IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO. 803 of 2010

INTERNET EXPERTS S.A. d.b.a. Insta Dollar	**CLAIMANT**
AND	
OMNI NETWORKS LIMITED (In Liquidation)	**1st DEFENDANT**
MONEY EXCHANGE INT'L LTD.	**2nd DEFENDANT**
MELONIE COYE	**3rd DEFENDANT**
MICHAEL COYE	**4th DEFENDANT**

BEFORE THE Honourable Madam Justice Sonya Young

Hearings
2014
12th May
30th May

Ms. Lisa Shoman, SC for the Claimant.
Mr. Arthur Saldivar for the Defendants.

RULING

1. This application is for the continuation of a freezing order made ex parte by

the court on the 5th May, 2014 against the assets of the second, third and fourth defendants.

2. **THE HISTORY:**

The claim in this matter was filed on the 16th November, 2010, against five defendants. The then third defendant Dean Fuller, the Director of the first defendant, succeeded in having the claim against him struck out. There remained four defendants. The claimant filed an application to strike out the defence of the second, fourth and fifth defendants (as they then were). That application was denied. Thereafter the second, fourth and fifth defendants (as they then were) withdrew their own application to strike out the claim. An order was subsequently made for security for costs against the claimant. The court also made certain orders for disclosure. Those orders were duly complied with by the claimant, not the defendants. It is important to note that from January 1st 2009 until March 4th 2014 the second, third and fourth defendants have been embroiled in money laundering proceedings before the Belize courts which concluded in their full exoneration. The first defendant was in liquidation prior to commencement of these proceedings and was dissolved on 8th March, 2011.

THE APPLICATION:

3. On the 8th April, 2014 the claimant applied for a without notice freezing order against the second, third and fourth defendants. The claimants relied on the 'Third affidavit of Ellen Zindler' filed on the 8th April, 2014. That application was heard on the 5th May, 2014 and was granted until the 19th May, 2014. The matter was returnable on the 12th May, 2014 and the claimant was instructed to file a further affidavit relating to the urgency of

the application by the 6th May, 2014. That affidavit was sworn to by counsel Lisa Shoman SC and accordingly filed. I state here that it is most undesirable for counsel with conduct of a matter or application to swear to an affidavit in that matter as it amounts to giving evidence from the bar table. At the inter partes hearing the claimants relied on their two affidavits referred to above and the 'Second affidavit of Ellen Zindler' filed on the 7th May, 2014 in support of the current application. The court assumes that the chronological title of that affidavit is an error. The defendants relied on the affidavit of Melonie Coye filed on the 7th May, 2014. Counsel for all parties made oral submissions to the court and filed closing submissions as directed. The court extends its gratitude to them both.

The application sought the following:

1. An Order restraining the 2nd, 3rd and 4th Defendants, whether by their servants or agents or any other person from disposing of or howsoever otherwise dealing with the proceeds of any and all bank deposits standing in their names, or on their behalf, in any financial institution in Belize, including, but not limited to the accounts set out in the SCHEDULE below until trial and/or further order of this Honourable Court.
2. An Order restraining the 2nd, 3rd and 4th Defendants, whether by their servants or agents or any other person from disposing of or howsoever otherwise dealing with the proceeds of any and all monies found and seized by the Belize Police department at the home or place of business of the 2nd, 3rd and 4th Defendants or any of them and currently held by the Financial Intelligence Unit.
3. A Freezing order restraining the 2nd, 3rd and 4th Defendants until trial or further order whether by themselves, their servants or agents or otherwise howsoever from removing from the jurisdiction the proceeds of any and

all bank deposits standing in their names, or on their behalf, in any financial institution in Belize, including, but not limited to the accounts set up in the SCHEDULE below and/or the proceeds of any and all monies found and seized by the Belize Police Department at the home or place of business of the 2nd, 3rd and 4th Defendants or any of them and currently held by the Financial Intelligence Unit until trial and/or further order of this Honourable Court.

4. An Order directing the 2nd Defendant and/or the 3rd Defendant to provide an accounting of all funds received by it/them from the 1st Defendant and an account as to the whereabouts of these funds.
5. An Order directing the 2nd, 3rd and 4th Defendants to provide disclosure of and an accounting for all transactions involving the accounts set out in the SCHEDULE below during the period November 2007 to present.
6. Any other order which the Court thinks just in the circumstances of this case, including an order that the 2nd, 3rd and 4th Defendants pay the cost of this application.

4. **THE CLAIM:**

The claimant is a company registered in the Republic of Panama and engaged in the resale of money exchange services to gaming merchants. The first defendant is (or was) a Belizean company and the Master Agent for Money Gram. The second defendant is also a Belizean Company, a sub-agent of Money Gram. The third and fourth defendants are directors of the second defendant. It is the claimant's pleaded case that the General Manager of the first defendant, Dean Fuller, offered to establish multiple Money Gram franchised locations in Belize which the claimant could use to provide internet payment services to its customers, gaming merchants.

However, since sub-licenses for Money Gram could only be given to Belizean nationals, Dean Fuller recommended that the fourth and fifth defendants be engaged for this purpose. He worked with them to have the second defendant incorporated with the fourth and fifth defendants as Directors. Thereafter the second defendant applied for and was granted sub-agent licenses. The claimant bore most of the cost of setting up the three locations for business since most of the second defendant's business would have been provided by the claimant. Once the operations were set up the claimant and the second defendant entered into a verbal 'Payment Services Provider Contract' which enabled The Scheme (reference taken from paragraph 11 of the Statement of Case).

THE SCHEME:

5. The claimant further pleads that the first defendant provided names and addresses for fund recipients to the claimant. The claimant under service contracts with the gaming merchants gave these names and addresses to the gaming merchants (its customers). The merchants would then give these names and addresses to their gaming clients for their use. The result was that the gaming clients, in order to make a deposit to their gaming account, would bring their cash and instructions to a Money Gram agency for transfer through the network. The first defendant as the Master Agent would receive these funds and forward the funds and instructions to the second defendant. The second defendant, under the verbal Payment Services Provider Contract would confirm receipt of these funds to the claimant. Then the first or second defendant was ultimately to pay these funds over to third parties or perhaps to the claimant so it could pay its customers (the gaming merchants). It appears that the Scheme worked well and yielded

considerable amounts in fees and commissions for the first and second defendants from November 2007 through December 2009. The claimant's pleaded case is that during this period they caused some US$6,753,082.47 to be transmitted to the first defendant but only US$1,949,994.07 was ever paid out on their behalf by the first and second defendants to third parties. The claimant now claims US$4,803,088.40 as amounts due from all the defendants which includes US$174,325.70 which the first and second defendants paid themselves as fees and commissions.

6. **THE DEFENCE:**

The second, third and fourth defendants offered what really amounts to a blanket denial of the claim. The second defendant denied communicating with the claimant at all and claimed only to communicate with the first defendant as it related to Money Gram transactions. It said that its fees were paid by the first defendant and that it had no contract whatsoever with the claimant. The second, third and fourth defendants stated that their records were not presently available. In objection to the current application they postulated that there was no cause of action between the claimant and the second, third or fourth defendants since there never was a contractual relationship between the second defendant and the claimant nor was any expressed or implied trust created. They maintained that there was no risk of dissipation of assets and evidenced this by their previous pattern of behavior when there was ample opportunity available to them to do so. They also raised issues of non-disclosure by the claimant as to where the third defendant lived at the time the police seized the subject matter of the money laundering case and the possible avoidance of any contract, which the claimant may have been party to, on the ground of illegality.

7. **THE FREEZING INJUNCTION**:

The jurisdiction to grant this type of injunction derives from the Belize Supreme Court of Judicature Act Cap. 91 Sec 27(1). It enables the court to grant same in all cases where it appears to the court to be just and convenient so to do. A freezing order is a supplementary remedy granted for the limited purpose of protecting the efficacy of court proceedings. It restrains the defendant from dealing with or disposing assets over which the claimant asserts no proprietary right but which following judgment may be attached to satisfy a money judgment. It does not provide the claimant with pretrial security nor does it give any advantage over other creditors ***Fourie v. Le Roux (2007) 1 WLR 320.*** It is one of the two nuclear weapons says Donaldson LJ in ***Bank Mellat v. Nikpour [1995] 87.*** It has even been called thermo-nuclear by another judge. As such it demands a number of procedural safeguards for the respondents and conditions for the applicant.

8. Blackstone's Civil Practice 2013 at 38.4 outlines the conditions or the five hurdle test as laid down by the courts in ***Mareva Compania Naviera SA v. International Bulkcarriers SA [1975] 2 Lloyd's Rep 509.***

(a) A cause of action.

(b) A good arguable case.

(c) Defendant has assets in the jurisdiction.

(d) A real risk of dissipation of the assets by the defendant before judgment.

(e) The defendant will be adequately protected by the claimant's undertaking in damages.

9. If the above test is satisfied, the court will exercise its discretion on the balance of convenience – is it just and convenient in all the circumstances? In this case there is really no issue as to whether the claimant has an existing cause of action in Belize or whether the defendant has assets within the jurisdiction. The claim is that there has been a breach of contract and they have suffered loss. They have also itemized the defendants assets of which they are aware. We therefore move directly to the claimant's need to show that it has a "good arguable case." There is no doubt that this is the minimum threshold for the exercise of the court's discretion when considering a freezing injunction application see ***Ninemia Maritime Corporation v. Trave [1983] 1 WLR 1412***. It imposes a higher merit requirement test than that of a 'serious issue to be tried' which is commonly used in applications applying the ***American Cyanamid*** principles (which the claimant wrongly in my estimation asserts is applicable) see ***Fiona Trust Holding Corporation v. Privalov [2007] EWHC 1217 (comm)***.

10. In fact, although the evidential burden to establish a good arguable case is high, it does not mean that a claimant is required to go as far as demonstrating that he is likely to obtain summary judgment. It was defined in ***The Niedersachsen (1983) 2 Lloyds Rep 600*** as a case which is more than barely capable of a serious argument and yet not necessarily one which a judge believes to have a better than fifty percent chance of success. Moreover, it is not for the court at this stage to resolve disputes on which the claims of either party may ultimately depend. It simply has to ensure that the applicant has the better (or much the better) of the argument.

11. **CLAIMANT'S CASE:**

The court, having reviewed all the evidence before it, including pleadings and the claimant's witness statements, realized that, the claimant, no where in its evidence has ever stated that the sum of US$4,803,088.40 claimed was ever "had or received" by the second, third and or fourth defendants whether as sub-agents for the first defendant or otherwise. There is provided evidence of communication (daily reports) between the third defendant and the claimant but not much more. As far as the pleadings go the claimant says at paragraph 16 of the Statement of Claim – "from November, 2007 through December 2009, the claimant caused some US $6,753,082.47 to be transmitted to the first defendant for credit to the second defendant." Then at paragraph 19 "the third defendant who is a director and mastermind behind the first defendant has acknowledged by letter dated April 21st 2009, being in possession of US $3,075,530.33 of the claimant's funds but has refused to pay over same." Additionally, exhibited is a letter from the third defendant stating that he holds some US$3,487,034.61 in an account which is an outstanding amount for the second defendant but he has chosen to pay it over to the FIU. The claimant cannot assert on one hand that the bulk of its money was still within the first defendant's possession but attempt to freeze the assets of the second, third and fourth defendants to satisfy its full claim without showing a good arguable case for how they could be held liable for it.

12. The claimants also urged the court on the first occasion and have again done so in this application to make certain disclosure orders. They were not simply orders for asset disclosure ancillary to the injunction. They were for accounts of all banking transactions and funds received by the second or

third defendants from the first defendant and the whereabouts of those funds in relation to the scheduled accounts from November 2007 to present. The court refused the application at the ex parte hearing and indicated why. These were not ancillary to the injunction, they were perhaps helpful to the claim. It was unfair to include them. It seems therefore that the claimants are on a fishing expedition. They do not know where the money is and they are hoping to find out by using this injunction. The court must not allow itself to be used in this manner and certainly that is not the purpose of an injunction. There are major limits to the court's jurisdiction to make ancillary disclosure orders – see ***Faith Paton Property Plan Limited v. Hodgetts [1981] 1 WLR 927***.

13. The claimant seems also to be asserting that it can do no more than rely on its pleaded case unless and until it has obtained from the defendants full disclosure of the fund transactions because all such knowledge or information is in their possession, see in particular paragraph 32 of the third affidavit of Ellen Zindler. The court considers the ***Tatiangela (1980) 2 Lloyd's Rep 195*** where Parker J rejected a similar argument – "The position must be judged at the stage when the matter is before the court. In the present case the plaintiff sets up nothing more than the actual loss. This establishes I accept, a prima facie case but it does no more. It does not show that the plaintiff has good arguable, weak or bad prospects or in anyway reveal the quality of his case." In these proceedings the defendants have no automatic obligation to disclose their financial affairs. There must be solid evidence supporting the application. The evidence of the defendant will normally be looked at to displace any inferences which could ordinarily be drawn from the claimant's evidence. Lenton LJ when speaking of the

defendant's evidence stated in ***Dellburg v. Corix Properties and Blissfield Corp. N.V. (unreported) Court of Appeal 26 June 1980***: "I have reminded myself that the absence of evidence proves nothing. On the other hand, the fact that there is no evidence from one side makes it easier to draw inferences from the evidence which is already before the court; …" One must be extremely careful not to shift the burden of proof on to the defendant.

14. In a claim such as this, one would from the initial stage expect to see some material which would indicate that the second, third and fourth defendants have had the property claimed or were somehow responsible to the claimant for it even if it was never in their possession. The claimant complains that the defendants have never complied with the disclosure orders originally made by the court. Well, the rules explain what steps could be taken by the claimant to force compliance with an order. These steps were never taken. The court will not now be called upon to ensure compliance in this unjust way. Furthermore, this matter was never stayed pursuant to Part 26.1 (2)(e) pending the resolution of the connected criminal proceedings. There was absolutely nothing barring the claimant from making the necessary applications. This is especially important since the third defendant in her affidavit says she was not incarcerated between December 31st, 2008 and August 2012.

15. This court considers the amounts of money which the claimant says moved between the parties to the Scheme and cannot but agree with the defendants that a verbal contract was certainly not the most prudent or business savvy way to conduct this type of business. But, be that as it may, the court is now

being asked to provisionally agree upon the terms of this contract from the evidence before it, where what has been provided is confusing, vague and unparticularized. By their own Statement of Claim the claimant shows that there is uncertainty in the terms of the contract. They first assert that the funds were to be paid to them for distribution to their customers, then they state that some US$1,949,994.07 (the only sum not claimed to be outstanding) had been paid out to third parties by the first and second defendants on their behalf. So could the first defendant pay money out to third parties and could the second defendant also do this or could only the second defendant make payments to third parties or could they only make payments to the claimant. The crux of the claimant's case against the second, third and fourth defendants is that there has been a breach of the Payment Services Provider Contract and sums that should have been paid over to the claimant pursuant to contractual obligations were not paid, although they were demanded. If the very terms relating to payment out of the funds is not clear to the claimant can the court be called upon to determine a good arguable case in relation to that breach?

16. It is disturbing too the way the claimant often lumps the first and second defendants together when referring to certain transactions but how it also claims that they had a separate contract with the second defendant and derived their right to the sums claimed, there from.

17. The defence raised and spent considerable effort on the issue of illegality re the contract. I remind that these proceedings are not mini trials and at this stage it is not only inappropriate but near impossible to determine difficult issues of fact and law. In order to consider illegality it must be specifically

pleaded and the court has to apply certain tests which it is in no position to do at this juncture.

18. When the court considers all of the evidence it finds that the claimant does not have a good arguable case. Having concluded this the court need go no further in its consideration of the application. But for completeness let us consider the next hurdle, risk of dissipation.

19. **RISK OF DISSIPATION**

The jurisdiction to grant a freezing order is triggered by evidence that a defendant is wrongfully attempting, or is likely to attempt to make himself judgment proof. The test for this risk is an objective one based on whether the judgment may not be satisfied ***Mobil Cerro Negro Limited v. Petroles de Venezuela SA 2008 EWHC 5032 (com), [2008] Lloyds Rep. 684***. Direct evidence of such a risk is fairly rare and most times it is a matter of inference. There has to be "solid evidence" of the risk – ***Ninemia Maritime Corporation v. Trave (Supra), Dean and Dean v. Grinina (2008) EWHC 927 (QB), LTL 13/5/2008***. Mere expressions of opinion or assertion by the claimant are insufficient to satisfy the court – ***Rosen v. Rose [2003] EWHC 309***. The type of evidence from which the court may infer the risk was addressed in ***Third Chandris Shipping Corporation v. Uwaine SA [1975] QB 671-672***: "There must be facts from which a prudent, sensible commercial man can properly infer a danger of default." The claimant offered very little in this regard.

20. The claimant sought to rely on information received from the Financial Intelligence Unit (though they presented no affidavit to substantiate this) that

some $400,000 was taken from a bank account on the schedule on presentation of an order to the bank which showed that the Coyes had no case to answer in the criminal matter. It seems to this court that this could probably have been strong evidence in support of the claimant's assertion, yet they did not see it fit to get an affidavit in this regard nor to comment on why one was not made available. They also relied on statements by the fourth defendant which showed that contrary to her previous assertion, she did in fact have some income during 2008/2009. It is important to note here that this income came from the claimant purportedly to assist with legal expenses. It was baffling to this court that if in discussions, the third and fourth defendants had repeatedly admitted to being in possession of large sums of the claimant's money, and if the claimant held the honest belief that the second, third, and fourth defendants were withholding their money as claimed, why would they send an additional $15,000 to the third defendant for this stated purpose. It is also noteworthy that the paragraph in the affidavit in support dealing with this particular assistance comes immediately after the paragraphs which assert that certain offers to settle had been made to the third and fourth defendants. Further, at paragraph 27 of the third affidavit of Ellen Zindler the claimant discloses that in 2013 they offered to pay funeral expenses for the fourth defendant. This court is of the opinion that this application for a freezing order is only a ploy to get the second, third and fourth defendants to settle. It would not be allowed. Lloyd J in ***PCW Ltd. v. Dixon [1983] 2 All ER 158*** calls this an abuse and an injunction granted in those circumstances, unjust.

21. Finally the claimant relied on certain newspaper clippings to show that the third and fourth defendants may have other debts to pay. This was said at

paragraph 34 “The claimant verily believes, given my discussion with the Coyes, and the media reports which are exhibited to this affidavit, that the second, third and fourth defendants have no intention of settling this civil suit, and will, if monies which are currently frozen are release, dissipate those monies, which are claimed by the claimant …….” It must be remembered that a freezing order operates in personam. It does not deprive the party subject to its restraint either to title or possession nor does it improve the position of the claimant. A defendant is entitle to move his assets in order to pay his ordinary living expenses or to satisfy pre existing debt because preventing this would be unjustifiable – Steven Gee QC Gee on Commercial Injunctions (fifth edition) Sweet & Maxwell, 2004 at 12.032. It is an abuse of process for a claimant to attempt to obtain a Freezing Order merely in an attempt to obtain security for a prospective judgment. It is not a form of pre-trial attachment. Kerr JA in ***Z Limited v. A-Z [1982] 2 WLR* 288 at p 305** stated “that the jurisdiction must not be abused.” He then goes on to explain “the increasingly common one, as I believe, of a Mareva Injunction being applied for and granted in circumstances in which there may be no real danger of the defendant dissipating his assets to make himself ‘judgment proof’ where it may be invoked, almost as a matter of course, by a plaintiff in order to obtain security in advance for any judgment which he may obtain; and where its real effect is to exert pressure on the defendants to settle the action.” The claimant has therefore on both grounds failed to justify the continuation of the Freezing Order. I respectfully decline to exercise the discretion.

22. **It is hereby ordered:**

1. The injunction granted on the 5th day of May, 2014 is hereby discharged.

2. The claimant's application for an interim injunction filed on the 7th May, 2014 is dismissed.
3. Costs to the defendant to be assessed if not agreed.
4. The matter is scheduled for further case management on the 19th June, 2014.

SONYA YOUNG
JUDGE OF THE SUPREME COURT