EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2014/0004

BETWEEN:

[1] LUCITA ANGELEVE WALTON
(neé Lucita Angeleve De La Haye)
[2] MILES WALTON
[3] ROYAL SQUARE EXECUTORS LIMITED

Appellants

and

LEONARD GEORGE DE LA HAYE

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal

On written submissions:

Mr. William Hare of Forbes Hare, for the Appellants
Mr. John Carrington, QC of Sabals Law for the Respondent

2015: August 14.

Interlocutory appeal – Enforcement of foreign judgment – Section 83A of the BVI Trustee Act – Whether section 83A(19) of the BVI Trustee Act prohibits the enforcement of all foreign judgments that concern heirship rights – Freezing injunction – Whether learned judge erred in failing to discharge injunction on the basis of material misrepresentations/non-disclosures – Whether learned judge erred in holding that there was a risk of dissipation of assets – Fortification of undertaking in damages – Whether learned judge erred in refusing to order respondent to fortify undertaking – Summary judgment – Whether learned judge erred in granting partial summary judgment

The appellant, Mrs. Lucita Angeleve Walton ("Mrs. Walton") and the respondent, Mr. Leonard George De La Haye ("Mr. De La Haye") are siblings. Their mother, Mrs. Evelyn De La Haye, deceased, was a resident of Jersey in the Channel Islands. On 28th January 2013, Mr. De La Haye obtained judgment in the Royal Court of Jersey ("the Jersey Court") against Mrs. Walton in the sum of £414,949.62. The Jersey Court had

determined that Mrs. Walton was to repay to the moveable estate of her late mother the sum of £386,219.08 which included the sum of £225,259.08 which the Jersey Court had found that Mrs. Walton had taken from her mother's account after her death, together with the sum of £10,960 which Mrs. Walton had withdrawn during her mother's lifetime and used for her own purpose, along with the sum of £150,000 that Mrs. Walton had caused to be transferred to a BVI account. Costs on the judgment were awarded to Mr. De Lay Haye in the sum of £28,730.54.

Mr. De La Haye subsequently filed a claim in the BVI High Court on 11th February 2014 to recognize and enforce at common law the judgment of the Jersey Court ("the Jersey Judgment"). Mr. De La Haye also applied ex parte to the BVI High Court for a freezing injunction over Mrs. Walton's assets to the extent of the value of the Jersey Judgment and for an order to have Mrs. Walton and her husband Mr. Miles Walton ("the Waltons") disclose all the assets in which Mrs. Walton had a beneficial interest. Mr. De La Haye's application was granted by the learned judge who ordered that the freezing injunction was to expire on 12th March 2014 unless continued by a further order of the court. Mr. De La Haye subsequently applied to continue the ex parte order pending the full satisfaction of the Jersey Judgment. The Waltons then applied to the High Court for the following reliefs: that the ex parte freezing injunction be discharged, that the order requiring the Waltons to disclose Mrs. Waltons assets to Mr. De La Haye be stayed pending the determination of the application to discharge it; in the event that the discharge application failed, that Mr. Walton fortify his undertaking in damages; and costs of the application. The Waltons contended in the discharge application that Mr. De La Haye had failed to make material disclosures in obtaining the ex parte order and had misrepresented facts to the judge at the ex parte hearing. A few days later Mr. De La Haye applied for partial summary judgment to be entered on his claim and for costs in the proceedings.

Mr. De La Haye's application for the continuation of the ex parte order granting the freezing injunction and the Waltons discharge application as well as Mr. De La Hay's application for summary judgment came up for hearing together before a different judge of the BVI High Court. The learned judge found that there was sufficient basis to allow the continuation of the ex parte order and refused the Waltons application, finding that there were no material non-disclosures or misrepresentations. The learned judge also refused to order Mr. De La Haye to fortify his undertaking in damages. In addition, the learned judge granted partial summary judgment on Mr. De La Haye's claim in relation to the sums of £225,259.08 and £10,960 as well as on the costs in the sum of £28,730.54 awarded on the Jersey Judgment. However, the learned judge excluded the sum of £150,000 which the Jersey Court had found Mrs. Walton had transferred to a BVI account and which the Waltons alleged in their defence to Mr. De La Haye's claim was a disposition held on trust in the Virgin Islands and the Jersey Judgment being a foreign judgment concerning heirship rights, offended the provisions of section 83A(19) of the BVI Trustee Act.[1]

The Waltons, being aggrieved by the learned judge's decision on the applications, have appealed.

[1] Cap. 303, Revised Laws of the Virgin Islands 1991 (as amended).

Held: dismissing the appeal against the order of the learned judge which continued the freezing injunction; allowing in part the appeal against the learned judge's order on the summary judgement, only to the extent that the learned judge ought not to have granted summary judgment in relation to the assessed costs in the sum of £28,739.54 on the Jersey Judgment; and awarding costs on the appeal to Mr. De La Hay to be assessed, if not agreed, within 21 days of this judgment, that:

1. A court is entitled to discharge any ex parte order without going into the merits of the claim if there is proof that in obtaining the order the party was guilty of material non-disclosure. However, it is not for every omission that an ex parte order will be automatically discharged. A court must determine whether the facts not disclosed are of sufficient materiality to justify immediate discharge of the order without examination of the merits. The innocence or deliberateness of the non-disclosures is relevant, though not necessarily decisive.

   The King v The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington. Ex parte Princess Edmond de Polignac [1917] 1 KB 486 applied; **Ipoc International Growth Fund Limited v LV Finance Group Limited** BVIHCVP2003/0020 and 2004/0001 (delivered 19th September 2005, unreported) applied; **Brink's Mat Ltd v Elcombe and** others [1988] 3 All ER 188 applied; **Bank Mellat v Nikpour** [1985] FSR 87 at p. 90 applied.

2. In seeking to obtain an ex parte injunction, it is for the applicant to bring to the attention of the court any defence or objection that may be taken to the underlying claim; however, a failure to do so is not necessarily fatal; unless it was deliberate and material it may not result in an outright discharge of the order. In this appeal, the learned judge was quite aware that the Waltons had filed a defence in relation to Mr. De La Hay's claim and it was not fatal to the continuation of the injunction that the applicant seemed not to have gone into detail as to the nature of the defence during the ex parte hearing. Therefore, it was open to the learned judge during the inter partes hearing to conclude that there were no material non-disclosures which would justify the discharge of the ex parte freezing injunction. Accordingly, the learned judge exercised her discretion properly and did not exceed the generous ambit within which disagreement is possible.

   Ipoc International Growth Fund Limited v LV Finance Group Limited BVIHCVP2003/0020 and 2004/0001 (delivered 19th September 2005, unreported) applied; **Brink's Mat Ltd v Elcombe and** others [1988] 3 All ER 188 applied.

3. In the review of the exercise of a discretion by a judge in the lower court, an appellate court does not seek to pull apart every obiter statement which a judge makes in rendering a decision or giving an order. In the present appeal, although the learned judge made certain misstatements during the ex parte hearing, these statements were de minimis. Further, there was no merit to the complaints by the Waltons of misrepresentations by Mr. De La Haye as to the nature of the underlying claim for enforcement. In the circumstances, there was no evidence

upon which it could be properly concluded that the judge committed an error of principle in exercising her discretion to continue the freezing injunction.

4. The danger of assets being removed from the jurisdiction is only one facet of the "ploy" of a defendant to make himself "judgment-proof" by taking steps to ensure that there are no available or traceable assets on the day of judgment to avoid execution. A court therefore has the jurisdiction to grant a freezing injunction where there is a risk of a judgment which a claimant seems likely to obtain being defeated in this way. In this appeal, in view of the evidence that was before the court, in particular the uncontroverted affidavit evidence that Mrs. Walton did not intend to honour the Jersey Judgment but rather was taking steps to prevent its enforcement and the findings that were made by the learned judge, it was clearly open to the learned judge to exercise her discretion in the way she did and to conclude that there was a real risk of dissipation.

   In Z Ltd v A-Z and AA-LL [1982] QB 558 at p. 585F applied.

5. It is the duty of an applicant who wishes a court to order a claimant who seeks an injunction to fortify the undertaking as to damages to place evidence before the court upon which the court can conclude that there is a real risk that the undertaking would be worthless. In the present appeal there was no evidence placed before the court upon which it could be concluded that it was open to the judge to determine that there was a real risk that Mr. De La Haye's undertaking as to damages would be worthless. Accordingly, the learned judge could not be faulted for the manner in which she exercised her discretion by refusing a fortification of undertaking by Mr. De La Haye.

   Sinclair Investment Holdings SA v Cushnie and others [2004] EWCH 218 (Ch) applied.

6. Summary judgment should only be granted by a court in cases where it is clear that a claim on its face obviously cannot be sustained or is in some other way an abuse of the process of the court. What must be shown is that the claim or defence has no real prospect of success. In this appeal, the Waltons' defence only addressed the sole disposition of £150,000 to be held on BVI trusts as defined in section 83A(13) of the **Trustee Act** and did not address the entirety of the Jersey Judgment.

   Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste SLUHCVAP2009/0008 (delivered 11th January 2010, unreported) applied;

7. Section 83A(19) of the **Trustee Act** does not operate to prevent enforcement of all foreign judgments that concerns heirship rights as being contrary to public policy. The bar to enforcement under section 83A(19) only applies to the extent that a foreign judgement is inconsistent with section 83A(13) to (18). The BVI statutory scheme clearly indicates that is only where there is a disposition in relation to BVI trusts which also concerns the foreign judgment that the local legislation takes

precedence over the foreign judgment. Accordingly, a foreign judgment which is inconsistent with section 83A(19) of the **Trustee Act** cannot be enforced since to do so would be contrary to BVI's public policy. In this appeal there was only one disposition as defined by section 83A(13) of £150,000 to be held on trust in the BVI that could possibly offend BVI's public policy. There was no question of the sum of £10,960 and £225,259.08 being regarded either as dispositions or being held on trusts.

Section 83A of the **Trustee Act**, Cap. 303, Revised Laws of the Virgin Islands (as amended) applied;

8. In determining the question of severability of a judgment, a court must consider whether the part to be severed could stand on its own or whether it is so inextricably bound up with the rest of the judgment as to be inseparable. In the present appeal, the Jersey Court in its judgment compartmentalized the various heads under which the award was made. The sum of £150,000 that formed part of the Jersey Judgment and which may regarded as a disposition under BVI law was a discrete and identifiable aspect of the judgment. In the circumstances, the learned judge's exercise of discretion to sever the foreign judgment and to grant partial summary judgment on the aspects of the judgment for £10,960 and £225,259.08 cannot properly be impugned.

   Raulin v Fischer [1911] 2 KB 93 applied; rule 15.6 of the **Civil Procedure Rules 2000** applied.

9. A foreign order for costs is not severable from the main award where the cost order cannot sensibly be separated from the judgment in respect of which the costs had been accrued. In the present appeal, in so far as an award of summary judgment could not be granted for the £150,000, neither could assessed costs in relation to the other sum be sensibly separated from the entire costs award. Accordingly, although the learned judge acted quite properly in carving out the sum of £150,000 from the summary judgment, the judge erred in granting summary judgment on the assessed costs in the sum of £28,739.54.

   Mayo-Perrott v Mayo Perrott [1958] CLY 501; [1958] JR 336 applied.

JUDGMENT

Introduction

[1] **BLENMAN JA:** This is an appeal by Mrs. Lucita Angeleve Walton ("Mrs. Walton") and Mr. Miles Walton (collectively, "the Waltons") against an order of the learned judge which continued the freezing injunction and disclosure orders against them and granted Mr. Leonard George De La Haye ("Mr. De La Haye") partial summary

judgment on his claim against them. Royal Square Executors Limited did not take any part in the applications below and took no part in this appeal. Indeed, from the record of proceedings this seems correct.

Factual Background

[2] Mr. De La Haye and Mrs. Walton are siblings and children of Mrs. Evelyn De La Haye (now deceased), who was a resident of Jersey in the Channel Islands. Mr. De La Haye had obtained judgment in the Royal Court of Jersey ("the Jersey Court") against Mrs. Walton in the sum of £414,949.62. On 11th February 2014, he filed a claim in the court below for the common law enforcement of a foreign judgment of the Jersey Court dated 28th January 2013 ("the Jersey Judgment"). The Jersey Court had determined that Mrs. Walton was to repay to the moveable estate of her late mother the sum of £386,219.08. This figure included the total amount of money which she had received from her mother during her lifetime which the court found constituted "avances" that ought to be repaid. It also included the sum of £225,259.08 which the Jersey Court found that Mrs. Walton had taken from the account after her mother's passing together with the sum of £10,960 which Mrs. Walton had withdrawn during her mother's lifetime and used for the former's own purposes, together with the sum of £150,000 that Mrs. Walton had caused to be transferred to a Virgin Islands ("BVI") account. The costs which were awarded to Mr. De La Haye in those proceedings were subsequently assessed in the sum of £28,730.54, together with interest which has been accruing on both this sum as well as the judgment sum from 28th January 2013 at a rate of 2.5% per annum.

[3] Having filed a claim in the BVI to enforce and recognise at common law that judgment, Mr. De La Haye also applied to the BVI court for a freezing injunction over Mrs. Walton's assets to the extent of the value of the judgment. He made an ex parte application to the BVI High Court for an order that the Waltons disclose all assets in which Mrs. Walton held a beneficial interest (whether solely or jointly with some other person). The application was granted and the learned judge stipulated

that the freezing injunction was to expire on 12th March 2014 unless continued by a further order of the court. Mr. De La Haye subsequently applied to continue the ex parte order pending the satisfaction in full of the judgment of the Royal Court of Jersey. The Waltons later filed an application in which they sought the following reliefs: that the ex parte freezing injunction be discharged; that paragraph 6 of the ex parte order[2] be stayed pending determination of the application to discharge it; in the event that the discharge application failed, that Mr. De La Haye be required immediately to fortify his undertaking in damages by the payment of US$10,000, in default of which the injunction shall stand discharged; and that costs of the application be awarded to the Waltons. A few days later, Mr. De La Haye applied to the court below for partial summary judgment to be entered on his claim and for costs of the proceedings. By consent, the parties agreed that the freezing injunction should continue until the inter partes hearing of the discharge application and the summary judgement application.

[4] In seeking to obtain the discharge application, the Waltons contended that Mr. De La Haye had failed to make material disclosures in obtaining the ex parte order. They also complained that he had misrepresented facts to the judge at the ex parte hearing. They also argued that the judge should have discharged the injunction since he had failed to provide his correct address and at the very least the judge should have required him to fortify his undertaking as to damages.

[5] The three applications came up for consideration before a different judge of the High Court in the BVI, who found that there was sufficient basis to allow the continuation of the ex parte order, pending the satisfaction of the order of the Jersey Judgment. Accordingly, the judge refused to discharge the ex parte application finding that there were no material non-disclosures nor misrepresentations. The learned judge did not require Mr. De La Haye to fortify his undertaking. The learned judge also granted partial summary judgment on the

[2] This paragraph of the ex parte order required the appellants to disclose to Mr. De La Haye all of the Mrs Walton's assets within the BVI.

claim below. The Waltons are aggrieved by the decision of the learned judge and have appealed on twelve grounds. The appeal is vigorously opposed by Mr. De La Haye.

[6] I now propose to address the grounds of appeal.

Grounds of Appeal

[7] As indicated previously, the Waltons have filed a total of twelve grounds of appeal, some of which contain sub-grounds; however, the grounds of appeal can helpfully be crystalised as follows:

1. Whether the learned judge erred in failing to discharge the injunction on the basis of material misrepresentations/non-disclosures.

2. Whether the learned judge erred in holding that there was a serious risk of dissipation.

3. Whether the learned judge erred by refusing to order Mr. De La Haye to fortify his undertaking as to damages.

4. Whether the learned judge erred in granting partial summary judgment to Mr. De La Haye.

[8] I propose to deal with each ground of appeal seriatim.

Ground 1: Whether the learned trial judge erred in failing to discharge the injunction on the basis of material misrepresentations/non-disclosures

Appellants' Submissions

[9] Learned counsel, Mr. William Hare, submitted that the learned judge erred in failing to discharge the injunction on the grounds that Mr. De La Haye: failed to bring the substance of the Waltons' defence to the attention of the judge, in

particular, the operation of the **Trustee Act 1961**[3] (as amended) as an arguable defence available to Mrs. Walton; misled the court by misrepresenting that he was seeking a post-judgment injunction in circumstances where no BVI judgment subsisted and where a defence had been raised to the claim; failed to inform the court that the "avance" payments had been characterised in the Jersey Judgment as "gifts" which had been given to Mrs. Walton by her deceased mother and instead spoke about the payments as having been "taken", or as being payments to which Mrs. Walton "helped herself", which mischaracterisation was very likely to have affected the court's thinking in relation to the risk of dissipation of assets; payments were made out of a joint account to which Mrs. Walton was signatory; failed to correct the judge when she concluded that Mrs. Walton had made a "fraudulent misrepresentation" to the Jersey Court; substantially misstated the amounts withdrawn by Mrs. Walton from the Jersey account; failed to disclose that Mrs. Walton was the managing director of a regulated entity in the BVI which would have been subject to the FSC's 'fit and proper person' test, which would have seriously impacted upon the judge's views of the risk of dissipation at least insofar as the second appellant was concerned; and failed to disclose the existence of enforcement proceedings in Jersey.

[10] Learned counsel, Mr. Hare, also argued that on the basis of the above material non-disclosures, the learned judge ought to have discharged the ex parte injunction. In failing to do so the learned judge erred and therefore the appeal should be allowed on this ground. Mr. Hare submitted that the instances in which Mr. De La Haye misled or failed to disclose important information to the court are eminently sufficient to have warranted the discharge of the freezing injunction. Mr. Hare referred the court to **Brink's-Mat Ltd v Elcombe and others**[4] as authority for this proposition. Mr. Hare further submitted that, in declining to discharge the injunctions, the learned judge erroneously failed to explain why the

[3] Cap. 303, Revised Laws of the Virgin Islands 1991.
[4] [1988] 3 All ER 188.

above examples of non-disclosures misleading of the court by Mr. De La Haye, in the first instance, were insufficiently serious to warrant discharge.

[11] Learned counsel, Mr. Hare, also complained that Mr. De La Haye had failed to correct the judge when she concluded that Mrs. Walton had made a fraudulent misrepresentation to the Jersey Court. Mr. Hare submitted that there had been no such finding in Jersey and counsel who represented Mr. De La Haye ought to have pointed that out to the judge.[5]

Respondent's Submissions

[12] Learned Queen's Counsel, Mr. Carrington, submitted that the learned judge was satisfied that the alleged non-disclosures in the court below were not material. The defence had been drawn to the attention of the court at the ex parte hearing on three occasions and at the inter partes hearing it was also provided in the hearing bundle and referred to in the affidavit evidence of Mr. De La Haye. In any event, the defence was demonstrated at the inter partes hearing to be immaterial to the significant part of the claim. In relation to the Waltons' contention that the injunction had been characterised by Mr. De La Haye as a post-judgment injunction, Mr. Carrington, QC indicated that in his written submissions he had made it clear that the judgment was from the Royal Court of Jersey and he was not alleging that he had a judgment from the BVI. In this regard, he asserted that there was no misleading of the court or material non-disclosures. Critically, there was no deliberate attempt to mislead the court. Mr. Carrington, QC referred the court to **IPOC International Growth Fund Limited v LV Finance Group Limited**[6] in support of his contention that even if there were any non-disclosures, if they were not deliberate and material, they were not to be considered as being fatal. He also referred the court to **Brink's-Mat** in support of his contention.

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[5] It is noteworthy that, for the most part, the Waltons merely seemed to reproduce in their written submissions on this appeal, the grounds of appeal which had been set out in their notice of appeal and only very brief submissions are made, under some of the grounds. The grounds of the appeal also however appear to mirror almost exactly the grounds of the Waltons' application in the court below dated 11th March 2014, through which they sought to, *inter alia*, discharge the ex parte order. However, the appellants did not state on appeal that they intended to rely on the contents of this notice of application.

[6] BVIHCVP2003/0020 and 2004/0001 (delivered 19th September 2005, unreported).

[13] In relation to the issue of the characterisation of the "avance" payments by the Jersey Court, Mr. Carrington, QC submitted that the finding of the Jersey Court was actually that the original payment by Mrs. De La Haye into the joint account amounted to a gift and the court did not make any finding that the payments out of that account for the benefit of the Mrs. Walton were gifts. The language of the court was as follows:

> "To the extent that monies were subsequently paid out of the joint account to or for the benefit of the defendant or accrued to her by survivorship, they became avances which have to be brought back into account."[7]

There was no finding by the court that Mrs. De La Haye was aware that payments were being made from the joint account. Mr. Carrington, QC further submitted that the defence raised by Mrs. Walton in the Jersey proceedings, that her mother had transferred the monies into the joint account in Jersey pursuant to an agreement to pay her for her interest in property that had been sold in Jersey, is inconsistent with any allegation now being made in submissions (but not raised at all in her evidence) that she was not responsible for the withdrawals from the account.

[14] In relation to the Waltons' contention about Mr. De La Haye's failure to correct the learned judge when she concluded that the first appellant had made a "fraudulent misrepresentation" to the Jersey Court, Mr. Carrington, QC posited that this was at least arguable in light of the findings of the Jersey Court that Mrs. Walton was at least reckless in putting into evidence and relying on a document that had clearly been tampered with and as the only person standing to benefit from such tampering was Mrs. Walton herself, it is a reasonable inference to make that she was responsible for or at least was aware of the tampering.

[15] Mr. Carrington, QC submitted further that the total amount of £225,259.08 that Mrs. Walton had withdrawn from the joint account after her mother's death was not in issue, but only the timing of the withdrawals. Also, the standing of Mr. Walton was irrelevant as no allegation of wrongdoing was being made against him as he

[7] Judgment of the Royal Court of Jersey, record of appeal, p. 119 at para. 61.

was only a discovery defendant in the court below. In relation to the Waltons' contention that Mr. De La Haye failed to disclose the existence of enforcement proceedings in Jersey, Mr. Carrington, QC submitted that these enforcement proceedings only commenced after the ex parte orders had been made and in any event, Mr. De La Haye was entitled in law to explore concurrently different avenues for enforcement of the judgment. Mr. Carrington, QC urged this Court not to discharge the freezing injunctions. He contended that in relation to the freezing and disclosure orders that were continued by the learned judge, the making of these orders involves a discretion by the lower court.[8] Mr. Carrington, QC cited **Hadmor Productions Ltd. and others v Hamilton and others**[9] in support of the proposition that an appellate court has a limited role in an appeal when dealing with the exercise of discretion of the judge of the lower court. In that case, the House of Lords outlined the circumstances in which the judge's exercise of discretion may be set aside by an appellate court:

> "[the Court of Appeal] must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."

[8] See section 24 of the West Indies Associated States Supreme Court (Virgin Islands) Act, Cap. 80, Revised Laws of the Virgin Islands 1991 and rule 17.1 of the Civil Procedure Rules 2000.
[9] [1983] 1 AC 191, p. 220B-C.

[16] Mr. Carrington, QC posited that the appellants have not identified any such errors. The key consideration must be that this is now an appeal from a decision reached at an inter partes hearing at which the learned judge had before her applications to continue as well as to discharge the interim freezing and disclosure orders and not an appeal against the making of the orders ex parte. For the inter partes hearing, the parties filed evidence for that hearing and addressed the learned judge in written and oral submissions on all matters which the appellants now seek to raise before this Court. At the end of the hearing, the learned judge had the discretion to choose whether the orders made ex parte should be discharged altogether, discharged and then re-granted, or simply continued. There is no material distinction between the exercise of the power to re-grant and to continue the injunctions as both are premised on the court being satisfied that a case had been made out inter partes for the grant of an injunction. The learned judge adopted the language of continuing the orders based on the evidence before her[10] and the true question is whether the learned judge abused her discretion by continuing/re-granting the interim orders on 20th June 2014.

Discussion and Analysis

[17] This is fundamentally an appeal against the exercise of discretion by the learned judge who refused to discharge the ex parte injunction and instead ordered it to be continued. The law is well settled. The appellate court only has a limited role in an appeal from the exercise of discretion by the court of first instance. I accept the principles that were enunciated in **Hadmor Productions Ltd v Hamilton** by the House of Lords and referred to by Mr. Carrington, QC above.

[18] The main issue for determination in this appeal is whether the learned judge exercised her discretion properly or erred in principle by refusing to discharge the freezing injunction which was obtained ex parte. I do not accept that what is only of significance is that the continuation of the freezing injunction was made during an inter partes hearing. I do not agree as urged by learned Queen's Counsel that

[10] Transcript of proceedings (20th June 2014), p. 101, lines 7-18.

the key consideration is simply that what is before the court is now an appeal from a decision reached at an inter partes hearing at which the judge had before her an application to continue as well as to discharge the interim order and not an appeal against the making of the order ex parte. It is clear to me that the gravamen of the complaint in this appeal is that the judge erred in not discharging the injunction on the basis of material non-disclosures or misrepresentations. The main thrust of the complaint is that at the inter partes hearing the judge who heard that application ought to have discharged it on the basis that it was obtained in circumstances in which there were material non-disclosures or misrepresentations and that the judge erred in continuing the freezing injunction. Also there are other complaints in relation to the failure to order fortification of the undertaking that was given and the judge's conclusion that there was no need for fortification.

[19] It is the law that the court is entitled to discharge any ex parte order without going into the merits of the claim if there is proof that in obtaining the order the party was guilty of material non-disclosure.[11] However it is not every non-disclosure that would result in the discharge of an order or injunction that was obtained on an ex parte basis. The non-disclosure must be material and deliberate.

[20] It is axiomatic that a freezing injunction obtained without notice is liable to be discharged for material non-disclosure.[12] The applicable principles were summarised by Ralph Gibson LJ in **Brink's-Mat**:

(a) the claimant must make a full and fair disclosure of all material facts;

(b) materiality is to be decided by the court, not by the claimant or his legal advisers;

[11] See The King v The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington. Ex parte Princess Edmond de Polignac [1917] 1 KB 486; see also Ipoc International Growth Fund Limited v LV Finance Group Limited.

[12] See The King v The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington. Ex parte Princess Edmond de Polignac.

(c) proper inquires must be made before making the application and the duty of disclosure applies not only to facts known to the claimant but to those which he would have known if he had made proper inquires;

(d) the extent of the inquiries which are necessary must depend on the nature of the case, the probable effect of the order on the defendant, the degree of legitimate urgency and the time available for making inquiries;

(e) the court will be astute to ensure the claimant is deprived of any advantage he may have derived by his breach of duty;

(f) whether the undisclosed fact is sufficiently material to justify immediate discharge of the order without examination of the merits depends on its importance; the fact the nondisclosure was innocent, in the sense that the fact was not known to the claimant or not perceived to be relevant, is an important consideration, but not decisive, because of the need to make proper inquiries;

(g) there is a discretion to continue the order, or to grant a new one on terms notwithstanding proof of material non-disclosure. The discretion is to be 'exercised sparingly'[13], but the application of the principle should not be 'carried to extreme lengths'[14]. Slade L.J. continued:

> "I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the *R v Kensington Income Tax Comrs* principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience."

[13] At p. 194 (Balcombe LJ).
[14] At p. 194 - 195 (Slade LJ).

[21] Lord Denning MR in **Bank Mellat v Nikpour**[15] held that "it is not for every omission that the injunction will be automatically discharged".

[22] Also in **Ipoc International Growth Fund Limited v LV Finance Group Limited et al**[16] this Court stated that "a court must, nevertheless determine whether the fact(s) not disclosed are of sufficient materiality to justify immediate discharge of the order without examination of the merits. The innocence or deliberateness of the non-disclosure is relevant, though not necessity decisive;".

[23] In **National Bank of Sharajah v Delborg and others**[17] it was held that the place to disclose the relevant facts, both favourable and unfavourable is in the affidavits, not the exhibits.

[24] I do not propose to repeat verbatim the criticisms that were made of the learned judge who heard the inter partes application; suffice it to say however that the main complaint in the appeal is that the learned judge ought to have discharged the injunction, since it was made in circumstances where there was no full disclosure of the nature of the defence. Having reviewed the transcript of the ex parte hearing it is clear to me that at that hearing the learned judge was quite aware that the claim that was brought in the BVI by Mr. De La Haye was seeking to enforce the Jersey Judgment and that the Waltons had filed a defence in relation to that claim. In addition, in his affidavit in support of the application for freezing and disclosure orders, filed on 24th January 2014, Mr. De La Haye, at paragraph 26, had clearly deposed to the fact that a defence was filed in the matter. In addition, the transcript of the proceedings, as Mr. Carrington QC has posited, indicates that on several occasions during the the ex parte hearing of the application for the injunction, the judge's attention was adverted to the fact that a defence had been filed in the claim for the enforcement.

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[15] [1985] FSR 87 at p. 90.
[16] BVIHCVP2003/0020 and 2004/0001 (delivered 19th September 2005, unreported) at para. 37 (Gordon JA).
[17] (1992) Times, 24 December.

[25] It is the law that in seeking to obtain an ex parte injunction, it is for the applicant to bring to the attention of the court any defence or objection that may be taken to the underlying claim. However, the failure to do so is not necessarily fatal; unless it was deliberate and material it may not result in an outright discharge of the order.[18] It is worthwhile to have a look at the defence. A perusal of the defence reveals that it was a very short document of 11 paragraphs and basically the thrust of the defence only addresses the £150,000 and is to the effect that the Jersey Judgment in relation to this sum was based on heirship rights. In BVI, the heirship rights are to be disregarded under the laws of the BVI. Therefore, it would be against public policy to recognize and enforce the Jersey Judgment in so far as it violates section 83A(19) of the **Trustee Act**.

[26] With no disrespect intended, it is important to state that of the entire 11 paragraphs of the defence, it was paragraph 8(a) - 8(f) that went to the root of the defence. In all of the circumstances, it seems to me that it would be very difficult to conclude that the judge was not aware that Mr. De La Haye's claim for the enforcement of the Jersey Judgment was being opposed by Mrs. Walton, when only one paragraph of the document spoke to the crux of the defence.[19] In any event, the learned judge during the ex parte hearing referred to the defence.[20]

[27] Applying the principles enunciated in **Brink's Mat Ltd, The King v Kensington Income Tax Commissioners** and **Ipoc International Growth Fund Limited**[21] to the appeal at bar, I am unable to conclude that there were material non-disclosures. Further, any non-disclosures such as there was, was not material and therefore not fatal. I am satisfied that at the inter partes hearing it was open to the judge to conclude that there were no material non-disclosures which would justify the discharge of the ex parte freezing injunction. It is not fatal to the continuation of the injunction that the applicant seemed not to have gone into

[18] See IPOC International Growth Fund Limited v LV Finance Group Limited et al BVIHCVP2003/0020 and 2004/0001 (delivered 19th September 2005, unreported).
[19] Mr. Walton also filed a defence which mirrored that filed by Mrs. Walton.
[20] See transcript of proceedings, record of appeal at p 52.
[21] BVIHCVP2003/0020 and 2004/0001 (delivered 19th September 2005, unreported).

detail as to the nature of the defence during the ex parte hearing. The judge exercised her discretion properly and within the generous ambit within which disagreement is possible.

Misrepresentation

[28] The alleged misrepresentation by Mrs. Walton is another aspect of the Waltons' complaints. They can be helpfully characterized as misrepresentations as to the nature of the underlying claim for enforcement. The other alleged misrepresentations relate to misstatements that were made by the judge during the application which seemed to slightly mischaracterise the transactions between Mrs. Walton and her deceased mother. Nothing would be gained from dealing with each complaint in detail. However, I propose to refer to a few of the complaints: Mr. De La Haye failed to indicate to the court that in the Jersey Judgment the "avances" were characterized as "gifts" and did not correct the judge when the judge stated that the payments had been "taken" or as being payments to which Mrs. Walton helped herself; and the mischaracterised injunction as a post judgment injunction. It seems to me that whether the application in relation to the Jersey Judgment was characterized by the learned judge as a post judgment injunction is of little moment since one can only seek to enforce a judgment if it is final and conclusive. What is critical is that the judge was at all times alive to the fact that in the BVI claim, Mr. De La Haye was seeking to enforce the Jersey Judgment having filed a claim at common law to recognise and enforce that judgment. The judge remained alive to this throughout the application – that the underlying claim was for the recognition of the Jersey Judgment and enforcement. There is no merit in the Waltons' complaint in this regard.

[29] In relation to their further complaint that the judge indicated that Mrs. Walton "helped herself" to the moneys, while this is not what the Jersey Court found, it is not fatal to the judge having exercised her discretion in the manner she did. It would be strange if it is open to an appellate court to seek to pull apart every obiter statement which a judge makes in rendering a decision or giving an order in

seeking to reverse the exercise of the judge's discretion. In any event, the misstatements that were made by the judge, such as they were, are de minimis. I have no doubt that at the inter partes hearing, it was clearly open to the judge to decline to discharge the freezing injunction. There is absolutely no evidence upon which it can be properly concluded that the judge committed an error of principle in exercising her discretion to continue the freezing injunction. Neither is it of any consequence that Mr. De La Haye did not tell the judge that Mr. Walton was the manager of a regulated company in the BVI and therefore had to meet the fit and proper person test. He was merely a disclosure defendant and no allegation of wrongdoing was made against him.

[30] I have no doubt that the judge exercised her discretion within the generous ambit of which reasonable disagreement is possible and therefore did not err in principle. For the sake of completeness, it is important to state that it is immaterial whether the judge at the inter partes hearing continued the injunction that was granted or discharged it and granted another one afresh. For all of the above reasons, the Waltons' appeal on this ground fails.

Ground 2: Whether the learned trial judge erred in holding that there was a risk of dissipation

Appellants' Submissions

[31] Learned counsel, Mr. Hare, submitted that the learned judge erred in concluding that there was sufficient evidence of a risk of dissipation of Mrs. Walton's assets so that a freezing injunction was warranted. That is the extent of his submission on that ground.

Respondent's Submissions

[32] Learned Queen's Counsel, Mr. Carrington, submitted that there was sufficient evidence of a risk of dissipation by Mrs. Walton to justify the grant of a freezing order against her and this is more so in the absence of evidence in rebuttal by her and the decision of the court below cannot be said to have been blatantly wrong in

this regard. Learned Queen's Counsel, Mr. Carrington, contended that Mrs. Walton's response to the evidence of risk of dissipation put forward by Mr. De La Haye (that is, that she was within her rights to operate the Jersey account as she wanted until judgment was handed down) does not advance her position, as dissipation is not concerned with the inherent illegality of an act by the defendant but with the effect of such act, i.e. does it increase the risk that the judgment would remain unsatisfied.

[33] Mr. Carrington, QC referred the court to Mr. De La Haye's affidavit evidence that was before the judge in relation to the risk of dissipation of Mrs. Walton's assets, which would have justified the continuation of the freezing order. Mr. De La Haye said that Mrs. Walton:

(a) has not appealed the Jersey Judgment but has refused to satisfy it, even in part, for over a year;

(b) removed substantial sums from the Jersey account after the death of her mother after judgment had been given against her;

(c) showed herself to be capable of using substantial amounts of her mother's funds for her own benefit during her mother's lifetime;

(d) was found by the Royal Court to be an unconvincing witness, some of her evidence being "incapable of belief";

(e) was willing to rely on tampered documents that she had put into evidence;

(f) has indicated to family members that she will take steps to prevent enforcement of the judgment against her;

(g) has not stated any intention to satisfy the judgment but is willing to take steps to resist enforcement in the BVI.

[34] It is noteworthy that Mrs. Walton deposed at paragraph 5 of her affidavit sworn to on 11th March 2014, that contrary to what Mr. De La Haye states at paragraph 16 of his first affidavit (i.e. that she has expressed an 'intention to go bankrupt' or to 'keep moving around the world' so as to prevent the Jersey Judgment from being enforced against her), she has never made any such statements. Mr. Carrington, QC submitted that there was no effective response to the above evidence in the Waltons' evidence, save that Mrs. Walton asserted that she was within her rights to operate the Jersey account as she wanted until judgment was handed down.[22] Mr. Carrington, QC therefore argued that the learned judge was correct to conclude that there was a risk of dissipation.

Discussion and Analysis

[35] In relation to this complaint, I find the arguments advanced by learned Queen's Counsel, Mr. Carrington, more attractive to those of Mr. Hare and accept Mr. Carrington, QC's arguments. It is far from the truth to assert that no evidence was provided to the judge upon which it can be concluded that there was a serious risk of dissipation. Indeed, in the affidavit that was filed in support of the application for the injunction, Mr. De La Haye had deposed to being informed from a source that Mrs. Walton had evinced that intention not to honour the Jersey Judgment. While it is true that the source of the information and belief was not provided in the original affidavit (in conflict with the rules of procedure), it is of some utility that at the inter partes hearing the source of the information was disclosed and no objection seemed to have been taken to the veracity of this.

[36] Also, even though the risk of dissipation is a ground of appeal, learned counsel, Mr. Hare, apart from repeating the ground of appeal which challenges the judge's conclusion that there was sufficient evidence of a risk of dissipation of Mrs. Walton's assets, did not go on to state why in his view this was an incorrect finding. It is regrettable that there was no elaboration of this complaint since it leaves one in an unenviable position of seeking to divine the basis of this

[22] See affidavit of Lucita Angeleve Walton, record of appeal, p. 131, at para. 6.

complaint. This is in contradistinction to the position taken by Mr. Carrington, QC which defends the judge's conclusion. Accordingly, I am ineluctably driven to conclude that Mrs. Walton has failed to adduce any basis for this Court to impugn the judge's decision. It must be borne in mind that Mr. Carrington, QC referred to the following factors for consideration: (a) there was an existing Jersey judgment which had not been appealed but had remained unsatisfied; (b) Mrs. Walton had removed substantial sums of money from Jersey after her mother's death with knowledge of the protests and commencement of the proceedings by Mr. De La Haye against her and even after the judgment had been rendered against her had indicated to family members that she will take steps to prevent enforcement against her and (c) she had not stated any intention to satisfy the judgment but is willing to take steps to resist enforcement of the judgment.

[37] I am cognizant of the fact that at the inter partes hearing all of the parties had filed affidavits in support of their respective positions. It is passing strange, as pointed out by Mr. Carrington, QC that all Mrs. Walton deposed to in relation to very serious allegations that were made against her which undergird the risk of dissipation allegation was that she was within her rights to operate the Jersey account as she waited until judgment was handed down. At the inter partes hearing it was necessary for Mr. De La Haye to show that a refusal of the injunction would involve a real risk that the enforcement of judgment would be rendered ineffective.[23]

[38] **In Z Ltd v A-Z and AA-LL**, Kerr LJ opined:[24]

> "the danger of assets being removed from the jurisdiction is only one facet of the "ploy" of the defendant to make himself "judgment-proof" by taking steps to ensure that there are no available or traceable assets on the day of judgment; not as the result his using his assets in the ordinary course of his business or for living expenses but to avoid execution by spiriting his assets away in the interim … It is, therefore, logical to extend the scope of

[23] See Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H UND Co. K.G. [1983] 1 WLR 1412.
[24] [1982] QB 558 at p. 585F.

this jurisdiction whenever there is a risk of a judgment which a [claimant] seems likely to obtain being defeated in this way."

[39] In view of the evidence that was before the court, the findings that were made and the principles that were relevant, it clearly was open to the learned judge to exercise her discretion in the way she did and to conclude that there was a real risk. I am not of the view that the learned judge committed an error of principle in this regard. Accordingly, this ground of appeal also fails.

Ground 3 – Whether the Judge erred by refusing to order Mr. De La Haye to Fortify to his Undertaking

Appellants' Submissions

[40] Learned counsel, Mr. Hare, complained that the judge was wrong to conclude that there was no need for Mr. De La Haye to fortify his undertaking in damages because he had a substantial foreign judgment debt against Mrs. Walton. He said that this was erroneous and was aggravated by the fact that Mr. De La Haye had provided no details whatsoever as to his own assets and had provided an incorrect address to the court at the ex parte hearing. Mr. Hare contended that the judge explained her decision in terms of the existence of a judgment debt against Mrs. Walton which rendered the need for security meaningless and that the judge's approach was erroneous since it prescribed that the judgment debt was recognizable and should be recognized in the BVI and failed to take into account Mr. Walton's portion in respect of whom no judgment debt existed. He urged this Court to discharge the freezing injunction on that basis.

Respondent's Submissions

[41] Learned Queen's Counsel, Mr. Carrington, argued that the judge exercised her discretion properly in refusing to order Mr. De La Haye to fortify his undertaking in damages. He reminded the court that the Waltons led no evidence of any potential damage that could be caused by the grant of a freezing order to Mr. De La Haye, who had obtained a judgment in Jersey in his favour, or that any potential damage could exceed the amount due by Mrs. Walton to Mr. De La

Haye. Mr. Carrington, QC, further stated that an order for fortification is based on the court's determination of the risk or loss that may result from the grant of the injunction and whether that risk is sufficient so as to require fortification. In the absence of any evidence of risk or loss, and in light of the evidence of the judgment debt from the Jersey proceedings which remains a judgment debt owed by Mrs. Walton whether or not it can be enforced in the BVI, the court was correct in concluding that the risk that the undertaking would be worthless was minimal and in refusing fortification. Learned Queen's Counsel relied on **Sinclair Investment Holdings SA v Cushrie and others**[25] in support of his submission. Mr. Carrington, QC therefore argued that there is no basis to impugn the learned judge's exercise of discretion, on the basis of her failure to require Mr. De La Haye to fortify his undertakings

Discussion and Analysis

[42] It behooves an appellant who wishes the court to order a claimant who seeks an injunction to fortify the undertaking to place evidence before the court upon which the court can conclude that there is a real risk that the undertaking would be worthless. The general rule is to require the claimant to undertake to pay any damages subsequently found due to the defendant as compensation if the injunction that was previously granted cannot be justified at trial providing there is proof that the defendant has suffered loss as a consequence of the grant of the injunction. However, the law is clear, that in certain circumstances, the court has a discretion to grant an injunction without requiring an undertaking as to damages. As a general rule, the court requires an undertaking as to damages as occurred in this case at first instance. This usually suffices.

[43] In **Sinclair Investment Holdings SA v Cushnie and others** it was held that:

> "If it is not sufficiently apparent there is a sufficient risk of loss, then while that is no reason for not extracting a cross-undertaking, it would be a reason for not requiring fortification. It seems to me to be impossible to specify any formula for or definition of that level of risk. All that can be said

[25] [2004] EWHC 218 (Ch).

> is that the court must be satisfied that there is a sufficient level of risk to require fortification in all the circumstances. That will be a question of judgment in every case where it arises..."

[44] However, it is only where there are doubts about the claimant's resources that the court may exercise its discretion to require either security or the payment of money into court or fortify the undertaking. There must be the evidential basis for ordering the fortification of the undertaking. From a reading of the record and the transcript, I am in total agreement with learned Queen's Counsel, Mr. Carrington, that not a scintilla of evidence was placed before the court upon which it could be concluded that it was open to the judge to determine that there was a real risk that Mr. De La Haye's undertaking as to damages would be worthless. Also of great importance is the fact that Mrs. Walton in her affidavit evidence did not indicate to the court that the grant or continuation of the freezing injunction carried with it a real risk of loss to her. It was therefore well within the generous ambit of reasonable disagreement for the judge to conclude that the risk of loss if at all was minimal, and as a consequence decline to order Mr. De La Haye to fortify his undertaking. Indeed, the judge cannot be faulted for the manner in which she exercised her discretion. This ground of appeal also fails.

Ground 4: Whether the learned trial judge erred in granting partial summary judgment to Mr. De La Haye

Appellant's Submissions

[45] Learned counsel, Mr. Hare, submitted that the judge ought not to have granted Mr. De La Haye partial summary judgment. Mr. Hare argued that the judge erred in concluding that the only part of Mrs. Walton's defence which could survive the claim was the part which related to the disposition of the sum of £150,000 into a BVI bank account. Also, the judge erred in concluding that the Jersey Judgment was capable of being severed for the purpose of common law enforcement so that summary judgment could be given on only part of it and that the costs order that resulted from that judgment was capable of being treated in the same way. Mr. Hare further argued that the learned judge failed to have sufficient regard to

the fact that section 83A(13) of the **Trustee Act** provides a complete defence to the common law registration of a judgment that is inconsistent with the terms of that Act. Because the judgment is not severable, the judge erred in ordering summary judgment in respect of the claim insofar as it related to the parts of the foreign judgment which did not have anything to do with a transfer of funds to the Virgin Islands and the costs order made in respect of the foreign judgment. Mr. Hare posited that no part of the foreign judgment may be severed and separately enforced in the face of the terms of section 83A(19) of the **Trustee Act**. It is noteworthy that Mr. Hare did not provide any authority in support of his submission that the court was wrong to sever the judgments.

[46] Mr. Hare maintained that, alternatively, the learned judge erred in disposing of such matters summarily and that questions of public policy and the exercise of a discretion to recognise a judgment (the existence of which discretion is disputed) are prima facie best determined at trial in light of the full facts. Even if (contrary to his submissions) the Jersey Judgment was capable of being severed by the BVI court, the learned judge erred in granting Mr. De La Haye summary judgment when the enforcement of the judgment is subject to a discretion, the proper judicial exercise of which was not capable of being carried out summarily.

Respondent's Submissions

[47] Learned Queen's Counsel, Mr. Carrington, submitted that there is no legal or rational basis for the court to set aside the order for summary judgment. **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste**,[26] on which both parties relied, indicates the principles in relation to when summary judgment should be granted, namely, that in determining whether a defence has a real prospect of success, a court is entitled to have regard to the manner in which the defence has been pleaded as well as the evidence before the court on the application for summary judgment. The case at bar was eminently suitable for a summary judgment award.

[26] SLUHCVAP2009/0008 (delivered 11th January 2010, unreported).

[48] Learned Queen's Counsel, Mr. Carrington, submitted that Mrs. Walton's sole defence to the claim (which was admitted at the hearing)[27] was that under section 83A(19) of the **Trustee Act**, the recognition and enforcement of the Jersey Judgment should be denied. He said it was common ground that the defence was that enforcement should be contrary to section 83A(13) of the **Trustee Act**. Mr. Carrington, QC advocated however that section 83A(13) of the **Trustee Act** only addresses the protection of: (i) Virgin Islands trusts and (ii) dispositions of property to be held on Virgin Islands trusts. He accepted that the Waltons' defence averred that the transfer of £150,000 in November 2009 was a disposition to be held on trusts of a Virgin Islands trust, however, Mr. De La Haye's evidence in the court below (that is, the Jersey Judgment) showed that there were other payments out of the Jersey account which the Jersey Court held should be repaid, namely, the six small payments which amounted to £10,960 and the balance on the account after the death of the first appellant's mother, which totaled £225,259.08. Mr. Carrington, QC pointed out that the Waltons raised no averments that these two amounts were dispositions or were held on BVI Trusts and in fact, this was conceded by the appellants at the hearing in the court below.[28] In fact their defence simply did not address these two sums of money which formed part of the Jersey Judgment.

[49] Mr. Carrington, QC submitted that contrary to the Waltons' submissions, section 83A(19) of the **Trustee Act** does not operate to prevent the enforcement of all foreign judgments that concern heirship rights as being contrary to public policy, but rather, the bar to the enforcement under this section only applies 'to the extent that' the foreign judgment is inconsistent with the preceding subsection 83A(13). It therefore follows that there is no prohibition on the enforcement of a foreign judgment to the extent that it is not inconsistent with subsections 83A(13) to 83A(18). Mr. Carrington, QC posited that the Waltons' appeal against the grant of

[27] See record of appeal, pp. 51-57.
[28] Transcript of hearing, 20th June 2014, p. 34, line 20 to p. 35, line 25.

summary judgment collapses upon the most generous examination of section 83A(19).

[50] The Waltons themselves have pleaded that there was only one disposition (the £150,000 transfer done in November 2009) to be held on BVI trusts and the court at first instance excluded that sum from the summary judgment and permitted them to defend the claim in relation to this (this being the part of the judgment which was not severed). As a result, there could be no issues of fact to be determined at trial in relation to the other monies that were required to be repaid by the first appellant, nor the assessed costs because the defence did not aver that these were dispositions or held on Virgin Islands trusts. Mr. Carrington, QC submitted that there is no basis for stating that the Jersey Judgment is repugnant to BVI public policy generally, as the determination of rights among individuals in relation to property in a foreign jurisdiction has no effect on the BVI. No authority was provided by the appellants for their contention to the contrary and neither did they raise the issue in the court below. It is the statute that introduces a bar to enforcement in relation to property held on Virgin Islands trusts. The extent of this bar is determinable therefore by reference to the statutory provisions only and there is no basis in law for a conclusion that it is meant to apply outside the parameters of the statute. Furthermore, no pleading or evidence in the court below addressed the existence of any discretionary factors as a result of which the judgment should not be enforced other than section 83A(19) of the **Trustee Act**.

[51] Mr. Carrington, QC reminded the court that rule 15.6 of the **Civil Procedure Rules 2000** ("CPR 2000") provides that the court may give summary judgment on any issue of fact or law, whether or not the judgment will bring proceedings to an end. The Waltons' defence raised the issue whether there was a disposition of property that was being held on trusts of a Virgin Islands Trust only in relation to the sum of £150,000.00. The uncontested evidence which was led by Mr. De La Haye on the application below shows that this issue did not arise with respect to the other two sums to be repaid (£10,960.00 and £225,259.08), nor the costs which were

assessed in the sum of £28,730.54. Therefore, there were easily identifiable aspects of the Jersey Judgment which did not involve, even on the Waltons' case, any aspect of section 83A(19) and were therefore enforceable to the extent that they were not inconsistent with that section.

Discussion and Analysis

[52] Summary judgment is available in cases where there is no serious factual dispute and, if a legal issue, then no more than a crisp legal question as well decided summarily as otherwise. A defendant with no or no more than a partial defence will not be allowed to cheat a claimant of his just desserts by producing an elusion of complexity where none exists. Where the point at issue is a short one, the court will recognize that fact and act accordingly. It is always open to a claimant even in circumstances where the defendant has filed a defence to assert that the defendant has no defence to the claim or part thereof except as to the amount of damages claimed. It is the law that a court has the inherent jurisdiction to prevent misuse of its process and to prevent the unnecessary protraction of a claim or part of claim by granting summary judgment in clear cases. George-Creque JA in **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste**,[29] enunciated that summary judgment should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or is in some other way an abuse of the process of the court. What must be shown is that the claim or defence has no real prospect of success.

[53] It is trite law that where a claimant has obtained a judgment abroad against the defendant which remains unsatisfied, it is open to the claimant to bring an action against the defendant on the foreign judgment in the local court.

[54] In an effort to test the soundness of the submissions I will now refer to relevant parts of section 83A(13) of the Trustee Act which provides as follows:-

[29] SLUHCVAP2009/0008 (delivered 11th January 2010, unreported).

"(a) No Virgin Islands trust and no disposition of property to be held upon the trusts of such a trust, is void, voidable, liable to be set aside or defective in any fashion nor is the trustee or any beneficiary or other person to be subjected to any liability or deprived of any right by reason that:

(b) the Virgin Islands trust or disposition:

(i) Avoids or defeats any right, claim or interest conferred by foreign law upon any person by reason of a personal relationship to the settlor by way of heirship rights; or

(ii) Contravenes any rule of foreign law or any foreign judicial or administrative order or arbitration order or action intended to recognizing, protect, enforce or give effect to such a right claim or interest."

Section 83A(19) states that to the extent that it is inconsistent with subsections (13) to (18),[30] a foreign judgment shall not be recognised or enforced or give rise to any estoppel, and both its recognition and its enforcement shall be regarded as contrary to the public policy of the Territory.

[55] A close reading of the section leads me to agree with Mr. Carrington, QC that section 83A(13) or (19)of the Trustee Act of BVI states that "to the extent that it is inconsistent with subsections (13) to (18), a foreign judgment shall not be recognized or enforced or give rise to any estoppel, and both its recognition as contrary to the public policy of the Territory of the BVI. The above section is pellucid. I agree the above section 83A(19) does not operate to prevent

[30] For the sake of completeness, section 83A(14-18) provides as follows:
(14) Heirship rights conferred by foreign law in relation to the property of a living person shall be disregarded when determining rights of ownership of property subject to, or claimed to be subject to, a Virgin Islands trust.
(15) Heirship rights conferred on persons by foreign law shall not be taken to constitute those persons creditors for the purposes of section 81 of the Conveyancing and Law of Property ordinance, nor to constitute those persons "creditors or others" for the purposes of the Act against Fraudulent Deeds, Gifts, Alienations, etc. to the extent, it any, that that Act has any application in the Territory.
(16) Subject to subsection (17), the law designated as applicable to succession by virtue of the Territory's choice of law rules shall apply to a Virgin Islands trust, not being a testamentary trust, only to the extent that it does not contain rules conferring any right, claim or interest upon any person by reason of a personal relationship to the settlor or by way of heirship rights.
(17) Subsection (16) shall not apply6 where the law so designated is that of the Territory.
(18) In the case of a conflict between any of the provisions of subsections (13) to (17) and any of the provisions of subsections (6) to (11) and the First Schedule, the provisions of subsections (13) to (17) shall prevail.

enforcement of all foreign judgments that concern heirship rights as being contrary to public policy. There is no doubt that the bar to enforcement under section 83A(19) only applies to the extent that the foreign judgment is inconsistent with subsections (13)-(18).

[56] The BVI statutory scheme clearly indicates that it is only where there is a disposition in relation to BVI trusts which also concerns the foreign judgment (heirship) that the local legislation takes precedence over the foreign judgment. The effect of this is that a foreign judgment which is inconsistent with section 83A(19) of the Trustee Act cannot be enforced since to do so would be contrary to BVI's public policy.

[57] As indicated, it is undisputed that the Waltons' defence addresses the sole disposition to £150,000 and does not address the entirety of the Jersey Judgment. Mr. Carrington, QC's argument that the Walton's only defence was that there was only one disposition (as defined in section 83A(13)) to be held on BVI trusts and the court has permitted them to defend the claim in relation to this is correct. It is the disposition in relation to the £150,000 which is held on trust in the BVI that can possibly offend BVI's public policy.[31]

[58] It is incontrovertible that it is the statute which introduces the bar to the enforcement of judgments which are either dispositions or held upon trusts in the BVI. There is absolutely no basis for stating that the entire Jersey Judgment is repugnant to BVI public policy. Equally, I accept Mr. Carrington, QC's submissions that based upon the uncontested evidence that was led by Mr. De la Haye during the inter partes hearing on the application below coupled with the pleadings by the Waltons and the concessions made by learned Counsel Mr. Nader[32] in the court below, there is no question of the sum of £10,960 and £225,259 being regarded either as dispositions or being held on trusts. Critically,

[31] This is an issue to be dealt with at the trial.
[32] Mr. Nader and Mr. Hare are members of the same Chambers.

the Waltons' defence does not address this issue; neither do they refer to these sums.

[59] It is noteworthy that the Jersey Court in its judgment clearly compartmentalized the various heads under which the award was made. The sum of £190,000 that formed part of the judgment and which is regarded as a disposition under BVI law was a discrete and identifiable aspect of the judgment. In determining the portion in relation to the enforcement of judgment which was allegedly contrary to public policy I find the pronouncements of Professor Winston Anderson in his treatise Caribbean Private International Law very helpful. He opines that:

> "No action can be sustained on a foreign judgment contrary to the forum's principles of public policy and the recent CCJ decision in *BCB Holdings Ltd and The Belize Bank Ltd v The Attorney General of Belize* (149) [[2013] C.C.J. 5 (AJ)] holding that enforcement of the foreign arbitral award would be repugnant to [the] constitutional legal order of Belize[,] probably represents an important development of the law.[33]

[60] Professor Anderson further states at paragraph 10-029 of his treatise as follows:

> "It appears to be settled law that the unimpeached part of the judgment may be enforced provided it is properly severable from the other part or parts. In **Raulin v Fischer (151) [[1911] 2 K.B. 93]**, the defendant, a young American lady, while recklessly galloping her horse in Paris, collided with the plaintiff, a Frenchman, and seriously injured him. She was prosecuted under art.320 of the French Penal Code, convicted, fined and ordered to pay damages to the plaintiff, who happened to have been a French Colonel. In enforcement proceedings in England, the award of damages was held to be enforceable. There was power to dissect the judgment and enforce the civil aspect whilst not enforcing the criminal penalty."[34]

[61] Under the heading of 'severability' Professor Anderson states that in determining the question of severability, 'a basic consideration must be whether the part to be severed could stand on its own, or whether it is so inextricably bound up with the rest of the judgment as to be inseparable.'[35]

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[33] Winston Anderson: Caribbean Private International Law (2nd edn., Sweet & Maxwell 2014) at para 10-028.
[34] Ibid at para. 10-029.
[35] Ibid.

[62] Applying the pronouncements of Professor Anderson above and the principle in **Raulin v Fischer** to the facts, and bearing in mind what Mr. Hare has asserted, I have no difficulty in accepting Mr. Carrington QC's submission and have no doubt that the judgment was severable. Indeed, there were two aspects of the foreign judgment that did not involve, even on the Waltons' case, any aspect of section 83A of the **Trustee Act** and were therefore enforceable to the extent that they were not inconsistent with the Act. These are the sums of £225,259.08 and £10,960. The £150,000 was an identifiable and discrete sum which may properly fall within the category of a disposition under the **Trustee Act** and which is proceeding to trial. The learned judge's exercise of discretion to sever the foreign judgment and to grant partial judgment on the aspects of the judgment for £10,960 and £225,259.08 cannot properly be impugned. I am fortified in this view by CPR15.6 which enables the court to give summary judgment on any fact or law whether or not the judgment will bring proceedings to an end.

[63] This brings me now to address the separate issue as to whether the learned judge should have granted summary judgment on the assessed costs.

Assessed Costs

[64] It is clear to me that the issue of costs ought to have been addressed separately in the summary judgment since the costs in the sum of £28,750.54 were assessed by the Jersey Court on the entire judgment inclusive of the £150,000 disposition/trusts which arguably is caught by the BVI laws and may be against public policy. It is for this reason that the learned judge exercised her discretion by not granting summary judgment on the sum of £150,000 instead quite properly allowed the claim to be determined based on a full analysis.

[65] Professor Anderson in his treatise on Caribbean Private International Law refers to **Mayo-Perrott v Mayo-Perrott**[36] where it was held that a foreign order for costs was not severable from the main award; although an ancillary to a foreign divorce

[36] [1958] CLY 501; [1958] JR 336.

decree, the order could not be sensibly separated from the decree in respect of which the costs had been accrued. As the grant of the decree breached the forum's public policy, it followed that the order for costs was equally unenforceable.

[66] Applying the above principle to the present appeal, I have no doubt that while the judge acted quite properly in carving out the £150,000 from the summary judgment, however the same is not true in relation to her granting summary judgment on the assessed costs in the sum of £28,730.54. In so far as an award of summary judgment could not be granted for the £150,000 neither could assessed costs in relation to the other sum be sensibly separated from the entire costs awarded. The judge ought not to have awarded summary judgment in relation to the assessed costs.[37] The award of summary judgment in relation to the assessed costs of £28,750.54 cannot stand. I therefore accept the submissions of learned counsel Mr. Hare on this ground that the judge erred in granting summary judgment in relation to the assessed costs of £27,750.56. The appeal in respect of this limited aspect is therefore allowed.

Conclusion

[67] In view of the premises, I would make the following order:

(1) The Waltons' appeal against the order of the judge which continued the freezing injunction is dismissed.

(2) The Waltons' appeal against the learned judge's order on the summary judgment is allowed in part, only to the extent that the learned judge ought not to have granted summary judgment in relation to the assessed costs in the sum of £28,730.54 since that costs included costs in relation to £150,000 and for which latter sum leave was granted to proceed to trial.

[37] See Mayo-Perrott v Mayo-Perrott.

(3) In so far as both parties have had some success, with Mr. De La Haye having had the greater success, the appropriate order is that Mr. De La Haye should have his costs on the appeal to be assessed, if not agreed within 21 days of this judgment.

[68] I gratefully acknowledge the assistance of all learned counsel.

Louise Esther Blenman
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal