the appointment of a receiver is merely part of the Claimants' strategy to coerce them into a settlement. This letter was not brought to the court's attention on the hearing of the exparte application.

[30] When these factors are considered, it begs the question as to whether there was indeed a genuine urgency warranting application before action. I also take into account the fact that the Business Operations appear to be well established in Anguilla with apparently very lucrative contracts with BBD/ KOR for the supply of concrete and other heavy equipment services and also has a work force. RM himself refers to them as ***"actively trading operations"***[27] What is troubling however, is the fact is that DR appears, in respect of the BBD/KOR contracts, to have told the principals of BBD/KOR not to deal with the Claimants and BCC has also ceased placing orders with the Claimants. This stance, the Claimants contend, in essence, can have an adverse impact on the Business Operations and by extension the Claimants.

Non Disclosure of Material Facts

[31] The Defendants contend that the Claimants failed to disclose that the parties had submitted to mediation which at the very time of the Application was ongoing and that

[27] See: RM2 para.53.

mediation was at the suggestion of the Claimants. The Claimants in response say[28] there was an agreement to mediate without prejudice, it was non exclusive and confidential and in fact they had issued an open formal demand letter by 22nd October. I do not consider the fact that the parties had submitted to mediation on a confidential basis as being material to the issue as to whether an order should be made or not in light of the fact that by 22nd October, they had issued an open formal demand. This signaled that the mediation process was either not being pursued or was not being successful.

[32] The Defendants also contend that the Claimants failed to disclose that they had appropriated approximately 2 million dollars of the Defendants' monies thereby elevating themselves, improperly, to the status of a preferred creditor. In the Affidavit of Peter La Montagne [PLM 1] at paragraphs 9 – 1 3, he deposed to the various sums taken by the Claimants – a sum of $456,239.05 from BCC's account at FCIB and a total of $1,399, 130.30 received directly by the Claimants and not recorded in BCC's or AAC's accounts. In RM1 the Claimants refer to a sum of approximately one (1) million used to pay some creditors of BCC including a sum of $450,000.00 paid towards BCC's debt to the Claimants under the Bills of Sale. The Defendants' assertion of approximately 2 million taken by the Claimants and the fact that various sums paid by BBD was not recorded or reflected in the accounts of BCC or AAC has not been refuted. The Defendants accordingly contend that there was a failure to disclose whether all of the Claimants are in fact creditors as some may have been paid off entirely and thus what is owing to whom and by whom is not clear. The precise amounts of sums taken and the manner in which such sums were applied ought to have been fully disclosed to the court. As it stands, the Claimants, in the absence of an explanation, may have fallen afoul of the very allegations they make against the Defendants in terms of a lack of accounting.

[33] The Defendants also contend that the Claimants failed to disclose that damages would be an adequate remedy or that the Defendants would be unable to pay. The Claimants accept that their claims are in contract for specific sums due and owing under the Bills of Sale and Promissory Notes and for sums to be assessed under the Personal Agreement

[28] See: RM 2 para.24

and Services Agreement. They contend that the Defendants would not be in a position to pay them if they place their assets beyond the reach of the Applicants or otherwise dissipate them. Further evidence was adduced by the Claimants in respect of the Defendants' indebtedness to other creditors. Mr. Javier Guadayol deposed to a debt owing to Rody Trucks International Corp in excess of some $200,000.00 and to Partes y Piezas in Aruba of a sum in excess of 3 million dollars owing by AAC, BCC and /or DR and of their difficulty in being able to collect on the said debts. RM in his Third Affidavit filed on 4th January, 2008, in response to the Affidavit of Mr. Guadayol and RM3 stated that substantial payments have been made to Partes y Piezas and Rody Trucks including a wire transfer of $500,000.00 and that the balance due and owing was disputed. It is not clear when such payments were made but an examination of the exhibits shows payments being made in 1996, well before the current transactions at the root of this dispute came about. Furthermore, it does not appear that the Defendants could say with certainty the total amounts paid in respect of those debts. As the matter currently stands it is not at all clear on the evidence as to what is the true financial position of BCC and AAC. Thus whereas in theory, damages would be an adequate remedy it is difficult to say whether the Defendants would be in a position to pay them. From the preponderance of evidence led both by the Claimants and the Defendants, one cannot but sense that the accounting in respect of BCC and AAC has not been conducted with due diligence. Whether this is intentionally so or simply a lack of ability will no doubt be fully ventilated at trial.

Lack of stamping under the Stamp Act[29].

[34] The Defendants allege that the Promissory Notes, the Personal Agreement and Services Agreement relied on at the exparte hearing were not stamped pursuant to section 20 of the provisions of the Stamp Act and thus was inadmissible in evidence and accordingly the Claimants ought to have disclosed the legal effect thereon. It is now accepted that the Bills of Sale were stamped. The Promissory Notes are stated to be payable outside of Anguilla at the offices of FMCC in Montana, USA. The Stamp Act section 19 states as follows: " ***"Upon production of any instrument chargeable with any duty as evidence in any court of***

[29] Stamp Act c. 55 R.S.A.

civil judicature in Anguilla, the officer whose duty it is to read the instrument shall call the attention of the Judge to any omission ....of the stamp thereon and if the instrument is one which may be stamped after execution... it may on payment to the officer of the amount of unpaid duty.... be received in evidence, saving all just exceptions on other grounds ." Section 20 then goes on to state as follows: ***"Save and except as aforesaid, no instrument executed, in any part of Anguilla, or relating, wherever executed, to any property situate, or to any matter or thing to be done , ... in Anguilla, shall,.... be .... given in evidence or admitted to be good, useful, or available in law or equity unless it is duly stamped ......"*** Section 41 goes on further to state as follows: ***" .... A bill of exchange which is ..... payable outside Anguilla shall not be invalid by reason only that it is not stamped in accordance with the provisions of this Act, and any such bill which is unstamped ... may be received in evidence on payment of the proper duty..... provided by sections ...and 19."***

This ground, to my mind, is more technical than substantive as the provisions of the Act allows for remedial action then and there by payment to the officer in court. My attention was certainly not drawn to this fact. That being said however, in my view, the Claimants did not rely solely on the ***Bills of Sale, the Promissory Notes, the Personal Agreement and Services Agreements*** by merely exhibiting the instruments. In RM1 paragraphs 26 to 29, particulars of the agreements contained in the instruments are set out. Accordingly, were the instruments not exhibited I consider that a case would still have been made out based on the statements contained in the affidavit. Furthermore, DR in his First affidavit acknowledged the existence of the agreements and also acknowledged that monies were advanced. The Defendants do not assert that they made payments on account of the said advances of their own volition. What they appear to say is: (a) that the amount which is said to be due in respect of any particular agreement is disputed having regard to the fact that the Claimants, of their own volition, applied sums on account of the said debts, and (b) that any monies payable on account are not to be paid until such time as the Business Operations were turning a profit.

[35] Considering the matter in the round, I am quite satisfied that on the evidence presented by the Claimants there is a good arguable case. I am also mindful of the fact that the appointment of a receiver is an intrusive and expensive remedy and thus not one to be granted lightly. Without venturing too far into the purport of the various agreements it bears mention that the Personal and Services Agreements themselves create a unique

relationship between the parties which by its nature calls for transparency in the Business Operations as amongst themselves. Given the history of events such transparency is sadly lacking. Even though the Business Operations are well established in Anguilla I am satisfied that the Claimants' fears of the risk of dissipation are not unfounded. The operation and link to the entity DC5 in the USVI cannot be overlooked. The incidents of use of funds earned by the Business Operations for personal use have merely been denied. Troubling also are the statements by the Defendant DR to the effect that the business was profitable and yet there is no explanation for lack of payment on account in respect of the admitted advances. Indeed, the true financial position of the Defendants remains obscure. Furthermore, it seems to me that in respect of the agreements and covenants contained in the Bills of Sale and the Promissory Notes that the Claimants are in the position of an equitable mortgagee where a receiver may be appointed as a matter of course without the necessity of showing danger to assets. It is not, to my mind, enough that the Defendants say that this was not the basis on which the exparte Order was sought. In my view, it was open and remained open to the court to consider that basis and make an order therein where such a case has been made out. The Claimants rely on this basis also at the inter partes hearing. The substance of the allegations and the claims made have not changed.

[36] In all the circumstances, given the delay as well as the matters which were not disclosed, I am minded to discharge the exparte Order. I do consider however, based on all the material before me, that a fresh order ought to be granted as I am satisfied that unless an order is made there is the very real risk that the Claimants would be in a worse position without an order given the nature of their relations. I have also considered whether a maximum sum order would be best suited to the particular circumstances of this case, rather than a receivership order. This approach was much more attractive to me in that, it would mean only some of the assets would have been tied up pending the trial of the claims. The Claimants have estimated their total claim at $3 million. I would have been minded to make a maximum sum order in this sum. The difficulty with the making of such an order in this case however is twofold: (i) already alluded to is the obscurity of the Defendants' financial position and (ii) the amounts which may be said to be due under the

Personal and Services Agreements. There is no evidence before the court which demonstrates that the Defendants hold assets unencumbered up to or in excess of such a sum. The position with regard to BCC's and AAC's creditors is unclear. There appears to be at least another creditor to the tune of at least 3million dollars. Thus the making of such an order may not be efficacious in the peculiar circumstances of this case.

[37] Based upon the foregoing, whilst I consider that the exparte Order should be discharged, nonetheless I am driven to the conclusion that in all the circumstances of the case, it is fair and just that a receiver be appointed. In my view, a case has been made out warranting an appointment on both bases as enunciated in **Kerr** and set out above. Accordingly, I hereby discharge the exparte Order and in the exercise of my discretion, make a fresh order on terms similar to the exparte Order, save that:

(a) Paragraph 3.I be deleted.

(b) As to paragraph 7, the sentence beginning "For the avoidance of doubt' to the end of that paragraph be deleted.

(c) As to paragraph 8 by adding the following words at the end. "The sum of US$1,500.00 has been approved in respect of the individual Derrick Romney for living expenses".

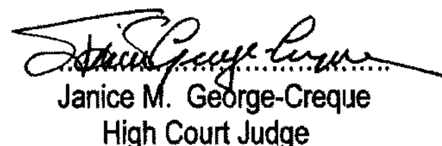
(d) Paragraph 10 be deleted.

(e) Paragraphs 15 to 19 inclusive be deleted.

Based upon the information, background, qualification and experience provided to the court, I hereby appoint Mr. Marcus Wide of Price Waterhouse Coopers LLP, CA, CIRP as receiver in respect of the order herein made. The receiver shall not be required to provide security and shall be remunerated in accordance with his normal hourly billing rate which shall be subject to approval by the court. The receiver shall file his accounts with the court every sixty (60) days, unless otherwise ordered.

Costs

[38] The costs in respect of the applications herein shall be costs in the cause.



Janice M. George-Creque
High Court Judge