THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2011/0721

BETWEEN

STUART ALEXANDER LOCKHART

Applicant/Claimant

AND

CARIBBEAN DEVELOPMENTS (ANTIGUA) LIMITED

GEERT DUIZENDSTRAAEL

GAYE HECHME

Respondents/Defendants

Appearances:

Mr. Andrew Young, with Mrs. Stacy Richards Anjo for the Applicant/Claimant.
Mr. Anthony Astaphan SC with Mr. John Fuller and Ms. Nellisa Spencer for the Respondents/Defendants.

2012: August 2

DECISION

[1] **REMY J.:** This ruling deals with an application for discharge of an ex parte freezing injunction.

BACKGROUND

[2] By Claim Form filed on the 4th November 2011, the Claimant claimed against the Defendants:-

1) An Order for damages; and

2) A declaration that he is:

   i. A Director of the First Defendant

   ii. The sole shareholder of the First Defendant.

[3] On 17th February 2012, the Claimant filed an Amended Claim Form seeking against the Defendants the following:-

1. An Order for damages; and

2. A declaration that he is:

   i). A Director of the First Defendant

   ii). The sole shareholder of the First Defendant on trust for the 2nd Defendant.

[4] Another Amended Claim and Amended Statement of Claim were filed by the Claimant on the 22nd day of June 2012; this claim states that it was filed pursuant to the order of Master Mathurin dated 13th June 2012. In the Amended Statement of Claim, the parties are described in these terms:-

1. "'The Claimant' Stuart Alexander Lockhart is an Attorney-at-Law, and Notary Public. It is averred that the Claimant was and or is also a Director of Caribbean Development (Antigua) Limited (the "First Defendant"). Further, the Claimant avers that he has sole legal title to the Bearer Shares for Jolly Harbour AG.

2. The First Defendant is a company in the business of property management, sales and development. The Second Defendant is a businessman and also a director of the First Defendant.

3. The Third Defendant is a Director of the First Defendant. She was appointed and or took office as a second Director on 12 January 2006."

The relief sought by the Claimant in this Amended Statement of Claim is as follows:-

1) "An Order for damages; and

2) A declaration that he is:

   i. A Director of the First Defendant

   ii. The sole shareholder of the First Defendant.

3) An Order for delivery up of the Bearer Shares to Jolly Harbour AG."

[5] On the 22nd day of June 2012, the Claimant filed a Without Notice application for a freezing injunction. This application was supported by an Affidavit sworn to by the Claimant Mr. Stuart Lockhart, as well as an Affidavit sworn to by Mr. Terrance Ortt on the same date. The Amended Claim filed on the 22nd day of June 2012 (paragraph 4 above) was attached to this application.

[6] The attached amended Statement of Claim detailed as follows:-

THE FIRST AGREEMENT

i). At or around 10th December 2005 the Second Defendant offered to the Claimant:-

(a) A position as a Director of the First Defendant with a proviso that the Claimant would resign subject to the Second Defendant being granted a licence to be a Director of the First Defendant.

(b) The sole shareholding of Jolly Harbour AG, upon terms;

(c) The provision of an office in close proximity to Jolly Harbour Realty at a subsidized rent;

(d) The payment of a sum equivalent to 1% of the value of any land sold by the First Defendant;

(e) Exclusive recommendation of legal services to potential buyers.

The Claimant accepted the Second Defendant's offer in full.

ii). In or around December 2005 the Claimant was instructed to facilitate a land sale by the First Defendant to a company called Fantini. The sale was for $40 million US. The Claimant travelled to London to complete the transaction. Unbeknown to the Claimant, Fantini was a company set up by the Defendants and the transaction was a sham and the value of the land was actually $10 million US. The transaction was to deceive the Claimant and third parties as to the profitability of the Defendants.

iii). In 2012, Albert Hartog admitted that the transaction did not show on the records of the First Defendant in Antigua thereby confirming that the transaction had been a sham and as a consequence an equitable fraud.

iv). The Claimant was not paid for his services. Accordingly, the Defendants are liable to the Claimant for his losses and damages arising under breach of contract and or the consequences of equitable fraud practiced upon him. The details of the breach of contract are as follows:-

1. The third Defendant used the services of John Fuller and did not exclusively recommend the Claimant.
2. In or around the 7th September 2006, the Claimant discovered that an extraordinary meeting of the First Defendant had taken place without his knowledge, where he (the Claimant) "had been purportedly removed as a Director."
3. The minutes of the meeting indicate that the Claimant had waived his right to attend, which was not true. Further, the 2nd Defendant was purportedly appointed as a Director at that same meeting.
4. There has been an unlawful attempt to remove the Claimant as a director by each and every defendant.
5. In or around February 27th 2007, the Third Defendant wrote to the Claimant stating that they no longer needed his services and included payment for $67,500.00 E.C.

6. The Claimant refused the payment, rejected the letter and avers that his removal as director is unlawful.

COMPROMISE AGREEMENT

v). In or around June 26th 2007, the Claimant attended a meeting with the Second Defendant at which meeting it was agreed that the Claimant would forbear his right to sue for his unlawful purported removal as a Director and any losses associated with the failure of the First Defendant to instruct and or promote him as a conveyancing attorney in consideration of the following:

1. A single payment of $73,500.00 US.

2. The Claimant to be instructed as attorney in all future conveyances (as previously agreed) and to be paid 1% of the value of land subject to conveyance in addition to any payment from a buyer (if they elected to use the Claimant's services).

3. The second Defendant would instruct the Claimant in additional legal matters.

4. The First Defendant was developing new Commercial Centre, and the Claimant would have first refusal of a suitable office space in the new buildings;

5. The Claimant would retain $37,500 US which he held on account for the First Defendant as part payment towards an agreed payment of $73,500. US.

vi). The Defendants failed to complete the compromise agreement, notwithstanding the part payment, save that the Claimant was instructed on a small number of conveyances on behalf of the first Defendant.

[7] The Claimant claims:-

a. That the Defendants' breach amounted to repudiation of the compromise agreement to forbear his right to sue and that he has accepted that repudiation and therefore claims for loss and damages as a consequence of his unlawful purported removal as a Director of the First Defendant.

b. AND OR IN THE ALTERNATIVE, the Claimant claims loss and damages as a consequence of the breach of the compromise agreement. The Claimant claims that he did not receive remuneration in accordance with any of his agreements with the Defendants pleaded above. He claims his contractual loss and damages against them jointly and severally.

c. FURTHER AND OR IN THE ALTERNATIVE, the Second and/or Third Defendants

i. intentionally or recklessly procured breach of contract on the part of the First Defendant and or the Second Defendant;

ii. Had full knowledge of the Claimant's contracts with the First Defendant but nevertheless had dealings with the First Defendant which were inconsistent with the Claimant's contracts with the First Defendant; and/or

iii. Engaged in a wrongful direct and or indirect intervention as between the First Defendant and the Claimant's contracts to prevent performance.

[8] In addition to the Claimant's claim in contract for loss and damages arising out of his agreement and performance in respect of the sham transfer of land, the Claimant claims his loss and damages as a consequence of the wrongful conduct of the Defendants. The Claimant avers that the Defendants made false representations knowing them to be untrue, and intended that the Claimant would act to his detriment and either knew or intended that he would suffer loss.

[9] In his Affidavit in Support, the Claimant deposed as follows:-

(1) There is a cause of action, detailed in the attached Amended Statement of Claim, which shows a good arguable case.

(2) CDAL (The First Defendant) is not paying its debts when they become due and therefore is insolvent;

(3) There is an Affidavit from Terrance Byran Ortt as evidence of the company's financial difficulties.

(4) CDAL (the First Defendant) has substantial debts and has sold the marina and part of the golf course.

(5) CDAL has been used as a vehicle of fraud; the current directors are implicated or acquiesced to the fraud.

(6) The third Defendant's integrity is questionable.

(7) There is immediate risk that assets may be dissipated and deprive the Applicant of executing judgment if he is successful.

(8) CDAL is being considered as an asset of La Perla Living, which is in administration in the Netherlands. Bart de Man has been appointed as Administrator of La Perla. The Affidavit of Terrance Ortt details Bart De Man's control over the First Defendant.

(9) The Applicant has evidence that monies from sales of CDAL's assets are being transferred to an account controlled by the Second Defendant in France.

(10) The Applicant believes that as a result of the above there is a serious risk of dissipation of assets of CDAL. He has a restriction on lands in Jolly Harbour, but the Defendants are challenging it.

(11) The value of his claim is in excess of $3 million US for land transfers due to a contractual arrangement with the Defendants.

(12) It would be just and convenient to grant the Order sought.

[10] In his Affidavit, Mr. Ortt deposed that he was President of the Jolly Harbour Homeowners Association (the "Association"). He stated among other things, that, as President of the Association, himself and his fellow Executive officers "have become increasingly alarmed" about the manner in which the Defendant has managed their community. He deposed that, at a meeting, a Mr. De Man spoke about the financial condition of CDAL indicating that without changes to the expenditures and source of revenues CDAL was not financially viable. He stated that Mr. De Man told the Association that CDAL, under the leadership of Mr. Geert Duizendstrall, President and CEO of La Perla and Director of CDAL, "millions of dollars of CDAL assets had been sold to third parties and unacceptably the funds had been withdrawn from CDAL leaving CDAL without sufficient working capital and other financial resources to operate. He also disclosed that remaining assets of CDAL had been pledged as security to third parties and that the ability of CDAL to continue to operate would depend upon either the financial support of Mr. Hartog or a major restructuring of the affairs of CDAL.

[11] According to Mr. Ortt, "rumours continue to abound about CDAL being insolvent and a CDAL employee confirmed that APUA had interrupted provision of electricity due to non-payment more than once in the past months."

[12] The grounds stated in the Notice of Application for the Freezing Injunction were as follows:-

i). The Applicant has brought a Claim against the Respondent and two of its Directors. (A copy of the Amended Statement of Case was annexed)

ii). The Statement of Claim alleges serial and deliberate breach of contract by the Respondent. Significantly, the Statement of Claim particularises equitable fraud which it is claimed was committed by the Respondent and its officers.

iii). A freezing injunction is a discretionary remedy and stems from the decision in Mareva Compania Naviera SA v International Bulkcarriers SA [1980] 1 ALL ER 213. Normally the Court would grant such an Order where it considers it just and convenient to do so. This is such a case.

iv). The Court must be satisfied that there is a cause of action which is justiciable, see The Siskana [1979] AC 210. The Claimant relies upon his claim that is currently before the Court. Master Mathurin on 13 June 2012 has ruled that there is a valid cause of action before the Court. Further, the learned Master recognized that there is a good arguable case, the Respondent having attempted and failed to strike out the claim. A good arguable case is a necessary requirement.

v). There is a real risk that the Respondent may dispose of or dissipate its assets before judgment can be enforced if unrestrained. What is required "is a good arguable case for risk of dissipation" see Neuberger J in Customs & Excise v Anchor Foods Ltd [1999] 1 WLR 1139. The Court is invited to read the affidavits of Stuart Lockhart and Terrance Ortt. It is submitted that the threshold is not only achieved, it is surpassed. The Applicant also relies upon the fact that the Respondent has failed to comply with an Order of court in the past and asks the Court to take this into consideration.

[13] The Court granted the Claimant's application for a freezing order in, inter alia, the following terms:-

> "4. Until the return date or further order of the court, the Respondent must not remove from Antigua and Barbuda or in any way dispose of, deal with or diminish the value of any of its assets which are in Antigua and Barbuda up to the value of $3 Million US.
>
> 5. Paragraph 5 applies to all the Respondent's assets whether or not they are in its own name and whether they are solely or jointly owned or

whether held for them by nominees or in trust for them. For the purpose of this order the Respondent's assets include but are not limited to any asset in which it has a legal and/or beneficial interest; and/or it has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions.

6. This prohibition includes the following assets in particular –

a. The property known as Jolly Harbour or any part thereof or the net sale money after payment of any mortgages or loan if it has been sold;

b. The property and assets of the Respondent's business carried on in Antigua or the sale money if any of them have been sold; and

c. Any money standing to the credit of any bank account including the amount of any cheque drawn on such account which has not been cleared.

7. If the total value free of charges or other securities ('unencumbered value') of the Respondent's assets in Antigua and Barbuda exceeds $3 Million US the Respondent may remove any of those assets from Antigua and Barbuda or may dispose of or deal with them so long as the total unencumbered value of his assets still in Antigua and Barbuda remains above $3 Million US."

[14] A further hearing in respect of the Order was scheduled for Thursday 12th July, 2012 at 9 a.m. ("the return date.")

THE APPLICATION TO DISCHARGE THE FREEZING ORDER

[15] On 29th June 2012, the Defendants filed a Notice of Application to Discharge the Freezing Injunction, seeking an Order that:-

(a) The said Order of the 22nd June, 2012 be stayed forthwith from having any effect or being enforced pending the determination of this application to discharge said Order;

(b) The Order dated 22nd June, 2012, which Order was granted ex parte to the Claimant, be discharged in its entirety;

(c) Costs of this application to be paid by the Claimant to the First Defendant, on the basis of prescribed costs.

[16] The Defendants also sought further Orders that:-

a. The Claim herein be struck out and judgment entered in favour of the Defendants; and

b. The Claimant to pay prescribed costs to the Defendant.

[17] This ruling is confined to the application to set aside the freezing order.

[18] The grounds of the Defendants' application to set aside the freezing order can be summarized as follows:-

(a) The Claimant has misrepresented the facts concerning his alleged directorship of the company Caribbean Developments (Antigua) Ltd (CDAL) and/or failed to disclose all material facts relevant to the application.

(b) The Claimant's misrepresentation and/or failure to disclose material facts was intentional.

(c) The Claimant failed to disclose that the Judicial Committee of the Privy Council and our other Courts have repeatedly held that a party ought not to apply ex parte for coercive and intrusive orders such as a freezing order without notice except in rare cases of extreme urgency.

(d) There was no urgency whatsoever.

(e) There was and is no risk of dissipation of the First Defendant's assets.

(f) The Order seeks to freeze the operating and commercial assets and accounts of the First Defendant which is wholly unacceptable and improper; the effect of which will be to prevent the First Defendant from operating;

(g) The Claimant has failed to justify the scope of the Order;

(h) It is unjust in all the circumstances for the Order of 22nd June, 2012 to have been granted, or to have effect or to continue in force against the First Defendant.

(i) The Claimant has no real prospect of succeeding on the claim.

i. The claim is based on an alleged agreement unsupported by facts
ii. The claim discloses no reasonable cause of action, and
iii. The Claimant's claim is a breach of public policy.

[19] The Notice of Application was supported and accompanied by four Affidavits, namely Affidavits by (a) the Third Defendant Ms. Gaye Hechme, a director of the First Defendant (b) the Second Defendant Mr. Geert Duizendstraael, a director of the First Defendant, (c) Mr. Albertus Willem De Man also known as "Bart de Man", and (d) Mr. Albert L. Hartog, a director of the First Defendant.

[20] In her Affidavit, the 3rd Defendant Gaye Hechme (Ms. Hechme) asked the Court to preserve the status quo, to allow the Claimant to continue to carry on its business and to immediately discharge the Order which "if allowed to take effect would unduly prejudice

the First Defendant and virtually cripple the First Defendant and prevent it from being able to operate normally or at all."

[21] She deposed in her Affidavit that the freezing injunction should be discharged on the following grounds:-

(a) Non-Disclosure of Material Facts.

Ms. Hechme states that the applicant is an attorney at law; he is aware of the requirement to disclose all material facts and has still failed to do so. He has failed to disclose a number of relevant facts namely:-

i. He brought a similar claim in 2010 against the First Defendant, within which he accepted that his directorship had ended. Counsel for the Claimant, Dr. Dorsett, signed a certificate detailing the fact that the Claimant's directorship had been temporary, until when the Second Defendant received his Non-Citizens Land Holding Licence.

ii. The Defendant has written to the Claimant more than once, beginning in 2007, insisting that the Claimant cease purporting to act as legal counsel for the First Defendant. The Claimant has also collected money on behalf of the First Defendant and refused to deliver substantial sums of money to the First Defendant. Copies of the letters are attached.

(b) No risk of Dissipation of the First Defendant's assets.

i. Ms. Hechme states that the Claimant has provided no evidence of the risk of dissipation of assets by the First Defendant. He has relied on allegations and lack of response by Counsel for the Defendants to support this claim. In the two years since his first claim, he has failed to provide evidence to support this allegation.

ii. There is an ongoing dispute between the homeowners over community charges but that is not relevant to the issue of solvency of the First Defendant.

iii. The First Defendant is in the business of property development and therefore the selling of land is in the ordinary course of the Defendant's business.

iv. The information provided by the Claimant of proceedings in Holland is not relevant to the issues and the Claimant does not know what these proceedings are about.

v. The Claimant must show that not only is there a risk of dissipation of assets, but also that the dissipation is for the purpose of evading payment of the Claimant's damages if he were to be so awarded. The Claimant has not provided any evidence in this regard.

vi. If the Claimant asserts that the First Defendant has substantial debts it is unjust for the Claimant to put the assets out of the reach of lawful creditors, for his own purpose. The Claimant should not be allowed to prevent the First Defendant from operating in the normal course of business and pay its lawful debts and expenses.

vii. The Claimant's allegations of insolvency are incorrect and a valuation of the assets of the First Defendant is attached. The present day value is relatively the same, $35 million US. The company is not indebted to any banks, and it has one liability in the form of a guarantee for an associated company.

(c) Agreement not binding

Ms. Hechme states that the agreement upon which the Claimant is basing his claim is not legally binding. It was not finalized and certain.

(d) Scope and Effect of the Order

Ms. Hechme states that the Claimant's application to freeze assets of $3 million US is excessive. The Claimant cannot contend that were he to win he will be entitled to recover damages in this amount. He has provided no basis for this figure. She further states that the effect of the Order has been draconian. The effect has been to prevent the First Defendant from carrying on its regular business. The $2500 US allowed for weekly operations of its business is inadequate. The monthly operating expenses of the company require a minimum of $2 million EC.

[22] In his Affidavit, the Second Defendant Geert Duizendstraael deposed inter alia that:-

i. Prior to becoming a director of the First Defendant, he learned that he had to obtain a Non-Citizen's licence and made the necessary application for the required licence.

ii. The Claimant volunteered to hold over as director effectively in his stead until such time as he was able to obtain the licence; the Claimant was aware that the process would take a couple of months to complete.

iii. The Claimant made the offer voluntarily. When he acquired the relevant licence, the Claimant was made aware of this and was advised that his directorship thereupon ceased.

iv. The Claimant's assertions that he is still a director or that he was improperly removed "are all absurd and simply lies." The Claimant fully knows that the agreement was as set out above. He has had sight of the Claimant's previous claim against the First Defendant in 2010 and the Claimant himself admitted the aforementioned arrangement. That claim was discontinued by the Claimant; it is only in this more recent claim that the Claimant is now making the "ludicrous and false assertion" that he is still a director of the First Defendant.

v. In addition to being a director of the First Defendant, he is the "ultimate shareholder" of Jolly Harbour AG, the shareholder of the First Defendant and he states categorically that the Claimant is not and was not ever a shareholder of

Jolly Harbour. He therefore does not know why the Claimant is making this "false assertion."

vi. The Freeze Order is excessive and will cripple the First Defendant.

vii. There is absolutely no need or justification for the Order to take effect as there is no risk of the First Defendant dissipating its assets at all and certainly not in order to avoid satisfying a judgment which in all the circumstances, legal and factual , he cannot foresee the Claimant obtaining.

[23] In his Affidavit, Mr. De Man deposed inter alia that:-

(a) He is familiar with all the parties solely in a professional capacity. He is not a director or shadow director of the First Defendant as has been alleged by the Claimant.

(b) He is currently the Administrator of La Perla Investments BV (La Perla) which was the shareholder of Jolly Harbour AG which is the shareholder of CDAL (the First Defendant.)

(c) He wishes to immediately correct the "false assertions" made by the Claimant in his affidavit, specifically any assertion that La Perla is currently undergoing bankruptcy proceedings, as this is untrue. Additionally, he is the "bewindvoerder" in Dutch of La Perla; while this translates into English as "Administrator", this is not as far as he understands it the same as the official legal term and context of the word Administrator in English or Antiguan law.

(d) He has not taken over nor does he have "control" of La Perla; the company is still in the hands and under the control of the Board of Directors. They make the day to day decisions and run the operations of the company but for all legal acts they will need his approval, specifically for instance in some circumstances , where decisions may devalue or result in a loss of assets of La Perla. He was appointed by the court of Amsterdam in the Netherlands and regularly reports to the supervisory judge for the proceedings.

(e) The suspension proceedings have and will have no direct effect on the First Defendant and will not adversely affect its solvency or day to day operations.

(f) In the course of his capacity as Administrator and in seeking to get a full picture of the different holdings of La Perla, he commissioned a report from Zanders, a well known and trusted company to make findings into the assets of La Perla, to include the solvency of the First Defendant. From this report, he can state that he is aware that the First Defendant is in fact solvent and any assertions to the contrary are simply false. The First Defendant's assets exceed its liabilities according to the Zanders' report.

(g) It is possible and not unusual for a company to be solvent and not liquid. Notwithstanding the fact that the First Defendant is solvent, he is aware that it may be experiencing some liquidity challenges; the freezing of its assets will likely only have a significant detrimental effect and will not in any way help improve the liquidity challenges being faced by the First Defendant.

(h) He is not aware that the Claimant is or was ever a shareholder of Jolly Harbour AG, and has not been able to identify any information which would substantiate his assertion in that regard.

[24] On the 5th July 2012, the matter came up for hearing before Michel J. At that hearing, upon the First Defendant undertaking not to dispose of any of its real property prior to the return date of this matter of 12th July, 2012, the Court made an Order in the following terms:-

"BY CONSENT IT IS HEREBY ORDERED AS FOLLOWS:-

(a) The Order of this Court dated the 22nd June 2012 is hereby immediately suspended and shall be of no effect pending the determination of this matter;
(b) The First Defendant is to have carriage of this Order;
(c) The Claimant shall no later than 6th July, 2012 file this Order and serve same on the First Defendant, all relevant financial institutions and on any other party on which the original Order dated 22nd June, 2012 was served."

[25] When the matter came up for hearing on the 12th July, 2012 (the return date) before Michel J., the Court made an Order in the following terms:-

a) "Written submissions with authorities to be filed by both parties by 3 p.m. on Monday 16th July, 2012.
b) It is further ordered that it is entirely for the discretion of the court to either require further written submissions or oral submissions.
c) The undertaking given to the court by the First Defendant, as reflected in the order dated 5th July 2012, is hereby continued until Monday 16th July 2012, by which date the parties shall agree on the wording of a new undertaking to be given by the First Defendant and to the execution and filing of a consent order reflecting same. Failure of the parties to agree on the terms of a new undertaking shall result in the discharge of the freeze order dated 22nd June 2012, with liberty to the Claimant to apply."

[26] Counsel for the Defendants filed their submissions along with authorities within the stipulated time. Counsel for the Claimant filed submissions within the stipulated time; however, in non-compliance of the Order dated the 12th July 2012, their legal authorities were filed the following day. The Court notes, further, that on the 16th July 2012, the Claimant filed an additional document comprising an Affidavit of some 21 pages and 65 paragraphs. Attached to that Affidavit were exhibits marked SAL 1 to SAL 5. With respect to the said Affidavit (and attached exhibits), the Court makes the following observations:-

a) No leave was granted by the Court on the 12th July 2012, or on any further date, permitting the Claimant to file the said Affidavit and no application was made for leave to file the said Affidavit.
b) The Affidavit filed on the 16th July 2012 does not comply with Part 30.5(2) of the Civil Procedure Rules (CPR) 2000.

[27] In light of the above, the Court totally disregards the Affidavit filed by the Claimant on 16th July 2012.

THE LAW

[28] Until the advent of the Civil Procedure Rules (CPR), a freezing order was formerly known as a Mareva injunction, a name by which it is still known and referred. A freezing order was described by Lord Donaldson M.R. as "one of the law's two nuclear weapons"; the other being the search order. "The heart and core of the Mareva injunction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in the action " – per Megarry V.C. in **Barclay-Johnson v Yuill** [1].

[29] Part 17.1 of the Civil Procedure Rules (CPR) 2000 states that "the court may grant interim remedies including –

(a) .....
(b) .....
(c) .....
(d) .....
(e) .....
(f) .....
(g) .....
(h) .....
(i) .....
(j) an order (referred to as a "freezing order") restraining a party from –

i. dealing with any asset whether located within the jurisdiction or not;
ii. removing from the jurisdiction assets located there;

[30] According to Blackstone[2], "it has always been recognized that freezing orders are draconian measures, and they will be granted only if a number of onerous conditions are

[1] [1980] 1 W.L.R. 1259 at 1264
[2] Blackstone's Civil Practice 2011, (page 563, paragraph 38.1)

fulfilled." These conditions or requirements as laid down by the courts for granting freezing injunctions are:-

a. A cause of action.
b. A good arguable case.
c. The defendant having assets within the jurisdiction.
d. The duty to make full and frank disclosure.
e. A real risk that the defendant may dissipate the assets before judgment can be enforced.
f. That the defendant will be adequately protected by the claimant's undertaking in damages.

[31] A hearing to discharge an injunction is a re-hearing – not an appeal: **Laemthong International Lines Co. Ltd. V Artis**[3]. According to Steven Gee[4] "The application to discharge the injunction takes the form of a complete re-hearing of the matter, with each party being at liberty to put in evidence."

[32] According to Blackstone (supra), applications to vary or discharge freezing injunctions are made to a judge, either pursuant to the liberty to apply provision in the order itself, or on the Claimant's application to renew the order on the return date[5]. Freezing injunctions may be discharged on the ground that one of the usual requirements has not been made out[6].

[33] According to Blackstone, "..... the above requirements must be established and it is not sufficient to say that a freezing injunction would involve no immediate and obvious prejudice to the defendant."

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[3] [2005] 1 Lloyd's Rep 100 at 107
[4] Commercial Injunctions (5th edition, paragraph 23.021)
[5] Page 578, paragraph 38.31
[6] Page 579, paragraph 38.33

SUBMISSIONS OF COUNSEL

THE CLAIMANT'S SUBMISSIONS

[34] In his closing submissions, Learned Counsel for the Claimant, Mr. Andrew Young submits that the Applicant has both satisfied and exceeded the common law hurdles for the imposition of a freezing injunction. Quoting from "Commercial Litigation Pre-emptive Remedies," second International Edition at A2-097), Mr. Young submits that "the approach adopted in common law jurisdictions is to set six hurdles for an applicant to jump before the court should exercise its discretion to grant a freezing order. These hurdles are:-

a. The existence of a legal or equitable right. Under this head, he submits that since a Master has refused to strike out the Applicant's claim, hurdle one is achieved.
b. Jurisdiction – under this head, he submits that it is axiomatic to the Master's ruling that the court holds jurisdiction.
c. A good arguable case – under this head, he submits that the Claimant either was or is a director of CDAL. He states that he has adduced a copy of an invoice designed to defraud others. The Claimant relies upon the past performance of a compromise agreement as pleaded in his claim. Part performance escalates the strength of his claim to a standard rarely seen at this stage of what may or may not be a contested contractual issue.
d. Assets - under this head, he submits that assets whatever their true value are held within the jurisdiction.
e. Risk of dissipation – under this head, he submits that the Court will have to decide whether in the light of un-denied equitable fraud and un-denied siphoning of assets for the benefit of the second Defendant there is a risk of dissipation of assets by a company which as a matter of law is insolvent. He contends that it is clear from the affidavits of Mr. Ortt that the current owners of CDAL are in the business of "asset stripping". He contends further that upon any legal view,

CDAL is insolvent and that in the instant case there is evidence of fraud which has not been denied.

f. Undertaking in damages.

[35] Learned Counsel further submits that the grounds filed by Mr. Fuller (Counsel for the Defendant) to discharge the freezing injunction are misconceived. He submits, inter alia that Mr. Fuller argued that the Applicant has misrepresented facts concerning his alleged directorship; he states that Mr. Fuller did not point to any particular paragraph and say that is a misrepresentation, because he could not do so. Learned Queen's Counsel submits further that Mr. Fuller's ground of material non-disclosure is "wrong".

THE DEFENDANT'S SUBMISSIONS

[36] In paragraph 1 of their Closing Submissions, Learned Counsel for the Defendants submit that:-

> "1. The Claimant's case, and application for the freezing order, are premised on
>
> 1.1 An allegation that the Claimant was and is a director and sole shareholder of the (parent company and sole shareholder of the) First Defendant; and
>
> 1. 2 A purported agreement."

[37] Learned Counsel for the Defendants further submit that "it is the Defendants' case that there is no basis in fact or law for the claim and freezing order, and that there was in any event no basis whatsoever for the without notice application and order. Indeed, it appears that this claim and application for a freezing order are forensic fictions." Learned Counsel further state that the affidavits of Terrence Bryan Ortt and Richard Sayer are totally irrelevant and ought to be disregarded outright on the basis that they chronicle matters which are of no assistance to the court in determining the central issues in relation to the freeze order. Additionally, the said affidavits should be disregarded on the further basis that both deponents have ongoing disputes with the First Defendant and obvious axes to grind.

[38] Learned Counsel submit that the freezing order ought to be discharged "completely with prescribed costs to be paid by the Claimant on the claimed sum of $3 million US" for the following reasons:-

i). The Claimant's claim discloses no reasonable cause of action at all and/or none with any reasonable prospects of success;
ii). The Claimant deliberately and intentionally misrepresented and/or failed to disclose material facts;
iii). There was and is no evidence of dissipation; and
iv). It is only just and convenient for the freezing order to be discharged completely.

[39] I will now deal with the requirements for the grant of a freezing injunction, under the various heads.

(A) CAUSE OF ACTION

[40] A freezing injunction, like any other injunction, can only be granted if it is ancillary to a substantive claim within the jurisdiction of the court - David Bean[7]. An injunction is not a cause of action, but a remedy. Further, it is an equitable remedy.

[41] In the instant case, there was a substantive claim filed.

[42] Learned Counsel for the Defendants correctly submit that a freezing order will only be granted in support of an existing cause of action. They cite the case of Mirsand Planning and Architects Ltd. V Samuel S. Conde. Counsel further contend that "at the interlocutory stage the Claimant was required to show that he had pleaded a good cause of action, and if one was pleaded, which is in this case denied, "a good arguable case."

[7] Injunctions; 9th Edition, page 128, paragraph 7.13)

[43] As I understand the law, what must be shown to satisfy the above requirement is that there is an existing cause of action. A possible cause of action is not enough – **Steamship Mutual v Thakur Shipping Co. Ltd.**[8]. The Court is not aware of the requirement of a "good" cause of action.

[44] The Court is of the view that if (a) the court has jurisdiction over the potential respondent in the sense that he can be served with a claim form; and (b) the applicant have a cause of action in law, then the above requirement has been satisfied. The Court is of the further view that the said requirement has been satisfied in the instant case.

(B) A GOOD ARGUABLE CASE

[45] Learned Counsel for the Defendants contend that "one of the central issues on the facts for the determination of the learned Judge was whether the Amended Statement of Claim of June 2012 disclosed a cause of action with some prospects of success." Counsel further submit that "a proper review of the pleadings shows that no proper or sustainable cause of action was disclosed or pleaded by the Claimant."

[46] According to David Bean[9] (supra): - "The Claimant's case must show that he has a good arguable case (**Rasu Maritima SA v Pertamina**[10]): this means a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50 per cent chance of success (**Niedersachsen case**[11])."

[47] The Court is of the view that, based on the above, the requirement of a good arguable case has been met. Further, at the stage of the without notice application, the only documents before the Court were the Affidavits by the Claimant and on behalf of the Claimant. No defence had as yet been filed.

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[8] [1986] 2 Lloyd's Rep. 439
[9] page 130, paragraph 7.16
[10] [1978] Q.B. 644
[11] [1983] 1 W.L.R 1412

(C) DUTY OF FULL AND FRANK DISCLOSURE

[48] In making an application for a freezing injunction, the claimant is under a duty of frankness. The affidavit(s) in support must set out the facts on which the applicant relies for the claim being made against the respondent, including any material facts of which the court should be aware: in other words, there is a duty to state fairly any arguments expected to be advanced by the defendant against the grant of an injunction (**Third Chandris Shipping Corp v Unimarine SA**[12]) If this is not done, the injunction may be discharged for non-disclosure – David Bean[13] (supra))

[49] Blackstone[14], states as follows:-

> "A consequence of freezing injunction applications being made without notice is that a claimant applying for a freezing injunction is under a duty to give full and frank disclosure of any defence or other facts going against the grant of the relief sought. This duty extends both to facts within the actual knowledge of the claimant, and to facts which would have been known on the making of reasonable inquiries. It also extends to breaches of an advocate's duty to the court."

[50] A freezing injunction 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" – per Lord Scott of Foscote in **Fourie v Le Roux and others**[15].

[51] It is the submission of Learned Counsel for the Defendants that "there ought to be no question that the Claimant deliberately and intentionally misrepresented and/or failed to disclose material facts namely that:-

i). Geert Duizendstraal had in fact obtained the licences to be a shareholder and director and therefore the Claimant had ceased to be a director of the First

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[12] [1979] Q.B. 645
[13] Page 126, paragraph 7.07
[14] Page 580 paragraph 38.35
[15] [2007] UKHL 1

Defendant. This is clear even relying on the Claimant's own case, namely under the "proviso" to the purported agreement.

ii). The First Defendant and Mr. Nicholas Fuller had written to the Claimant since 2007 to demand that he stop the façade of acting as the First Defendant's Attorney. Indeed, the Claimant was threatened with legal and disciplinary action

iii). The terms and contents of the exchange of correspondence between his latest attorney Ms. Richards and Mr. Bart de Man, and in particular the fact that Mr. de Man had questioned his allegation of ownership of shares.

iv). The particulars of the Statement of Claim and Witness Summary in the proceedings which the Claimant previously initiated against the First Defendant, the truth of both documents having been certified.

v). In accordance with numerous authorities, notice of the application for the freeze order ought properly to have been given to the First Defendant; and

vi). In accordance with decided cases on the matter, any alleged agreement between the Claimant and the First Defendant for the Claimant to provide legal services as alleged, could be easily lawfully determined at any time by the First Defendant.

[52] It is the contention of Learned Counsel for the Defendants that the above "are material facts fully within the knowledge of the Claimant and his advisers, which ought to have been disclosed. They were not disclosed by the Claimant in any affidavit or in the course of submissions by his Attorney at Law."

[53] The rival submissions of Learned Counsel for the Claimant on the issue of material non-disclosure are as follows:-

i. The learned Judge who granted the application was addressed in respect of the earlier claim having raised the issue of her own motion before the Applicant was able to raise the matter.

ii. Item 3(1) of the Claimant's First Affidavit in support of an ex parte freezing injunction set out:

iii. I am the Claimant in an action currently before the Court in which I am seeking substantial un-liquidated damages which exceed $3 Million US.

iv. It is clear that the freezing injunction relates to contractual issues and consequential losses. Any element concerning the Applicant's continued capacity as a director does not impact on the measure of damages sought. The reality is that the applicant will be relieved if the court were to declare that he has in fact discharged his duties as a director and thus absolving him from the liabilities that the other directors and any shadow director may incur. It follows that the issue of directorship is not material. However, for the avoidance of doubt, the learned judge did ask in what capacity Mr. Lockhart sought the injunction. The Court was told that the action was a private law action, but that Mr. Lockhart took his duties as a director very seriously and that he would be seeking the courts clarification in the form of a declaration.

v. A previous claim which in any event was withdrawn by the Claimant because the CMC had already taken place and it was apparent that it contained defects is simply not relevant. At best, with permission, the Respondents could attempt to use it as a material for cross examination. A claim sets out facts in issue which need adjudication, the claim was withdrawn before there was any finding of fact.

vi. Further, the learned Judge was aware of the previous claim, Counsel for the Applicant having explained that it had been incorrectly pleaded.

[54] Counsel refers the Court to the second affidavit of the Claimant in support of his above submission. As stated in paragraph 27 above, the Court disregards this Affidavit.

[55] On the issue of non-disclosure, the relevant principles are stated in the judgment of Ralph Gibson LJ in **Brink's – Mat Ltd. V Elcombe and others**[16], in which the learned Judge, after a comprehensive review of the authorities, summarized the principles thus:-

> "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 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 Thormax 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

[16] [1988] 1 WLR 1350, 1356- 1357

examination of Scott J. of the possible effect of an Anton Piller order in Colombia Pictures Industries Inc v Robinson [1987] Ch. 38; and (c) of the degree of legitimate urgency and the time available for the making of the 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 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 sometime 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 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 1343 – 1344A."

[56] As can be gleaned from the Brink's Mat Ltd. case above, on the issue of material non-disclosure on a without notice application, where the non-disclosure is innocent, the Court has a discretion to overlook it ; it is not for every omission that such an ex parte order will be set aside .

[57] In the instant case, I find:-

A. That there was material non-disclosure on the part of the Claimant, particulars of which include:-

(a) Failing to disclose that, in previous proceedings, he had admitted that his directorship had ceased as the appropriate licences were acquired by the Second Defendant.

(b) Failing to disclose that the Second Defendant Geert Duizendstraal had obtained the licences to be a shareholder and director and therefore the Claimant had ceased to be a director of the First Defendant.

(c) Failing to disclose correspondence between himself (the Claimant) and the Defendants, in particular, the letters attached to the Affidavit of the Third Defendant Gaye Hechme (exhibit GH2) :-

i). A letter dated the 22nd February 2007 signed by Ms. Hechme with respect to the Claimant's "continuing to act as legal counsel" on behalf of the First Defendant.

ii). A letter dated 20th March 2007 in which Attorney at law Mr. Nicholas Fuller had written to the Claimant to demand that he (the Claimant) stop the façade of acting as the First Defendant's

Attorney and for immediate delivery of the sum of $300,000.00 US (which the Claimant had received from a purchaser of the First Defendant's property and "had refused to pay over" to the First Defendant). Further, that in the said letter, the Claimant was threatened with legal and disciplinary action.

(d) Failing to disclose that there had been an exchange of correspondence between the Claimant's Attorney Ms Richards and Mr. Bart de Man, and in particular the fact that Mr. de Man had questioned his allegation of ownership of shares in his email response dated June 20th 2012.

B. That the non-disclosure was material and intentional.

[58] In light of the above, it is my finding that the freezing injunction should be discharged on the ground of the material non-disclosure.

C. RISK OF DISSIPATION

[60] In his closing submissions, Learned Counsel for the Claimant states, "The Respondents have perpetrated frauds and are intent on stripping assets of an insolvent Antiguan company and dissipating them beyond the reach of the Antiguan courts to make themselves judgment proof."

[61] Learned Counsel further submits:-

(a) It is clear from the affidavits of Mr. Ortt that the current owners of CDAL are in the business of asset stripping. The previous owners were defrauded into selling CDAL and were not paid as promised.

(b) The second Defendant who claims to own Jolly Harbour AG based on his affidavit is a serial director of insolvent companies. He has not denied this in his affidavit of reply. Counsel further submits that upon any legal view

CDAL is insolvent. This is no coincidence. Insolvency invariably means that creditors go unpaid. In the instant case there is evidence of fraud which has not been denied.

(c) As stated at paragraph 26 of the Applicant's Affidavit in support of the Freezing Order, the Applicant asserted that the Respondents siphoned off money due to Caribbean Developments and diverted it to a company under the control of the second Respondent. Once again, there has been no denial. He contends that it is inconceivable that the Respondents or their Attorney could have overlooked this serious allegation.

(d) The absence of evidence from a respondent may strengthen the inference which the applicant seeks to draw. He poses the following questions:-

> Why is there no denial of fraud? Why does the third Defendant who is Antiguan criticize the translation of a Dutch newspaper, when the second defendant is dutch and says nothing? Counsel posits that "if the Defendants were going to criticize the translation, the native speaker would have been expected to say what was wrong with it."

[62] Learned Counsel for the Defendants submit the following:-

(a) The Claimant was obliged (as the burden of proof was on him) to produce "solid evidence" to show that the Defendants were removing assets from the jurisdiction and therefore a real risk existed that a judgment in their favour may go unsatisfied. Mere unsupported statements or suspicion are not sufficient and have no evidential value. Counsel rely on Blackstone's Civil Practice 2001 at paragraph 38.3 to 38.9; page 374 to 378 and on the case of O'Regan v Iambic Productions Ltd.

(b) It was for the Claimant to prove not only that any dissipation was occurring but also that any such dissipation was with the intention to deprive the Claimant of

the benefit of any judgment which he may obtain. Injunctions of this nature "are not granted to give a claimant advance security of his claim." Counsel cite the case of Fourie (above).

(c) There was no objective evidence whatsoever to justify any allegation of dissipation of assets. The evidence shows that since 2007 the Defendants had written the Claimant demanding he stop purporting to act for the First Defendant. The letters (GH2) were written over five years. If it was the intention to dissipate assets the Defendants would have done so many years ago. They did not. Counsel cite the case of Dubai Bank Ltd. V Galadari and Others [1990] 1 Lloyd's Law Reports 120.

(d) On the Claimant's own evidence there has been some intervention by the Dutch Courts and an 'administrator' Mr. Bart de Man was appointed. This of necessity required the Claimant to establish that notwithstanding the appointment of de Man, dissipation was taking this (sic) place. There was no such evidence. On the contrary, Mr. de Man said, at paragraph 5 of his affidavit sworn to on the 29th June 2012, Mr. de Man made it clear that his approval is required for any decision concerning the assets of the First Defendant.

(e) The Claimant used much of the court's time to repeatedly make allegations of insolvency on the part of the First Defendant. This is denied and the First Defendant exhibited as GH4 a valuation report which indicates that its assets far exceed its liabilities. In any event, apart from being untrue, the allegations of insolvency are irrelevant. Insolvency does not amount to dissipation of assets. The Claimant failed to adduce any evidence that the First Defendant was seeking to put assets outside his reach. There was and is no risk of dissipation.

[63] According to Blackstone[17]:-

> "The claimant must establish that there is a real risk that the defendant will dissipate assets if unrestrained."

[17] Page 569 , paragraph 38.12

[64] The applicable test for risk of dissipation was formulated by the Court of Appeal in **Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft GmbH** (The Niedersachsen[18]) as follows:-

> ".....whether, on the assumption that the plaintiffs have shown ' a good arguable case', the court concludes, on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiff's would remain unsatisfied."

[65] The test is therefore an objective one of assessment of the risk that a judgment may not be satisfied. However, it is not every risk of a judgment being unsatisfied which can justify Mareva relief (Gee, page 351, paragraph 12.037) In assessing the risk of dissipation the court is concerned with the risk of dissipation which, if it were to take place, would be "unjustifiable" , not the overall risk of whether the asset will be preserved intact until judgment in the action, including the risk or proper expenditure. What is 'unjustifiable' depends upon the purpose of the injunction. What is justifiable before judgment may become unjustifiable once there is a judgment and the judgment creditor is entitled to be paid.

[66] There has to be 'solid evidence' of the risk of disposal. It is for the Claimant to adduce this 'solid evidence' to support his assertion that there is a real risk that the judgment or award will go unsatisfied. According to Gee[19] (supra) "since each case depends on its own facts it is impossible to lay down any general guidelines on satisfying this evidential burden." The learned writer goes on to state some of the factors which may be relevant. These include:-

(a) The nature of the assets which are to be the subject of the proposed injunction, and the ease or difficulty with which they could be disposed of or dissipated.. The claimant may find it easier to establish the risk of dissipation of a bank

[18] [1983] 1 WLR 1412 at 1422
[19] (page 353 paragraph 12.039)

account, or of moveable chattels, than the risk that the defendant will dispose of real estate...

(b) The nature and financial standing of the defendant's business.

(c) The length of time the defendant has been in business. Stronger evidence of potential dissipation will be needed where the defendant is a long-established company with a reasonable reputation than where little or nothing is known or can be ascertained about it.

(d) The defendant's past or existing credit record. A history of default in honouring other debts may be a powerful factor in the claimant's favour – on the other hand, persistent default in honouring debts, if it occurs in a period shortly before the claimant commences his action, may signify nothing more than the fact that the defendant has fallen upon hard times and has cash-flow difficulties, or is about to become insolvent. The possibility of insolvency does not justify the granting of Mareva relief. As a factor it may weigh against it, on the grounds that an injunction would be oppressive because it might deprive the defendant of a last opportunity to put his business affairs in good order again. The fact that a Mareva injunction has been granted over the defendant's assets may well discourage a bank or other company from lending him money or otherwise coming to his aid.

(e) The defendant's behaviour in response to the claimant's claims: a pattern of evasiveness, or unwillingness to participate in the litigation or arbitration, or raising thin defences after admitting liability, or total silence, may be factors which assist the claimant.

[67] **In Customs and Excise Commissioners v Anchor Foods Ltd.**[20], Neuberger J said that what is required is a good and arguable case for a risk of dissipation. The risk of dissipation has to involve a risk of impairing the claimant's ability to enforce a judgment **(Mobil Cerro Negro Ltd. V Petroleos de Venezuela S.A.**[21]

[20] [1999] 1 WLR 1139
[21] [2008] EWHC 532 (Comm)

[68] In his closing submissions, Learned Counsel for the Claimant states, "The Court will have to decide whether in the light of un-denied equitable fraud and un-denied siphoning of assets for the benefit of the second Defendant there is a risk of dissipation of assets by a company which as a matter of law is insolvent."

[69] Learned Counsel grounds his submission that there is risk of dissipation of assets on the following:-

(a) The First Defendant is "as a matter of law" insolvent.
(b) There is evidence of equitable fraud because the defendants have not denied the allegation.
(c) There is evidence of "siphoning of assets for the benefit of the second defendant" because the allegation has not been denied.

[70] The Court cannot endorse the submission in paragraph 69 (a) above. In the first place, the Claimant has provided no evidence before the Court to substantiate his claim that the First Defendant is insolvent "as a matter of law." Counsel for the Claimant submits that "the Respondents are as a matter of law insolvent. They cannot pay debts as they become due and accordingly are insolvent as defined by Companies Act." Secondly, what the Claimant had deposed to in paragraph 3 (ii) of his Affidavit filed on the 22nd day of June 2012 is that "CDAL (the First Defendant) is not paying its debts when they become due and therefore is insolvent. "Not paying debts is different from inability to pay debts. Further, according to Mr. Terrance Ortt's Affidavit filed on the 22nd day of June 2012, "rumours continue to abound about CDAL being insolvent and a CDAL employee confirmed that APUA had interrupted provision of electricity due to non-payment more than once in the past months." It would appear, therefore, that what the Claimant is contending as a "matter of law" is based on his speculation without proof, as well as "rumours".

[71] In any event, the authorities are clear that:-

a. Freezing orders are not granted in order to provide security for a claim. By procuring an order that assets are frozen, an applicant is not put in a better position than any other creditor.
b. The possibility of insolvency does not justify the granting of Mareva relief, or freezing injunction ;
c. Being short of money is not to be equated with an intention to dissipate assets – see **Midas Merchant Bank plc v Bello**[22].
d. The mere fact that the actual or feared conduct would risk the claimant's ability to enforce a judgment or award does not in every case mean that a freezing order should be granted. The conduct must be "unjustifiable."

[72] With respect to the submission in paragraph 69 (b) above, the Claimant contends that "there is evidence of equitable fraud because the defendants have not denied the allegation."

[73] It is the submission of Counsel for the Claimant that the Respondents have engaged in equitable fraud. He contends that "it is significant that the Respondents have failed to deny this claim and that any honest respondent and particularly one advised by an Attorney who specializes in crime could not have denied this matter quickly enough."

[74] Learned Counsel for the Claimant submits that "the equitable fraud as evidenced by Stuart Lockhart was commissioned in the United Kingdom since transactional documents were delivered to and signed in London."

[75] The rival submissions of Learned Counsel for the Defendants on the issue of the allegation of equitable fraud are as follows:-

[22] [2002] EWCA Civ 1496

(a) It is trite law that fraud must be expressly pleaded with detailed material facts and particulars which set out the basis for the allegation. Paragraphs 6 to 9 of the June 2012 amended statement of claim contain no such material facts and particulars. What they contain are vague statements of the Claimant's opinion. More importantly, even if an equitable fraud was committed and properly pleaded, which is denied, there was no fraud on the Claimant at all. On the Claimant's own case, he was not only a director but the 'attorney' for this transaction. Consequently, he may well have been an accessory to the fraud or in serious dereliction of his own legal obligations to ensure that proper valuations were done.

(b) The allegation of an equitable fraud in paragraphs 6 to 9 of the June 2012 amended statement of claim is a forensic fiction. There simply are no material particulars or evidence to support it. First, the alleged transaction allegedly occurred in 2005. There are no material facts to show when this alleged 'sham' was discovered. Second, there is no law prohibiting the transaction pleaded. Third, the Claimant has provided no material facts or evidence whatsoever. The allegation is premised on the Claimant's subjective and self-serving opinion. Fourth, one transaction is not the basis of establishing whether a company is profitable. Profitability is determined by the financial statements and revenue.

(c) Fifth, the circumstances of the allegations in paragraph 8 are unclear. The allegation that a transaction may not appear on financials 'in Antigua' seven years later, ie, from 2005 to 2012, is extremely vague particularly as there are other related and holding companies; the Claimant himself admits there are related companies in Holland. In any event , such a vague allegation could not reasonably or at all lead to any suggestion or inference of a sham or fraud. It is simply nonsense. Sixth, and most extraordinarily of all, the Claimant , despite his allegation of a fraud, at paragraph 9 of his amended Statement of Claim demands fees for work he alleges he did as the executioner of the fraud.

[76] The Court is of the view that the submission of Learned Counsel for the Claimant that there is evidence of equitable fraud because the Defendants have not denied the allegation is simply without merit. It is trite law that he who alleges must prove. The Claimant, in the view of the Court, has not supplied proof, on a balance of probabilities that CDAL (the First Defendant) "has been used as a vehicle of equitable fraud."

[77] In his submissions, Learned Counsel states:-

> "Paragraph 18 - The Claimant either was on any view, or is on a contested view, a director of CDAL. He is therefore uniquely qualified to provide insight into the business dealings of this manifestly corrupt organization."
>
> "Paragraph 19 – He (the Claimant) has adduced a copy of an invoice designed to defraud others. The fraud in question has not been denied. As a victim of that fraud, the Claimant has suffered loss and damages in excess of $800,000.00 U.S."

[78] In paragraph 3 of his Affidavit in support of the application for the ex parte freezing injunction, the Claimant deposes, inter alia, that "The current directors in control are either implicated in fraud or have acquiesced to it." In paragraph 6 of the said Affidavit, the Claimant deposes:-

> "I can also confirm to the Court that I understand the requirement of an undertaking in damages and readily give it. This commitment is underpinned by the assertion that I am a Director of CDAL, a matter for which we seek a declaration from the court as part of my claim. It is my opinion that I have a duty to protect the rights of the creditors, both in respect of preserving the assets of CDAL and bringing to the fore any fraudulent act(s) which are contrary to the best interests of the company, its officers, staff and creditors."

[79] The Claimant in his Amended Claim seeks, as well as an Order for damages, a declaration that he is:

a. A Director of the First Defendant; and is
b. The sole shareholder of the First Defendant.

[80] In paragraph 38 (iv) of his Submissions, Learned Counsel states:-

> "It is clear that the freezing injunction relates to contractual issues and consequential losses. Any element concerning the Applicant's continued capacity as a director does not impact on the measure of damages sought. The reality is that the applicant will be relived (sic) if the court were to declare that he has in fact discharged his duties as a director and thus absolving him from the liabilities that the other directors and any shadow director may incur. It follows that the issue of directorship is not material....."

[81] The Court is of the view that the issue of directorship is very material to the Claimant's allegation of equitable fraud and to the issue of the freezing injunction. As stated in paragraph 78 above, it is the Claimant who deposed that the undertaking in damages is readily given by him, and that this commitment "is underpinned by the assertion that he is a director of CDAL." It is worth repeating that part of the relief which the Claimant seeks is a declaration that he is a Director of CDAL. Paradoxically, Learned Counsel for the Claimant submits (paragraph 80 above) that the applicant will be relieved if the court were to declare that he has in fact discharged his duties as a director and thus absolving him from the liabilities that the other directors and any shadow director may incur. Based on the foregoing, it would appear that what the Claimant is seeking, merely on the basis of his evidence, is a Declaration from the Court that he is totally absolved of any wrongdoing or liability as Director, for any fraud perpetrated by the First Defendant, and that the other Directors and/or "shadow director" are liable for such fraud or wrongdoing. The Court cannot make such a declaration. In any event, the Claimant has not so pleaded.

[82] The Claimant deposes in his Affidavit in Support that the value of his claim against the Defendants in un-liquidated damages is likely to exceed 3 Million U.S. He deposes further that the claim set out the lands that he was due to transfer by virtue of the exclusive contractual arrangements between the Defendants and himself; one of these land transfer relates to "the stated equitable fraud (in itself a purported 40 Million US land transfer for which he was to receive 2%). The Claimant states that "whilst the said transaction was a sham, "he was "an unwitting participant." He adds "so indeed in addition to CDAL, the Defendants also subjected me to equitable fraud."

[83] It is quite perplexing to the Court that the Claimant alleges that he is "an unwitting participant" to the Defendant's fraud and that the Defendants have "subjected him to equitable fraud", yet at the same time, he claims damages in respect of "contractual arrangements" inclusive of land transfers with respect to the same "equitable fraud." Part of his claim, as stated in paragraph 22 of his Amended Statement of Claim is his "claim in contract for loss and damages arising out of his agreement and performance in respect of the sham transfer of land" as well as "his loss and damages as a consequence of the wrongful conduct of the Defendant." Further, as stated in paragraph 77 above, Learned Counsel for the Claimant has submitted that the Claimant has suffered loss and damage in excess of $800,000.00 "as a victim of that fraud." This submission is quite remarkable.

[84] It is the view of the Court that the Claimant's allegation of equitable fraud when he seeks damages in part from the fruit of that equitable fraud, is untenable.

[85] With respect to the submission in paragraph 69 (c) above, Counsel for the Claimant states that there is evidence of "siphoning of assets for the benefit of the second defendant" because the allegation has not been denied. In paragraph 26 of his Affidavit in Support, the Claimant deposed: - "I am able to produce evidence that 'proceeds' from the sale of CDAL land has been siphoned to a separate account off-shore (Exhibit SAL 12) i.e. monies paid for land owned by CDAL, being transferred on the direct instructions of the Second Defendant to a business account controlled by the Second Defendant in France; 'La Perla living Investments' SARL. Given that CDAL appears to be insolvent, I believe the purpose of the transfer is to prevent the just satisfaction of CDAL's creditors." In the view of the Court, this "belief" of the Claimant of the alleged "siphoning of assets" does not amount to proof.

[86] According to Blackstone[23], the most significant of the conditions that must be fulfilled in order to grant a freezing injunction is that there must be a real risk that the defendant will

[23] (page 562, paragraph 38.1)

dissipate assets to frustrate any judgment the claimant may obtain. In the view of the Court, in light of the authorities and the facts as stated above, the Claimant has not satisfied this condition. The Claimant has not made out a good and arguable case for a risk of dissipation. The Court finds, therefore, that on that basis alone, the freezing injunction should be discharged.

[87] I will now address the issue of whether it is just and convenient to continue the freezing injunction.

[88] In his Affidavit in Support of the application for the freezing injunction, the Claimant deposed: "I believe that it would be just and convenient to grant the Order that I seek." He states further that:-

a. He has set out evidence that the Defendant has already taken steps to remove assets out of the jurisdiction;

b. There is evidence that the Defendant has debt default in the past.

c. His evidence supports his substantive cause of action and discloses dishonest and or suspicion of dishonest conduct on the part of the Defendants;

d. There is a history of breach, non-compliance or disregard of a court order by CDAL.

[89] Counsel for the Defendants submit that the Judge had to consider and decide whether it was just and convenient to grant the freezing order. Counsel contends that:-

(a) An important factor was whether it is just and convenient to prevent the First Defendant from continuing its lawful business in light of the fact that it has substantial assets in Antigua and Barbuda; that this was the effect of the freeze order which prevented the First Defendant from accessing its bank accounts, meeting its payroll or making any payments.

(b) In respect of the Claimant's absurd and irrelevant allegations of insolvency, even if accepted, it is submitted that a freeze order which in effect prevents the First Defendant from paying current creditors so to preserve assets in the event of a future and unlikely judgment in the Claimant's favour is disproportionate and improper.

(c) In all of the circumstances it was not just and convenient to grant or continue the freezing order.

[90] For interlocutory relief to be granted, it must be "just and convenient" to do so. The Court therefore, has to exercise a discretion, taking into account all the circumstances of the case. The Court must also be satisfied that the likely effect of the injunction will be to promote the doing of justice overall, and not to work unfairly or oppressively. This means taking into account the interests of both parties and the likely effects of an injunction on the defendant. The authorities are clear that even where all the requirements for the grant of a freezing injunction have been met, the "ultimate criterion is whether it is just and convenient to grant the injunction sought. Thus, a court may refuse to grant a freezing injunction even if the applicant apparently qualifies for its grant, if the injustice to the respondent would outweigh the justice to the applicant." – Commercial Litigation: Pre-emptive Remedies, Second International edition; page 284, A2-098.

[91] Learned Counsel for the Claimant submits that "the grounds filed by Mr. Fuller to discharge the freezing injunction are misconceived." I do not agree. Counsel for the Claimant further submits that "the rational approach would be to continue the freezing injunction, order further disclosure and refer the Respondents to the Director of Public Prosecutions and or the Serious and Organised Crime Agency in London." Again, I must respectfully disagree with this submission. I state further that, particularly in light of paragraphs 82-84 above, it is Counsel's latter submission which is misconceived.

CONCLUSION

[92] I will conclude my judgment by re- stating the nature and purpose for granting a freezing injunction. According to Blackstone[24]: - "The purpose of a freezing injunction is to prevent the injustice of a defendant's assets being salted away so as to deprive the claimant of the fruits of any judgment that may be obtained." Further, the authorities are clear that the purpose of a freezing order is not to give the claimant any priority or security if the defendant becomes insolvent. In paragraph 30 above, I stated what the onerous conditions are for granting a freezing injunction. I also stated, in paragraph 32 above, that freezing injunctions may be discharged on the ground that one of the usual requirements has not been made out. I have attempted to analyse each of these requirements.

[93] With respect to the submission of Counsel for the Defendants that the freezing injunction ought not to have granted, the Court states that the application was granted in the exercise of the Court's discretion, taking into account the evidence available to the Court at that time. As I stated in paragraph 31 above, the process involved in an application to set aside a without notice freezing order is not one by way of appeal, but of a re-hearing of the application. As such, in the words of Colman J. in Laemthong International Lines Co. Ltd and Artis and Others (supra), "discretion is re-opened."

[94] Further, as stated by Lord Hope of Craighead in the House of Lords decision of **Fourie v Le Roux and others**[25], "...But litigants do from time to time persuade judges to make orders in their favour ex parte which on more mature reflection have no sound basis in law and must be set aside."

[95] Each case turns on its own facts. On the basis of all of the foregoing, it is my view that the Freezing Injunction granted on the 29th June 2012 ought to be discharged. It is my view that, having given adequate consideration to the Affidavits filed by the Claimant and

[24] (page 562, paragraph 38.1)
[25] [2007] UKHL 1

on behalf of the Claimant, the Affidavits filed by the Defendants and on behalf of the Defendants, and having regard to the submissions of Counsel, the Court holds that the freezing injunction ought to be discharged for the following reasons, as have been stated and detailed above. These are:-

(a) The Court is persuaded that there is no real risk of the Defendants dissipating the assets (of the First Defendant) in order to frustrate any judgment which the Claimant may obtain (see paragraph 86 above)

(b) There has been material non-disclosure (see paragraph 57 above.)

[96] The Court further finds that it is just and convenient that the freezing order be discharged. The effect of a continuation of the freezing injunction would be unduly oppressive to the First Defendant's business and would be an undue interference with the operation of its normal course of business and its ability to pay its lawful debts and expenses. Further, that failure to discharge the freezing injunction would cause injustice to the respondent which would outweigh the justice to the Claimant. Lastly, as stated above, the grant – or continuation - of a freezing injunction is discretionary. The Court is of the view that the freezing injunction should be discharged in the exercise of its (the Court's) discretion.

[97] In any event, in light of the clear language of Paragraph 3 of the Order of the Court dated 12th July 2012, the freezing injunction granted on the 22nd June 2012 had discharged itself as of the 16th day of July 2012. At the risk of repetition, the relevant part of the Order reads thus:-

> "3. The undertaking given to the Court by the first Defendant as reflected in the Order dated 5th July, 2012 is hereby continued until Monday 16th July, 2012 by which date the parties shall agree on the wording of a new undertaking to be given by the First Defendant and execute and file a court order reflecting same. Failure of the parties to agree on the terms of the new undertaking shall result in the discharge of the freeze order dated 22nd June, 2012 with liberty to the Claimant to apply."

ORDER

i. The Freezing Order granted on the 22nd June 2012 is hereby discharged in its entirety.

ii. The Claimant to pay costs to the Defendants in the sum of $10,000.00.

JENNIFER REMY
High Court Judge