

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV 0001/2010

BETWEEN:

CALEFACCIÓN Y VENTILACIÓN SA. DE C.V.

Respondent/Claimant

And

FLAG LUXURY PROPERTIES (ANGUILLA) LLC

Defendant/Applicant

Appearances:

Mr. Gerhard Wallbank and Mr. Harry Wiggins for the Defendant/Applicant

Mr. Thomas Astaphan for Respondent/Claimant

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2010: November 30
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DECISION

[1] **BLENMAN, J:** This is an application to discharge an ex parte Freezing Injunction granted by the court.

Background

[2] Calefacción Y Ventilación, SA. DE C.V (Calefacción) is a company registered under the Laws of Anguilla. It is involved in the provision and installation of equipment for Chiller Plant.

- [3] Flag Luxury (Anguilla) LLC (Flag) is a company incorporated in Delaware and registered under the Laws of Anguilla. It is the proprietor or substantial property in Anguilla and was in the process of constructing an upscale hotel.
- [4] Calefacción alleges that, based on a contract, it supplied and provided certain equipment of the Chiller Plant and man power to install the equipment to Flag. It alleges that while Flag has paid for some of the work it has outstanding sums and has refused to honour its financial obligation.
- [5] Calefacción has filed a Claim for a Statement of Claim against Flag. Calefacción alleges that Flag owes it US\$2,172,149.00 together with interest in the sum of US\$361,373.02 as payment for the supply and installation of Chiller Plant. These payments were certified by Flag's engineer yet it has refused to effect the payments. Despite repeated requests by Calefacción for payment, Flag has refused to effect any payment of the outstanding sum.
- [6] In seeking the court's assistance in obtaining the Freezing Injunction, Calefacción indicated that it was concerned that Flag was going to dispose of the goods. It therefore applied to the Court *ex parte* and obtained a Freezing Injunction restraining Flag from encumbering, removing or disposing, dealing with or diminishing the value of certain listed property, which is the subject matter of this application. The listed property were alleged to be some of that supplied by Calefacción to Flag.
- [7] Calefacción therefore implored the court to preserve the equipment that it supplied to Flag, to the value of US\$2, 243,665.49 in order for it to be able to recover the goods or to be paid in kind by way of the value of the equipment. It is also Calefacción's contention that the title to the equipment which they had supplied to Flag had not passed.

- [8] Calefacción also told the court that Flag has unsatisfied judgments in unrelated proceedings and therefore Calefacción was concerned about Flag's financial status.
- [9] The court granted the Freezing Injunction sought. The order did not prohibit Flag from dealing with or disposing of any of its assets in the ordinary course of business. It restricted Flag from disposing, dealing or encumbering with the specific equipment that was allegedly supplied by Calefacción.
- [10] Flag has applied to the court to have the Freezing Injunction set aside on three primary bases.
- (a) Calefacción did satisfy the requirements of law in order to obtain a Freezing Order.
 - (b) Calefacción in obtaining the Injunction was guilty of material non disclosure.
 - (c) A pre-existing creditor with a prior secured charge in the equipment renders the injunction effective
- [11] The application to discharge the Injunction is strenuously resisted by Calefacción.

Issue

- [12] The issue that arises for the court to resolve is whether the court should discharge or continue the Injunction that it has granted.
- [13] In order to put some context to the hearing between the parties, it is noteworthy that since the grant of the injunction, on the 18th February Mr. William Tacon was appointed as receiver by Credit Suisse AG, Cayman Islands Branch ("Credit

Suisse") in its capacity as administrative and collateral agent under a First Lien Credit Agreement, dated March 21st 2006. In the capacity mentioned, Mr. Tacon, on behalf of Flag has deposed to an affidavit opposing the continuation of the Freezing Injunction.

[14] Mr. Jose Martin Nunez deposed to further an Affidavit in Support of the Injunction

[15] Learned Counsel then on record, Mr. Ravi Bahadursingh filed extensive written submissions, on behalf of Flag seeking to have the Injunction that was granted discharged. At the hearing of the matter, between the parties, Mr. Wallbank has replaced Mr. Bahadursingh as counsel. The written arguments provided to the court were adopted by Mr. Wallbank.

[16] Learned Counsel Mr. Nyaramba Nota and Mr. Colin Meade then acting for Calefacción filed written submissions in opposition to Flag's application to discharge the Injunction.

[17] Mr. Nyaramba Nota was in disposed, at the hearing between the parties and Learned Counsel Mr. Thomas Astaphan represented Calefacción. He adopted the written submissions and filed additional submissions on behalf of Calefacción.

[18] The court also benefitted tremendously from oral arguments from Mr. Wallbank and Mr. Astaphan.

Calefacción's Submissions

[19] Learned Counsel Mr. Thomas Astaphan said that the ex parte Order granted to Calefacción on the 21st January 2010 is a combination of an Interim Injunction pursuant to Part 17.1 (1)(b) CPR 2000 and an order for the detention, custody or preservation of relevant property" pursuant to Part 17 (1) (h) (ii) CPR 2000.

Contrary to Flag's contention it is not a typical Freezing Order pursuant to Part 17.1 (1) (j) CPR 2000 because:

- (a) The Order does not prohibit the disposal, or dealing or diminishing the Respondent's assets (only the disputed assets which are the subject of the Claim),
- (b) There are no limitations as to what the Respondent can spend of his assets.

- [20] Mr. Astaphan Learned Counsel maintained that the principles that are applicable in the application at Bar, are those that were enunciated in the *American Cyanamid v Ethicon Ltd* [1975] 1 All ER
- [21] Flag's contention, that "the terms of the Order clearly show that Calefacción sought, and was granted, a Freezing Order" pursuant to Part 17(1) (j) CPR 2000 is rejected. Mr. Astaphan submitted that the injunction is, in fact, a combination of an Interim Injunction pursuant to Part 17.1 (1)(b) CPR 2000 and an order for the "detention, custody or preservation of relevant property" pursuant to Part 17 (1) (h) (ii) CPR 2000.
- [22] Learned Counsel Mr. Astaphan submitted that Calefacción is not required to satisfy the criteria necessary for the grant of a Freezing Order (formerly called a Mareva Injunction).
- [23] Calefacción claim is and has always been that title in the Equipment did not pass under the terms of the contract. Further, it is clear from the terms of the Order that Calefacción only sought to restrain Flag from dealing with the specific assets that are the subject of Calefacción's substantive proprietary claim. As such, the onerous pre-requisites for the grant of a Mareva Injunction did not apply to the Injunction, contrary to Flag's assertions. It is clear that the terms of the Injunction

are much less draconian than those that would be contained in a Mareva Injunction, and Mr. Astaphan submitted that the relevant legal principles that flow from the case of *American Cyanamid Co v Ethicon Ltd* 1975] 1 All ER, are the principles applicable to this case. Accordingly, Mr. Astaphan submitted that Flag's contention is that reliance on the *American Cyanamid* case is misplaced. Mr. Astaphan submitted that it is Flag's reliance, on case law concerning Freezing Injunctions that is misplaced because: a) those cases did not concern a proprietary claim b) a case concerning an injunction where there is a proprietary claim cannot be properly called a Freezing Injunction and/or c) those cases concerned injunctions which sought to restrain dealings with all of a respondent's assets.

[24] As such, the appropriate legal tests for ascertaining whether the correct juridical basis for the Injunction exists, flows from the *American Cyanamid* case. These are as follows:

- a. Calefaction must establish that he has serious question to be tried, that it is not frivolous or vexatious. It is not the court's function at this stage to try to resolve conflicts of evidence. This should be dealt with at the trial;

[25] If the above tests are satisfied, the court will exercise its discretion on the balance of convenience. In considering this, the court will take into account *inter alia*:

- i. Whether damages would be a sufficient remedy;
- ii. Whether the respondent is likely to be able to pay damages;
- iii. Whether the applicant is likely to be able to pay damages under its undertaking; and
- iv. The maintenance of the status quo.

- [26] Mr. Stephan submitted that Calefaction has established a serious question to be tried, namely, the question as to whether title in the Equipment passed to the Flag or not. Having established this, Learned Counsel Mr. Stephan submitted that the balance of convenience lies in favor of Calefaction, since damages would not be a sufficient remedy (since such judgment would be worthless) and, conversely, that Calefaction is in a position to pay damages under its cross undertaking in the Order. The status quo should be maintained until such time as the substantive issue of passage of title in the Equipment has been decided.
- [27] The arguments Flag makes in relation to the Injunction consisting of security for a debt are misconceived, since the principal issue to be decided is whether the Equipment belongs to Calefaction or Flag, not whether the Equipment should be used as security as a debt owed to Calefaction.

Material Non-Disclosure

- [28] Learned Counsel Mr. Stephan submitted that Flag relies *The Attorney General of Anguilla v Hansa Bank and Trust Co. Ltd et al* (13th March 2002, Unreported) to support its argument that Calefacción was bound to give full and frank disclosure of all matters which are material for the court to know regardless of whether they go against the grant of the relief sought. However, that case concerned a Freezing Injunction, which is a much more draconian form of relief than that granted by this court in favor of Calefaction.
- [29] Learned Counsel Mr. Astaphan said that Calefacción did give full and frank disclosure to the court all material facts in any event. The Caribbean Civil Court Practice (Butterworth Nexis Lexis, (2008) at Note 14.32 applies and that all material facts must be put before the court. Calefacción did put all material facts before the court and points out that, whilst the submission of written arguments is highly desirable in this context, it is not required to demonstrate that all material

facts were put before the court. Skeleton Arguments were not submitted in this case because of the urgency of the matter as explained above. Calefacción substantially complied with every other aspect of the recommendations in the quoted commentary, including taking a full note of Hearing and sending it to Flag.

[30] Mr. Astaphan said that Flag complains that Calefacción did not bring to court's attention the fact that Credit Suisse has a secured charge over Flag's property. Calefacción accepts that it did not bring this fact to the attention of the court and contends that the reason for this is that it was not a material fact. The reason for this is that, on the Calefacción pleaded case in the substantive proceedings, the property in the equipment has not passed to Flag and so cannot be affected by a secured charge over Flag's property.

[31] Flag cited the case of *Astrom Anguilla Inc v Flag Luxury Properties (Anguilla) LLC et anor* AXAHCV 2009/0091 to support its argument that the injunction would not have been granted had the court been aware of the existence of Credit Suisse as a secured creditor with a charge over Flag's assets. Mr. Astaphan submitted that the facts in the *Astrom* case are substantially different from the case before this court. In particular, that case is not authority for the proposition that the existence of a secured creditor must lead a court to the conclusion that a Freezing Injunction should not be granted. Learned Counsel Mr. Astaphan submitted that the existence of a secured creditor in that case was so significant because a Freezing Injunction would have had the effect of preventing the respondent company, in that case, from carrying on [its] business. Further, there were no substantial issues as to property in any of the assets affected by the injunction in that case. In the case before the court, the existence of Credit Suisse as a secured creditor with a prior interest in the assets of Flag was not a material fact Calefacción was required to disclose. Calefacción's claim is and has always been that the subject-matter Equipment is that of the Calefacción and not Flag as title did not pass from Calefacción to Flag. Mr. Astaphan further submitted that

whether or not there was a secured creditor is irrelevant to Calefacción's claim and thus, the application for Injunctive Relief.

[32] Calefacción's position is that the contract is a strict performance contract. As such, Calefacción sought to set out the relevant terms in the Statement of Claim. Calefacción contends that the intention of the parties was that title would not pass to Flag until all the terms of the contract had been performed. See Sale of Goods Act.

[33] Mr. Astaphan argued that Calefacción has complied with all of its obligations in terms of disclosure at the ex parte Hearing of the Application and, accordingly, rejects Flag's assertion that the Injunction should be discharged and Costs awarded.

[34] Mr. Astaphan maintained that Calefacción provided full disclosure of the material facts as required in an application for an Injunction of the type granted by this court on 21st January 2010. He submitted that Calefacción came to the court with "clean hands" as required. Accordingly, the injunction ought not to be lifted for failing to provide the required disclosure to the court, at the ex parte hearing.

Respondent as a Pre-existing Creditor with a Secured Charge

[35] Mr. Astaphan stated that he agreed with Flag in respect to the rights of a pre-existing Creditor with a Secured Charge over Flag's assets. Calefacción states as follows:

"Insofar as the Equipment is subject to a secured charge in favour of the Collateral Agent under the Debenture and/or the Registered Land Charge, such charge must necessarily rank in priority over any in persona claim against Flag over Calefacción as a matter of law".

[36] However, the point is that property in the Equipment did not pass, under the terms of the contract, to Flag in the first place and is not, therefore, subject to the secured charge in favour of Credit Suisse. There is unlikely to be any surplus money to pay Calefacción for the Equipment once the assets are sold. It is also clear from Flag's arguments that the intention is to dispose of the Equipment if the injunction presently in place is lifted. It is for this very reason that the injunction should remain in place until the substantive issue, of whether property in the Equipment transferred to Flag under the terms of the contract, is decided.

Proprietary Claim against Equipment

[37] Mr. Jose Martin Nunez does indeed make reference to a proprietary claim against the Equipment in his Affidavit. The legal arguments that title in the Equipment has not passed are particularized in the Statement of Claim. Flag's contention that this claim is vague and unparticularized is rejected as being without merit. The Statement of Claim particularizes this part of the Claim as follows:

- a. Pursuant to Section 2 of the Agreement, Flag has not paid for the goods and services in accordance with the strict terms of the contract that require payment within 30 days of the invoice of Payment Application;
- b. Pursuant to Section 2 (c) of the Agreement, Calefacción has not provided any release of claims for labour and materials;
- c. Flag specifically agreed to return of the equipment upon failure to pay for the contract work;
- d. On a true construction of the contract, the parties intended title in the goods to pass to Flag on payment of sums due under the Payment Applications.

- [38] Mr. Astaphan said that the rules governing transfer of title in goods are set out in the Sale of Goods Act (c.S10) Laws of Anguilla, but the contention that “Calefacción has proffered no or no sufficient allegation or evidence to displace the application of these Rules” is rejected. Flag contends that on a true construction of the contract, title in the Equipment would only pass once payment was received.
- [39] Section 20 of the Sale of Goods Act provides Rules for ascertaining the intention of the parties “Unless a different intention appears”. Calefacción contends that the true construction of the contract with respect to title is that property would not pass until sums due under the Payment Applications had been paid.
- [40] Learned Counsel Mr. Astaphan submitted that should the Injunction be lifted and the Receiver disposes of the Equipment prior to the determination of the substantial issue in this case, Calefacción if successful, would be left with only a Judgment of straw. The case at bar, is substantially different from the *Ashtrom* case cited by Flag, since that case concerned a claim for monies due and owing for work done and this case is a claim for the return of property owned by Calefacción, installed on Flag’s premises but not paid for. A gross injustice would be visited upon Calefacción if its property were to be sold by the Receiver to satisfy the Secured Creditor’s claim with no recourse by Calefacción in respect of its claimed proprietary rights.
- [41] Learned Counsel Mr. Astaphan stated that the Injunction granted on 21st January 2010 should continue in place, on the existing terms, until the issues rose in the Statement of Claim, in particular those concerned with passage of title in the Equipment, are resolved.

[42] Finally, Mr. Astaphan said that if the court thinks fit to discharge the Injunction, Flag be made to pay Calefacción's Costs, or alternatively, each party bears its own Costs. If this court does not discharge the Injunction, Flag pays Calefacción's Costs.

Flag's Submissions

Material Non-Disclosure

[43] Learned Counsel Mr. Wallbank stated that the court should discharge the Freezing Injunction that it has granted on the ground that Calefacción failed to make material disclosure. Mr. Wallbank maintained that Calefacción obtained a Freezing Injunction. Learned Counsel stated that Calefacción ought to have told the court that Credit Suisse AG, Cayman Islands Branch was a prior a secured creditor with a prior secured charge. In support of his argument, Learned Counsel referred the court to *The Attorney General of Anguilla v Hansa Bank and Trust Co. Ltd.* Suits No. 6 & 7 of 1994 and 1998.

[44] Learned Counsel Mr. Wallbank said that the existence of a pre existing creditor is an essential consideration for the court to take into account. He referred the court to The Caribbean Civil Court Practice, Butterworth's. Lexis Nexis, (2008) at note 14.32 provides:

"On an application made without notice (when the respondent is by definition, not present) all material facts must be put before the court especially those which ay defeat the applicant's case for the grant of such relief; it is accordingly, highly desirable practice that (1) the affidavits or other evidence contain all material facts and that (2) the general nature and structure of the applicant's case and the respondents probable case together with points of law be set out. Failure to disclose material facts will almost invariably result in any injunction so obtained being set aside."

Pre Existing Charges

- [45] Learned Counsel Mr. Wallbank adverted the court's attention to the existence of Credit Agreements between Flag and Credit Suisse for the sum of approximately US\$137,200,000 and US\$5,987,582.28. The indebtedness to Credit Suisse is secured by a Debenture and by Registered Charges.
- [46] Under Clause 2.02 of the Debenture dated 21st March 2006, all of Flag's rights, title and interests in the furnishings, fitting, appliances and apparatus, specialized fixtures were charged and assigned to Credit Suisse. The appliances are fixtures and are subject to charges under the Registered Land Act of Anguilla. Insofar as the equipment is the subject of the Debenture, the secured creditor's Credit Suisse's rights must take precedence over any claim of Calefacción.
- [47] Calefacción was aware, or at a minimum should have been aware that Credit Suisse was a pre existing creditor with a prior secured charge.
- [48] Mr. Wallbank Learned Counsel complained that Calefacción failed to make a number of material disclosures including the legal fees claimed being exorbitant and not in accordance with Part 65 Appendix B CPR 2000.
- [49] Insofar as Calefacción has failed to discharge its duty of disclosure the injunction granted should be discharged forthwith See *Brink's Mat Ltd v El Combe and others* [1998] 3 All. E. R 188.
- [50] Learned Counsel Mr. Wallbank said that *Z Ltd v A-Z* [1982] 2 WLR 288 is authority for the following propositions.
- (a) The jurisdiction to grant a Freezing Order is triggered by evidence that a defendant is wrongfully attempting, or is likely to attempt, to make himself judgment proof;

- (b) In attempting to make himself judgment, proof, the defendant must be seen to be trying to avoid execution by “spurting his assets away”.
- (c) A defendant acting in the ordinary course of his business is not to be seen as attempting to spurt his assets away; and
- (d) It is an abuse of process for a claimant to attempt to obtain a Freezing Order merely in an attempt to obtain security for a prospective judgment.

[51] Learned Counsel Mr. Wallbank argued that Calefacción application is an attempt to obtain a Freezing injunction merely for the purposes of security. The application is not an attempt to restrain Flag from hiding or frittering away assets for the purpose of defeating any prospective judgment. Calefacción has not stated that there is any real risk that Flag would dissipate its assets, thereby frustrating the process of the court.

[52] In addition, Learned Counsel Mr. Wallbank said that the real reason for Calefacción seeking the injunctive relief is what was deposed to by Mr. Nunez namely that the equipment will be encumbered and disposed of with no prospect of Calefacción being paid the significant sums outstanding.

Juridical Basis for Freezing Injunction

[53] Learned Counsel Mr. Wallbank stated that Calefacción failed to satisfy the criteria necessary for the grant of the Freezing Order. The applicant must show that he has an arguable case and secondly the court must be satisfied that there is a risk that the defendant would dissipate his assets if not restrained.

[54] *Kerr J A in Z ltd v A-Z* [1982] 2 WLR 288 at p305 stated “that the jurisdiction must not be abused. In particular, I would regard two types of situation as an abuse of it. First, the increasingly common one, as I believe, of a Mareva Injunction being applied for and granted in circumstances in which there may be no real danger of the defendant dissipating his assets to make himself judgment proof where it may be involved in order to obtain security in advance for any judgment which he may obtain; and where its real effect is to exert pressure on the defendant to settle the action”.

[55] Mr. Wallbank was convinced that Calefacción had no proper basis for obtaining the Freezing Injunction.

Proprietary Claim against Equipment

[56] Learned Counsel Mr. Wallbank stated that in paragraph 15 of Mr. Jose Martin Nunez’s affidavit he vaguely refers to Calefacción’s interest in the property. Learned Counsel Mr. Wallbank said that there are no serious issues to be tried in relation to any alleged proprietary claims to the goods.

[57] Learned Counsel Mr. Wallbank referred the court to the Sale of Goods Act; it sets out the rules for ascertaining the intention of the parties as to the time at which property in goods pass to the buyer.

[58] Learned Counsel Mr. Wallbank said that based on the Sale of Goods Act it is clear that the property in the goods passed to Flag.

[59] Mr. Wallbank pointed the court to the Receiver Mr. Tacon’s affidavit in which he stated that even if he were to sell the assets that are owned by Flag it would not realize sufficient funds to cover Flag’s indebtedness to Credit Suisse.

[60] Mr. Wallbank Learned Counsel also argued that the equipment was affixed to the land and are fixtures. They would therefore pass with the land.

Court's Analysis and Conclusions

[61] The court has reviewed the evidence in the matter and has given deliberate consideration to the very lucid submissions of all Learned Counsel. The following represents the court's analysis and conclusions:

[62] Calefacción in the substantive claim seeks the sum of US\$2,172,149.07 for the alleged breach of contract through which it supplied certain equipment to Flag and the latter has not paid the goods supplied. There is an alternative claim for the return of goods that it supplied on the alleged basis that title in the goods had not passed to Flag.

Fixtures

[63] The court proposes to briefly address the issue of whether the equipment are fixtures since Learned Counsel Mr. Astaphan and Learned Counsel Mr. Wallbank spent a considerable amount of time addressing whether or not the equipment had become annexed to land and therefore had become a part of the land. As a general rule, anything that becomes affixed to the land passes with the land. However, the court is of the view that in interlocutory or interim injunctive proceedings it is inappropriate and impossible to determine matter of facts. These proceedings are not mini trials. In these proceedings, the evidence has not been tested by way of cross-examination it is well high impossible to find facts. In order to determine whether items are fixtures the court has to apply the well known tests of mode and extent of annexation coupled with that of the object and purpose of annexation.

[64] During interim proceedings the court is in no position to apply the critical tests of mode and extent of the annexation coupled with the object and purpose of the annexation. These are important factors in the determination of whether the equipment that was supplied by Calefacción are chattels or have become fixtures and therefore passed to Flag.

Title to the Equipment

[65] Similarly, much time have been spent on the Sale of Goods Act, by both Learned Counsel in their attempt to persuade the court one way or the other in relation to the discharge or continuation of the injunction. It is imperative that it be said straight away that, even though significant arguments were advanced on the issue of whether or not title to the goods had passed, it is no part of the court's function during the hearing of an interim injunction to seek to determine that issue. In any event, that is a matter that can only be properly determined at the full trial during which all of the evidence will be tested. It is only then that the court will be able to determine the intention of the parties in relation to the sale and supply of the goods/equipment.

[66] The court is of the considered view that for the purposes of the application at bar. This is not a matter with which the court should be unduly concerned. It is well nigh impossible for the court to even attempt to determine what the parties' intention was, in the absence of evidence which is tested in cross-examination. The court cannot determine one way or the other whether or not title to the goods had or had not passed to Flag outside a full pledge trial which would provide the court with the opportunity to assess the tested evidence and review the forensic arguments.

Freezing Injunction

- [67] In order to put context to the matter, it bears repeating that the application sought by Calefacción was that Flag be restrained whether by itself, its servants or agents or any other person from encumbering, or disposed of with no prospect of Calefacción being paid the significant sums of money owed under a contract to provide and install the equipment to Flag.
- [68] All of the documents that have been filed by Calefacción refer to the order granted by the court as an Interim Freezing Injunction. Importantly, the order sought and obtained by Calefacción was a Freezing Injunction.
- [69] It is therefore surprising that during arguments for the continuation or discharge of the injunction that Learned Counsel Mr. Astaphan sought to persuade the court that the order which the court granted was not a Freezing Injunction. Even a very cursory read of the Order would confirm that the Order which the court granted was a Freezing Injunction.
- [70] The court granted the Freezing Injunction on the basis that Calefacción had established a good and arguable case to the claim for monies due and payable coupled with the risk of dissipation.
- [71] The court is not of the view that the Freezing Injunction was granted in circumstances where Calefacción had not established that it had a good and arguable case, as urged by Flag.
- [72] It bears stating that the grounds upon which the Freezing Injunction was sought and obtained.

- (a) Calefacción is owed US\$2,172,149.00 plus interest of US\$361.373.02 for payment due and payable for the installation of a Chiller Plant.

(b) Calefacción appeared to be in serious financial difficulty and the order was required to restrain Calefacción from encumbering, disposing or steal.

[73] It is worth noting that even though Calefacción had made a proprietary claim to the equipment against Flag, this is not the basis on which the Injunction was granted. The court has no doubt that, the application at bar, the order court granted was a Freezing Injunction.

[74] The court accepts that the Freezing Injunction would not seem to cover the situation in which there Interim Injunction restraining the disposal of property over which the applicant claims a proprietary interest.

[75] This does not negate the fact that the Learned Counsel Mr. Nota and the affiants approached the court and were granted a Freezing Injunction. At no time was it in the court's contemplation that the order sought was an order to preserve the goods as Learned Counsel Mr. Astaphan has posited during the inter parties hearing.

[76] A Mareva Injunction enables the court to grant the applicant an Interim Injunction restraining the defendant from disposing of, or even merely dealing with his assets being assets over which the claimant asserts no proprietary claim but which after judgment may be granted to satisfy a money judgment. The term Mareva Injunction is used interchangeably with Freezing Injunction.

[77] The court is of the view that the relevant principles on which the court granted its order are not those distilled from the *American Cynamid* Case but rather the principles that are relevant to the grant of a Freezing Injunction. See *Mareva Compania Naviera SA v international Bilk Carnier SA* [1915] 2 Lloyd's Rep 509.

Juridical Basis

[78] The court next proposes to examine whether Calefacción had provided a proper juridical basis for obtaining the Freezing Injunction or Mareva Injunction.

[79] The court's jurisdiction to grant a Freezing Injunction arises in circumstances in which there is evidence that the plaintiff is likely to succeed in his claim and there is the real risk of the defendant depriving the plaintiff of the fruits of his judgment by taking steps to ensure that there are no assets on the day of judgment. See *Z Ltd v A-Z* [1982] 2 WLR 288,305.

[80] At page 305, of *Z Ltd v A-Z* ibid Kerr J said that:

"The jurisdiction must not be abused. In particular, I would suggest two types of situations as an abuse of it. First, where a Mareva Injunction is applied for and granted in circumstances in which there may be no real danger of the defendant dissipating his assets to make himself "judgment proof"; where it may be invoked in order to obtain security in advance of any judgment which he may obtain; and where its real effect is to exert pressure on the defendant to settle the action."

[81] The court would only lend its assistance in the presence of evidence that the defendant is actively or likely to take steps to avoid execution by spiriting away his assets and will render the court's judgment nugatory.

Good and Arguable Case

[92] It seems from the untested and uncontroverted evidence that Flag is indebted to Credit Suisse, in the amount of approximately US\$137,200,000 and US\$5,987.78 as a consequence of loans that were given by Credit Suisse to Flag. These loans

are secured by way of Debenture and Registered Changes. They are registered in accordance with the Registered Land Act.

[82] The test for good and arguable case is said to be "one which is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50 percent chance of success". See *Nimonia Maritime Corporation v Trave GmbH & Co* [1983] 1 W.L.R 1412; *Polly Peck International Plc v Nadir* (No. 2) [1992] 4 All ER 769.

[83] In the application at Bar, the court was satisfied that Calefacción had established a good and arguable case in relation to the outstanding monies that are allegedly owed by Flag.

[84] Indeed, the pleaded case establishes a good and arguable case that Calefacción supplied several equipment and carried out several works for Flag and was paid some of the monies owed. Calefacción in accordance with the agreement it had with Flag submitted payment applications which were paid after they were certified by Flag's Project Manager/Engineer. However, some Calefacción has not been paid for some of the equipment it has supplied and some of the work that was done in installing the equipment.

Risk of Dissipation of Assets

[85] Next, the court must examine whether this limb of the test in order to obtain a Freezing Injunction was established. A closer review of the evidence by the court leads the court to conclude that the evidence led by Calefacción did not quite meet the required threshold to establish that Flag was likely to dissipate the assets. There is merit in Flag's argument that the mere fact that it is alleged to be in dire financial circumstances is insufficient to establish that there is the risk that Flag would dissipate its assets.

- [86] Calefacción also in obtaining the Freezing Order told the court in the affidavit of Mr. Nunez filed in Support of the Application that it was concerned that due to Flag's poor financial standing it may encumber or dispose of the equipment if they are not restrained, in the interim. The court addresses this issue in relation to the risk of dissipation.
- [87] The court reiterates that the applicant who seeks to obtain a Mareva Injunction or a Freezing Order must satisfy the court that it has a good and arguable case against the defendant and that there is a real risk of dissipation of assets by the defendant.
- [88] The above principle was applied and explained by Justice of Appeal Edwards in *National Insurance Corporation v Rochamel Development Company Limited* SLUHCV 2006/0638. Justice of Appeal Edwards discussed real risk of dissipation and stated that it referred to unjustifiable dissipation. Examining the factors that can constitute an unjustifiable dissipation of assets, Edwards JA opined that dishonesty, irresponsibility or improper dealings by the defendant with the assets will suffice.
- [89] In *Bekhor Ltd v Bilton* [1981] QB 923 at 941 Ackner LJ had this to say in relation to Freezing Injunction:

" The plaintiff, like other creditors of the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets merely because he fears that by the time he obtains judgment in his favour, the defendant will have no assets against which the judgment can be enforced. Were the law otherwise, the way would be open to any claimant to paralyze the activities of any person or firm against whom he makes his claim, by obtaining an injunction freezing his assets. It is not a form of pre-trial attachment".

- [90] During the interparties hearing Calefacción urged the court not to set aside the Freezing Injunction that was granted. Learned Counsel Mr. Astaphan said that should the court set aside its order, Calefacción would be left with no resource if it were to succeed with its proprietary claim against Flag.
- [91] It is clear that the main reason for the court's grant of the Freezing Order was to prevent Flag from dissipating or spiriting away its assets in order to avoid execution. However, as the hearing between the parties unfolded, it was evident that there was no likelihood of that occurring insofar as there is a secured charge by Credit Suisse over its assets for a very substantial sum of money.
- [92] It seems from the untested and uncontroverted evidence that Flag is indebted to Credit Suisse, in the amount of approximately US\$137,200,000 and US\$5,987.78 as a consequence of loans that were given by Credit Suisse to Flag. These loans are secured by way of Debenture and Registered Charges. They are registered in accordance with the Registered Land Act.
- [93] Calefacción has therefore failed to justify the continuation of the Freezing Order, insofar as there clearly is no risk that Flag is likely to dissipate its assets so as to render any judgment that Calefacción is likely to obtain nugatory. The Freezing Injunction is not, intended to give an applicant security for anticipated judgment. During the interparties hearing, it became clear that Calefacción was not saying that they were concerned that Flag would dispose or dissipate the property if not restrained. In contradiction, the argument was that the Injunction was required to prevent Flag from encumbering, diminishing, disposing of the equipment in the event that a judgment were to be obtained in those circumstances the judgment would be rendered worthless. This is not a proper factor that the court can take into consideration in the determination of whether to continue a Freezing Order. In any event, a Freezing Order cannot interfere with the rights of Flag's secured creditors.

Material Non-Disclosure

- [94] The duty of an applicant, who seeks an Injunction on the basis of a without notice or ex parte application, to make full and frank disclosure extends both to material facts that are within the actual knowledge of the applicant and material facts which he would have known on the making of reasonable enquires. See *R v Kensington Income Tax Comrs* [1917] KB 486, 514
- [95] As a general rule, the applicant's failure to disclose material facts to the court would result in the ex parte Injunction that was obtained being set aside without the court going into the merits of the application. It is incumbent on the applicant for an ex parte Injunction to disclose any points that the defendant might fairly raise if he were present to oppose the grant of the Injunction.
- [96] It is accepted by the court, that since the courts grant of Freezing Injunction a receiver, Mr. Tacon has been appointed in relation to Flag's assets. This is a consequence of Flag's substantial indebtedness to a secured creditor, Credit Suisse.
- [97] It was incumbent on Calefacción while seeking the court's equitable assistance to disclose that Credit Suisse was a secured creditor over Flag's assets. Calefacción ought to have made proper enquiries and place the material information before the court. See *Bank Mellat v Nikpour* [1985] FSR 87.
- [98] Insofar as it is stated that Credit Suisse's Registered Land Charge is clearly endorsed on the relevant Land Register, this is a material fact that ought to have been brought to the court's attention. The court in exercising its discretion must consider the possible prejudice to Flag or third parties. The court accepts that the existence of such a pre-existing secured creditor is a material matter that should have been disclosed to the court by Calefacción, at the hearing of the ex parte application.

- [99] The court would go further and state that had it been brought to the court's attention that Credit Suisse was a secured creditor the court would not have granted Calefacción an *ex parte* Freezing Injunction. At the very least this is the sort of matter in which a court that is properly seized of the facts would have ordered that Flag and or the collateral agent Credit Suisse be served and heard on the application. In the court's considered view this material disclosure is fatal to the continuation of the Freezing Injunction.
- [100] I digress to state that insofar as there is prima facie evidence that Flag's assets are subject to a secured charge in favour of Credit Suisse, this charge would as a matter of law rank in priority over Calefacción's claim to be compensated.
- [101] Insofar as the court has no doubt that Calefacción in obtaining the without notice order did not give the material disclosure of Flag's secured creditor, Credit Suisse's interest the court has no choice but to discharge the Injunction without going into the merits of the case. See *Brink's Mat Ltd v El Combe and others* [1988] 3 All ER 188, 193.
- [102] In view of the premises, the court is of the considered view that the Freezing Injunction that was granted should be discharged forthwith.

Conclusion

- [103] It is hereby ordered that the Freezing Injunction that was granted to Calefacción Y Ventilación SA DE CV is discharged forthwith.
- [104] Costs are awarded to Flag Luxury Properties (Anguilla) LLC in the sum of US\$1250.00.
- [105] The court gratefully acknowledges the assistance of all Learned Counsel.

Louise Esther Blenman
Resident High Court Judge,
Anguilla