IN THE SUPREME COURT OF BELIZE, A.D. 2020

CLAIM NO. 626 OF 2020

BETWEEN:

(BELLA GROUP, LLC	1st CLAIMANT
(BRENT BORLAND	2nd CLAIMANT
(ALANA LATORRA BORLAND	3rd CLAIMANT
(COPPER LEAF, LLC	4th CLAIMANT
(	

AND

(	
(MARCO CARUSO	1st DEFENDANT
(MICHELA BARDINI	2nd DEFENDANT
(MADELINE LOMONT	3rd DEFENDANT
(MAYAN LAGOON ESTATES LIMITED	4th DEFENDANT
(PALM TREE HOLDINGS LIMITED	5th DEFENDANT
(REGISTRAR OF COMPANIES	1st INTERESTED PARTY
(REGISTRAR OF LANDS	2nd INTERESTED PARTY

BEFORE THE HONOURABLE MADAM JUSTICE LISA SHOMAN

HEARINGS : November 16, 2020
December 11, 2020
January 26, 2021

Written Submissions 2020/2021
12th November 2020 – Claimants
25th January 2021

20th January 2021– Defendants

APPEARANCES: Mr. E Andrew Marshalleck SC
Mr. Allister Jenkins for the Claimants

Rt Hon Dean O Barrow SC
Mr. Adler Waight for the Defendants

RULING

1. The matters which are before this Court for resolution are two applications – one is an Application by the Claimants for an interim Freezing Order, which is now being heard inter-partes; and the other is an Application by the Defendants to discharge the freezing order granted on an ex-parte basis. Each is examined and addressed in turn, and in the order that each application was filed.

BACKGROUND

2. The Claimants filed the Claim herein seeking several declarations and reliefs in relation to an allegedly illegal forfeiture of shares in breach of the Articles of Association of the 4th Defendant Company, Mayan Lagoon Estates, an order for the cancellation of replacement land certificates in relation to Parcels 2128 and 2129, an order for the cancellation of the transfer of title in favor of Palm Tree Holdings in relation to the restoration of shares and the Register of Directors of the 4th Defendant, damages, interest and costs.

3. The Claimants are Bella Group LLC, a company incorporated in Nevis ("**Bella Group**"); Brent Borland, a director, member and beneficial owner of Bella Group ("**Brent**"); Alana Latorra Borland, also a director, member and beneficial owner of Bella Group ("**Alana**"); and Copper Leaf LLC, a company incorporated in the State of Washington, USA ("**Copper Leaf**").

4. The Defendants are Marco Caruso ("**Marco**") a member and director in the 4th Defendant Company, Mayan Lagoon; Michela Bardini ("**Michela**") a director of Mayan Lagoon; Madeline Lomont ("**Madeline**") a member and director of Mayan Lagoon; Mayan Lagoon Estates Limited ("**Mayan Lagoon**") a limited liability company incorporated in Belize with registered address at The Plantation , Placentia, Stann Creek District, Belize; and Palm Tree Holdings Limited, "**Palm Tree**").a limited liability company incorporated

in Belize with registered address at Lot 87, Placencia Residences, Maya Beach, Placencia, Stann Creek District, Belize.

5. The Registrar of Companies and the Registrar of Lands have been joined to the Claim as Interested Parties.

6. It is important to keep the scope of Claim 626 of 2020 in view because both parties have provided the Court with extensive background narratives and ample documentation via affidavit evidence by Brent and Marco. Both accuse each other of various misdeeds, and the mistrust and hostility is palpable. The most important thing that must be borne in mind, is where we are now, and what the Court is called to decide at this stage.

SCOPE OF THE CLAIM

7. The Claimants seek a declaration that the forfeiture of Bella Group's 10,000 shares in Mayan Lagoon is illegal and in breach of the Articles of Association of Mayan Lagoon, null and void.

8. The Claimants also seek a declaration to invalidate the forfeiture of Marco's 5000 shares in Mayan Lagoon as being illegal and in breach of the Articles of Association of Mayan Lagoon, null and void.

9. An Order is sought that the Registrar of Lands cancel a replacement land certificate, being a fraudulent application for replacement land certificate for Parcels 2128 and 2129, Block 36 Placencia North Registration Section.

10. An Order is sought that the Registrar of Lands cancel the transfer of title in favor of Palm Tree and the Land Certificate in favor of Palm Tree;

11. An Order that the Registrar of Companies do restore Bella Group as a shareholder of 10,000 shares and Marco as a shareholder of 5000 shares of Mayan Lagoon, and Brent

and Alana as Directors of Mayan Lagoon, and to rectify all annual summaries filed from 2010 to 2019 to reflect the same.

12. The Claimants are claiming an order Bella Group, Brent and Alana are also seeking an order restraining Marco, Michaela and Madeline, whether by themselves, agents or assigns from dealing with the assets of Mayan Lagoon without the involvement and participation of Brent and Alana as Directors.

13. The Claimants are claiming an order restraining Marco, Michaela and Madeline, whether by themselves, agents or assigns from dealing with the assets of Mayan Lagoon without the involvement and participation of Brent and Alana as Directors and without the approval of Copper Leaf.

14. And the Claimants claim an order that an order restraining Marco, Michaela and Madeline from lodging for registration any corporate documents on behalf of Mayan Lagoon at the Belize Companies and Corporate Affairs Registry until the Registrar of Companies has rectified the registers and files of Mayan Lagoon.

15. The Claim also seeks damages, interests and costs.

A. CLAIMANTS' APPLICATION FOR A FREEZING ORDER

16. The Claimants applied via an *Ex Parte* Notice filed October 10, 2020, and an Amended *Ex Parte* Notice filed November 13 2020 for the following relief:

> *(1) Pursuant to section 27 of the Supreme Court of Judicature Act and rule 17.1(f) of the Supreme Court (Civil Procedure) Rules* ***("CPR"),*** *an order restraining the 1st 2nd, , 3rd, , 4th and 5th Defendants, whether by themselves, their servants, agents, assigns, or otherwise, from transferring, disposing, otherwise alienating or encumbering any of their assets including Parcels 2129 and 2169 Block 36*

*Placentia North Registration Section ("**Parcels 2129 and 2169**") until the determination of the proceedings;*

(2) Pursuant to section 27 of the Supreme Court of Judicature Act and rule 17.1(f) of the CPR, an order restraining the 1st, 3rd 4th and 5th Defendants, whether by themselves, their servants, agents, assigns, or otherwise, from transferring, disposing, otherwise alienating or encumbering, any of the shares in the 4th and 5th Defendants until the determination of the proceedings;

(3) Such further or other relief as the Court thinks fit;

(4) Costs in the cause.

17. The Applications were supported by the First Affidavit of Brent Borland dated the 10th day of October 2020.

18. Orders were granted by the Court without notice dated November 16th, 2020 and continued on December 11, 2020 and were extended and still hold. The Claimants have provided an Undertaking which binds all Claimants. The Orders were in the nature of a Freezing Order against the Defendants as follows:

a. An interim freezing order was granted restraining the 1st 2nd, 3rd,, 4th and 5th Defendants, whether by themselves, their servants, agents, assigns, or otherwise, from transferring, disposing, otherwise alienating or encumbering any of their assets being the 107 parcels of land listed in the schedule hereto including Parcels 2129 and 2169 Block 36 Placentia North Registration Section ("**Parcels 2129 and 2169**") until the 11th December 2020 at 5'o'clock in the afternoon;

b. an interim freezing order restraining the 1st , 3rd 4th and 5th Defendants, whether by themselves, their servants, agents, assigns, or otherwise, from transferring,

disposing, otherwise alienating or encumbering, any of the shares in the 4th and 5th Defendants until the 11th December 2020 at 5'o'clock in the afternoon;

19. These Order were extended and are currently extant until further order of the Court and are now the subject of an inter partes application for Injunction by the Claimants for Injunctions as prayed in the ex parte Application, as well as for an Application filed by the Defendants to lift the interim Freezing Orders granted.

20. Both Parties have submitted voluminous documentation and extensive written submissions and there has been vigorous oral argument on the matter by Senior Counsel on both sides, all of which has been very helpful to the court and I tender my gratitude in this regard.

THE LAW ON GRANTING FREEZING ORDERS

21. As pointed out by Madam Justice Young in the Belizean case of **Internet Experts S.A. D.B.A. Insta Dollar v. Omni Networks Limited (In Liquidation)et al,** Claim 803 of 2010 (unreported), at paragraph 7:
"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. "

22. Young J notes further at the same paragraph 7 that a freezing order ***"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."

23. This is especially true since our Constitution guarantees the protection of deprivation from property under Section 17 save within circumscribed limits and which safeguard determination and enforcement compensation for the deprivation thereof if unwarranted. A freezing order is, therefore, one of those interim remedies which ought not to be entered by a Court unadvisedly or lightly, but advisedly and soberly.

24. The test for granting a Freezing Order is still that which is set out by the court in **Mareva Compania Naviera SA v. International Bulkcarriers SA** [1975] 2 Lloyd's Rep 509 as being :

(a) A cause of action;

(b) A good arguable case;

(c) The Defendant(s) has/have assets in the jurisdiction;

(d) There is a real risk of dissipation of the assets by the Defendant(s) before judgment.

(e) The Defendant will be adequately protected by the Claimant(s)'s undertaking in damages,

25. The Supreme Court of Judicature Act at Section 27 also stipulates that the Court is empowered to grant an interlocutory injunction ***"In all cases in which it appears to the Court to be just and convenient to do so."***

26. It is worth restating here that a freezing order is an interim remedy which is granted for the purpose of ensuring that that the court process is effective. A freezing order does not give Applicants security for the claim, and in particular does not give any proprietary rights against the assets covered by the order.

27. Freezing orders will therefore, not give priority over other creditors, and do not guarantee that Respondents will recover the value of any judgment eventually awarded.

28. Because the purpose of a freezing order is only to prevent Respondents from evading the court process by making unjustifiable disposals of assets, it does not prevent Respondents from carrying out ordinary business transactions. This provision is usually only necessary if the Respondent is a company or is known to be a sole trader/ self - employed. Where it is disputed, or is a matter of doubt, whether a proposed dealing with or disposal of assets is in the ordinary and proper course of business, a variation of the freezing order may be required : **Compagnie Noga v ANZ Banking Group** [2006] EHWC 602; and **Abbey Forwarding Ltd v Hone** [2010] EWHC 1532

A CAUSE OF ACTION, ASSETS IN THE JURISDICTION & A GOOD ARGUABLE CASE

29. The first three of the applicable tests can conveniently be examined together. The Claimants in this Claim have an existing cause of action in Belize. They have filed a claim seeking declarations and orders in relation to an allegedly illegal forfeiture of shares in breach of the Articles of Association of Mayan Lagoon, an order for cancellation of land certificates, the restoration of shares, rectification of corporate documents of Mayan Lagoon, damages, interest and costs.

30. There are assets in the jurisdiction held by the 4th Defendants, including real property – Parcels 2129 and 2169 of Block 36, Placencia North Registration Section, Parcel 2169 which was transferred to the 5th Defendant; and shares in the 4th and 5th Defendant companies,

31. The Claimants need, therefore to show that they have a **"good arguable case."** 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 which imposes a test with a higher threshold higher than that of a **'serious issue to be tried',** which is the standard for other types of Injunctions.

32. As Young J says in paragraph 10 of the **Internet Experts** case, ***"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 <u>The Niedersachsen</u> (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."***

33. The task is clear. No 'mini-trials' are permitted at this stage - and both sides agree on this. The task of the Court is to examine the affidavit evidence put before it to see if the Applicant(s) have been able to meet the required standard.

34. It is regrettable that both the Affidavit of Brent Borland in support of the Claimants' Application and the Affidavit of Marco Caruso in support of lifting the Interim Order in this Claim contained a plethora of paragraphs of the Brent and Marco saga writ large; but much of it is material which was not really relevant to this particular claim - or in assessing whether the test had been in fact satisfied and whether the Claimants do have a "good arguable case".

35. I do find however, that in the round, the Claimants have satisfied the threshold test that there is a good arguable case. Sufficient material was put forward before the Court by Brent, in his Affidavit, in order to satisfy the requirement of the threshold being met. There are several serious issues to be tried as between the parties, in particular, the various allegations of fraud, which point to a finding that the Claimants do have a good arguable case.

A REAL RISK OF DISSIPATION OF THE ASSETS

36. The test is an objective one and in **Lakatamia Shipping Co v Morimoto** [2019] EWCA Civ 2203, Haddon-Cave LJ adopted the summary of some of the key principles applicable to the question of risk of dissipation by Mr Justice Popplewell (as he then was) in **Fundo Soberano de Angola v dos Santos** [2018] EWHC 2199 (Comm) as follows:

> *"(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.*
>
> *(2) The risk of dissipation must be established by solid evidence; mere inference or generalized assertion is not sufficient.*
>
> *(3) The risk of dissipation must be established separately against each respondent.*
>
> *(4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinize the evidence to see whether the dishonesty in question points to the conclusion that assets [may be] dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.*
>
> *(5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.*

(6) ***<u>What must be threatened is unjustified dissipation</u>. The purpose of a WFO is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A WFO is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the WFO jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.***

(7) ***Each case is fact specific and relevant factors must be looked at cumulatively."*** **(Empasis added)**

37. The **Lakatamia** case was one involving an appeal against the discharge of a world-wide freezing order, but the principles apply equally to the instant claim. At paragraph 35, of the decision, Haddon –Cave LJ emphasized that all that the applicant has to show to establish its case on risk of dissipation is that there is a "good arguable case" that there is such a risk. He equated this to the "good arguable case" test for establishing a jurisdictional gateway as analyzed by the Court of Appeal in **<u>Kaefer v AMS</u>** [2019] 3 All ER 979. Accordingly, an Applicant does not have to prove the risk of dissipation on the balance of probabilities, though the Applicant does have to show that the risk is ***"more than barely capable of serious argument."*** The heart of the test is really, however, that there is a plausible evidential basis for saying there is risk of dissipation. Haddon-Cave LJ noted that the test is ***"not a particularly onerous one."***

38. In the instant Claim, the Applicants seek to satisfy the Court of the risk (which is contained in the Affidavits of Brent Borland in paragraphs 111 to 132) and ask the Court to find and found such risk in what is described variously as "a pattern of fraudulent behavior", a "pattern of conduct" and "fraudulent schemes" on the part of the 1st, 2nd and 3rd Defendants involving assets of the 4th and 5th Defendants.

39. I accept that where fraud is a central issue in a claim, and such alleged fraud is a good and arguable case, Courts have held that there can be found an inference of a "general risk of dissipation.

40. The British Virgin Island case of **Gilfanov v. Polakov** BV1HCMAP2016/0009 in the Eastern Caribbean Court of Appeal, is authority for the proposition that on an interlocutory application for a freezing injunction where there is a good arguable case of fraud, and the fraud is a central issue in the case, the judge should consider whether that finding by itself or with other relevant evidence could lead to an inference of a general risk of dissipation.

41. In the decision, Webster JA, at paragraphs 33 to 36 painstakingly points out as follows:

*"[33] The appellants relied on the decision of the Court of Appeal in **VTB Capital plc v Nutritek International** where Lloyd, LJ said–"We agree with Peter Gibson LJ that the court should be careful in its treatment of dishonesty. However where (as here) the dishonesty alleged is at the heart of the claim against the relevant defendant, the court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation..."*

*[34] The point is also made in **Madoff Securities International Ltd and another v Raven and others** where Flaux, J said–"It seems to me that what emerges is a sufficiently arguable case of deliberate wrong doing, the issuing of sham invoices and the disguising of the true nature of the payments of millions of dollars to the*

Kohn defendants over many years. This demonstrates in itself a serious risk of dissipation."

[35] I agree with the appellants' submissions on this issue. Having found that the appellants have a good arguable case in a claim where fraud is the central issue, the judge should have considered whether that finding of itself could have led to an inference of a risk of dissipation. It may not have, but he should have considered the possibility. Instead he treated it as a case where the allegation of fraud was immaterial.

[36] To sum up on the issue of dissipation, I find it difficult to reconcile the judge's finding of a specific act of dissipation with the further finding of no general risk of dissipation. It appears that he did not deal with the other evidence of dissipation, applied the wrong test and did not treat the finding of a good arguable case of fraud as a basis for inferring a general risk of dissipation. I conclude with respect to the learned judge that based on the finding of a good arguable case of fraud together with his own finding as to the consequent motive for the gratuitous transfer and other relevant evidence, he ought to have concluded that there was a general risk of dissipation. His failure to do so exceeds the generous ambit within which reasonable disagreement is possible."

42. Having found already in this claim, which is largely based on allegations of fraudulent actions taken by the Defendants, that the Claimants do have a good and arguable case, I also accept that there is a sound basis for inferring a general risk of dissipation of assets.

43. The Court is urged to issue a Freezing Order over the assets of Mayan Lagoon and of Palm Tree, being forfeited shares in Mayan Lagoon, and land transferred to Palm Tree Holdings Limited, the 5th Defendant. Each will be reviewed in turn to see what risk of dissipation is established.

THE SHARES IN MAYAN LAGOON

44. The Claimants claim (via the evidence provided in the Affidavit of Brent Borland) that the Defendants' *"unlawful and fraudulent actions"* were all *"designed to enable them to be in control of the 4th Defendant and to enable them to dishonestly dispose of the 4th Defendant's shares in the 4th Defendant"*.

45. The Claimants' evidence is that *"the scheme and subsequent disposal of the shares"* of the Bella Group and Marco Caruso in Mayan Lagoon was carried out after Mayan Lagoon had commenced a claim against Belize Infrastructure Fund LLC, Brent and Marco in the USA and obtained default judgments against Brent and Marco, which the Claimants say was used to commence another claim, in Belize, Claim 141 of 2019 (which is ongoing, and before me) the fact of which does not really impinge on the findings at this stage in this particular claim.

46. The evidence of Mr. Borland as to the shares, the amendment of Articles of Association of Mayan Lagoon via special resolution, the fiduciary duties owed to Brent and Alana; the removal of Brent and Alana as directors, , the forfeiture of the shares, the registration of resolutions in regards to the first call on shares, a second call on shares, and the forfeiture of the shares of Marco in Mayan Lagoon all do add up at this stage to a "good arguable case" for the 1st to 3rd Claimants as to the risk of disposal regarding the shares of Mayan Lagoon.

THE LAND

47. Quite apart from those claims, the Claimants claim that without the knowledge or approval of Brent and Alana, Marco and Michela, with intent to do damage to Mayan Lagoon, dishonestly applied to the Registrar of Lands to have the land title to Parcel 2129 replaced, dishonestly representing that the said title has been irrecoverably lost, knowing that the original land certificate for Parcels 2129 and 2169 Block 36 Placentia North Registration Section were being held in escrow, and that Parcel 2129 had been in

Michela's possession, who had deposited the same with Filler Rodriguez LLP per the terms of an escrow letter.

48. Furthermore, the Claimant's evidence is that Marco and Michela, purportedly on behalf of Mayan Lagoon, are said to have fraudulently transferred title to Parcel 2169 Block 36 Placentia North Registration Section to Palm Tree on the 16th August, 2019.

49. The Claimants say that Michela still holds 5000 shares in Mayan Lagoon and that Mayan Lagoon still owns 107 parcels of land, and that therefore, "it is likely" that "this fraudulent scheme" may reoccur. The purported value of the 107 parcels of land is $42 Million Dollars and the Claimants claim as to risk of disposal of these properties are found at paragraphs 111- 125 of the Affidavit of Brent Borland

50. I have scrutinized the evidence provided by the Claimants to see whether the alleged dishonesty in question points to the conclusion that assets may be unjustifiably dissipated. I find that there is more than a generalized assertion or inference.

51. I am satisfied that the 1st to 3rd Claimants have shown that there is a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets.

52. I have also reviewed the evidence provided by Marco, and in particular, that provided at paragraphs 43 to 42 of his Affidavit regarding the shares in Mayan Lagoon in order to take the necessary account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.

53. In my view, the 1st to 3rd Claimants have the better of the argument. They do have a good arguable case, and have, as a matter of fact, established the risk of dissipation of the assets of the 4th and 5th Defendants by the 1st to 3rd Defendants.

54. Copper Leaf as a Claimant relies on the risk of dissipation as established by the 1-3rd Claimants, but the guidelines do not demand that all Claimants establish risk, just that the risk be established against all Respondents. I find that the risk is established as required.

BALANCE OF CONVENIENCE – "JUST AND CONVENIENT"

55. Based on the same thorough review of the evidence, it is clear that the balance of convenience at this stage does lie in favor of the grant of the freezing order, and that in terms of both the shares in Mayan Lagoon and the properties in question which is the subject matter of the declarations and order being prayed in the Claim, it would be just and convenient to grant the Freezing Order at this stage of proceedings.

ADEQUATE PROTECTION BY THE CLAIMANTS' UNDERTAKING

56. A critical ingredient of the grant of an interim Freezing Order is that the Defendants will be adequately protected by the Claimants' undertaking in damages. Both Counsel agree that this is key.

57. In this claim, it is, if not common ground, then grudgingly conceded that both Brent and Alana have no great means to meet any undertaking. They have not provided this Court with any evidence beyond the assets which they - via Bella Group - claim a beneficial interest in, which are the assets of Mayan Lagoon and those transferred to Palm Tree; which actually belong to Mayan Lagoon.

58. Senior Counsel for the Defendants argued most insistently that the undertaking being given by the 1st – 3rd Claimants is "a sham", that it is "illusory" and that those Claimants rely on an interest in Mayan Lagoon which do not give them any right to pledge that interest, which in any event is the very subject of what is being contested in the claim.

59. Counsel for the Claimants in response, argues that the Undertaking is made by all the Claimants including Copper Leaf LLC, and that the Claimants in effect as a whole are

able to comply with an order for payment pursuant to the undertaking. Mr. Marshalleck contends that Copper Leaf is the holder of "significant judgments within the jurisdiction" and claims against Marco. The First Affidavit of Brent Borland discloses that Copper Leaf has a default judgment against himself and Caruso for 10 million USD which is exhibited at **BB1-43,** and which the Copper Leaf has used to file an ongoing claim in the Supreme Court of Belize.

60. Senior Counsel Marshalleck for the Claimants argued stoutly, both orally and in his skeleton in reply to the Application of the Defendants to discharge to Freezing Order, that the proper approach is to apply for "fortification of the undertaking", to show a loss arising, a discrepancy and that the loss is likely to exceed the undertaking.

61. Mr. Marshalleck says it is the duty of the Defendants to place evidence before the Court that the undertaking would be worthless and so would require fortification and cites a case from the Court of Appeal of the British Virgin Islands, **Lucita Angeleve Watson et al v. Leonard George De La Haye** BV1HCVAP2104/0004

62. In that Appeal, the learned Blenman JA points out in her decision at paragraph 42, that ***"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.***

63. That assertion is robustly rebutted by Senior Counsel Barrow who says that the Claimants including Copper Leaf have not provided anything at all to show that it is giving a proper

undertaking, and that the undertaking by Copper Leaf isn't merely insufficient, it is completely lacking, especially since at this stage, its purported assets are outside the jurisdiction. The Court is directed to the Jamaican Court of Appeal case of **TPL Limited v. Thermoplastics (Jamaica) Limited** 2014 JMCA Civ 50.

64. The Defendants say that it is crucial that the party seeking an injunction must show its willingness to give an undertaking as to damages, ***"as well as its financial ability to satisfy one".***

65. The Defendants argue that the Claimants ***"have purposefully failed have purposely failed to provide sufficient information to the support the undertaking given to the Court. They say that the Claimants seek only to use the "interest in the above-mentioned companies (via our Nevis company, Bella Group LLC) which have sizeable assets within the jurisdiction."***

66. They say further that none of the Claimants ***"have provided any information pertaining to assets within this jurisdiction or any jurisdiction. Copper Leaf LLC has purposefully remained silent on the matter."***

67. In these circumstances, I find paragraph 44 of the **Lucita Angeleve Watson et al v. Leonard George De La Haye** BV1HCVAP2104/0004 case to be sound guidance. Blenhem JA says there ***"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."

68. In the current case, although the complaint of the Defendants is that the undertaking of the Claimants is "a sham" and "illusory", I accept that it is for the Defendants to place evidence before the Court, upon which the Court may determine that there was a real risk that the Claimants' undertaking as to damages would be worthless. There was some evidence provided to that effect, certainly where Bella Group, Brent and Alana are concerned. The Defendants say that they are not aware that any of the Claimants have any assets within the jurisdiction.

69. I also find that there is, in Marco's Affidavit, at paragraphs 90 to 92, and 95 to 99, some evidence that does indicate to the court that both the grant, as well as the continuation of the freezing orders, carry a real risk of loss to Mayan Lagoon Estate, and Marco and Michela.

70. There is, in the circumstances, a sufficiency of evidence to support a decision that the Court should in this case, exercise its discretion and require either security, or the payment of money into court or fortify the undertaking made by the Claimants in support of the Freezing Order.

B. DEFENDANTS' APPLICATION TO DISCHARGE THE FREEZING ORDER

71 The Defendants filed their Application dated January 15, 2021 and filed January 18, 2021 on behalf of the 1st to 4th Defendants, seeking the discharge of the freezing injunction granted by the Court without notice on November 16, 2020 continued December 11, 2020, and seeking an inquiry into the damages caused by the freezing injunction in the matter.

72. The Defendants are applying for the following reliefs:

1. *The Freezing Injunction contained in the Order dated November 16th, 2020, continued December 11th, 2020, be vacated and discharged.*

2. *The Claimants be directed to take immediate steps to inform in writing anyone to whom it has given notice of the Freezing Injunction, or who it has reasonable grounds for supposing may act upon the Freezing Injunction, that it has ceased to have effect.*

3. *There be an Inquiry as to damages on the undertaking given by the Claimants at paragraph 1 of the Order, for the purposes of which the following directions shall apply:*

   a. *The Defendants shall serve upon the Claimants Points of Claim setting out the loss alleged to have been caused by the Freezing Injunction by _____;*

   b. *The Claimants shall serve upon the Defendants Points of Defence by _____; and*

   c. *The Defendants shall be at liberty to serve Points of Reply by _____.*

   d. *Witness Statements shall be exchanged on or before _____.*

   e. *The hearing of the Inquiry is set for _____.*

   f. *The costs of complying with these directions be costs in the Inquiry.*

4. *The Claimants pay the Defendants' costs of this application in the sum of $_____.*

5. *Liberty to Apply.*

6. *Such further and other relief as the Court deems just.*

73. The Application by the Defendants is supported by the First Affidavit of Marco Caruso dated January 15, 2021.

74. The Defendants' grounds for discharging the interim Freezing Order which was granted ex parte are essentially as follows:

a. The Claimants are seeking to use the Freezing Injunction as an instrument of oppression;

b. There is no real risk of dissipation of assets by the Defendants;

c. There was material non-disclosure and misrepresentation of the facts by the Claimants at the without notice hearing on November 16th, 2020;

d. The undertaking given by the Claimants is inadequate and worthless ; and

e. The Claimants have unduly delayed in seeking equitable relief.

f. In all circumstances it is just and convenient that the order be discharged.

INJUNCTION AS AN INSTRUMENT OF OPPRESSION

75. The Defendants/Respondents say that the Claimants are seeking to use the Freezing Injunction as an "instrument of oppression".

76. The contention is that even if the Claimants are successful in their suit, and the Bella Group LLC is restored as a shareholder of Mayan Lagoon along with Marco Caruso, the properties and assets subject to the Freezing Injunction belong to Mayan Lagoon only, and that even if the Bella Group, Brent and Alana succeed, Mayan Lagoon still remains a separate legal entity.

77. The Defendants/Respondents ask the Court to take note that all the assets of Mayan Lagoon being frozen and they ask why is such an expansive schedule necessary. They say that the answer is that the Freezing Injunction is being used as a tool of oppression, which is a blatant misuse of the jurisdiction.

78. This goes to the heart of what the freezing injunction is intended to do. As pointed out before, the purpose of a freezing order is only to prevent Respondents from evading the court process by making unjustifiable disposals of assets.

79. The Respondents complain that the Claimants do not seek the freezing of any assets of the other Defendants, which the Claimants would have recourse against, should the Claimants be successful and that the Claimants have only sought a Freezing Injunction against Mayan Lagoon and the assets of Mayan Lagoon.

80. The Claimants are seeking as a remedy, and order restraining Marco, Madeleine and Michaela from disposing of any of the properties of Maya Lagoon and the Order currently in force affects 107 parcels of property held by Mayan Lagoon. The Affidavit of Brent Borland exhibits at **BB1-31**, 107 Parcels of land with an aggregate value of $42 Million dollars per the 2016 Appraisal commissioned by Marco.

81. Freezing orders should be made only in respect of those properties which are the subject of the claim, and in respect of which the Claimants claim remedies. The said assets are the subject of an interim remedy which was granted for the purpose of ensuring that that the court process is effective.

82. The Order should not be used as a tool, however, to prevent Mayan Lagoon from operating its business, which is the sale of property. The Freezing Order is wide and covers parcels of Land other than 2129 and 2169 - the Schedule covers 107 parcels of land.

83. The **Lakatamia** case cited above is clear that what must be threatened is unjustified dissipation. To repeat ***"The purpose of a WFO is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will***

have the effect of making it judgment proof. A WFO is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business.".

84. One of the contested issues is, however, that the Claimants claim that the manner in which Marco and Michela are carrying out the business of Mayan Lagoon is not "in the normal course of business", and that to permit business to be conducted by Mayan Lagoon, while Brent and Alana remain removed as directors would be unlawful having regard to the provision of Article 143 of the Amended Articles of Association of Mayan Lagoon.

85. In the circumstances, and on a review of the Affidavits before me, I would permit the maintenance of the Freezing Order on those additional parcels of land which are not directly in contention in this claim, but that will impact (and therefore need to be reflected) on the increased risk of likelihood of significant loss arising as a result of the Freezing Order remaining in place; and the Parties are therefore invited to address the Court in this regard, on the matter of the necessary fortification of the Undertaking to be provided by the Claimants.

86. If the Claimants make out their claim, and they are right, no problem; however, if the Claimants do not succeed, there could be significant damage to the business of Mayan Lagoon. Therefore, the more assets of Mayan Lagoon that are frozen at this stage to prevent dissipation, the greater will be the fortification of the undertaking required of the Claimants.

NO REAL RISK OF DISSIPATION

87. For the reasons stated before, I have already assessed the evidence provided and I have found that there is a real risk of dissipation of the said assets, and the Claimants have satisfied the threshold test. I decline to discharge the injunction on this basis.

MATERIAL NON-DISCLOSURE AND MISREPRESENTATION

88. The Respondents aver that there was material non-disclosure and misrepresentation of the facts by the Claimants at the without notice hearing on November 16th, 2020; and that this would justify the discharge of the Freezing Order made on that date. In the UK Court of Appeal case of **PJSC Commercial Bank v Kolomoisky** [2019] EWCA Civ 1708, the Court at Paragraph 249 onwards, considered the Applicant's duty to make full and frank disclosure when applying for a Freezing Order without notice, and the following principles were distilled as follows :

a) The applicant has to make full and fair disclosure of all the material facts. What is material, is to be decided objectively by the court- it does not depend on the applicant's assessment, or that of his legal advisors.

b) The applicant must make proper enquiries before making the application. He must disclose not only what he knows, but what he would have known if he had made proper enquiries. The scope of the enquiries that must be made depends on all the circumstances- so if the application is particularly urgent less extensive enquiries may be justified.

c) Whether the injunction should be discharged depends principally on the importance of the non-disclosed fact to the issues to be decided by the judge.

d) However, it is necessary to consider whether the non-disclosure was innocent, or deliberate.

e) If a non-disclosure was innocent (in the sense that the applicant did not know the fact or did not appreciate its relevance) that is an important factor, but not decisive. But the duty to make enquiries must be borne in mind. A non-disclosure is unlikely to be considered innocent if the applicant failed to make the relevant enquiries for fear of discovering inconvenient facts.

f) If the non-disclosure was deliberate or substantial, the court's likely starting point will be to discharge the injunction.

g) Ultimately the question is where the interests of justice lie. That may include continuing the freezing order, but marking the non-disclosure in some other way, such as with a suitable order as to costs.

89. The facts in the **PJSC Commercial Bank** case on the issue of non-disclosure were complex, but the Court of Appeal did overturn the trial judge's decision to set aside the freezing injunction on the basis that while the applicant should have gone further than it did in making full and frank disclosure, there was no basis for holding that the failure was deliberate in the relevant sense.

90. That decision highlights the need for any applicant for a freezing injunction to:
(a) carefully consider what material should be disclosed and why;
(b) make all relevant enquiries that can be made in the time available, so that full and fair disclosure can be made; and
(c) be able to explain, persuasively, why material which has not been disclosed was considered, objectively, not to be relevant.

91. In the current case, there was much disclosure by both Parties which was not material, but which was purportedly "background" for not only this claim, but a series of other claims which have been filed in what may be described as the 'Brent and Marco Saga'.

92. For whatever reason, neither of the parties to this claim, nor those in the other claims in the Brent and Marco Saga have requested the consolidation of any or all these claims, and, thus, while the color and context of the general relationship between Brent and Marco and their various dealings, partners and vehicles is of interest and quite helpful as background, the real issue is importance of the non-disclosed fact to the issues to be decided by the judge.

93. Both Brent and Marco omitted certain details in their respective affidavits, but I do not consider them to be deliberate, and neither do those omissions amount to material non-disclosure and misrepresentation of the facts by either of the Affiants. In this case, a costs order to reflect non-disclosure therefore would not be a suitable remedy.

94. An appeal by the Respondent Marco Caruso is made that the Claimants have "put forward one affidavit with a series of matters that are not germane to Claim 626 to confuse and bury the Defendants with a deluge of claims and spurious materials", is not determinative of there being material non-disclosure and misrepresentation of the facts by the Claimants at the without notice hearing on November 16th, 2020; and neither is the complaint that the Claimants "have purposely taken a series of claims that can conveniently tied together and have separated them to "cover the field" to bury the Defendants with a multiplicity of claims and injunctions. That isn't material.

95. There are paragraphs of complaint in the Affidavit of Marco that speak to these multiple claims particularly those which Marco says " the Claimants failed to disclose and properly account for; and that the intent is to "harass and hound myself and the Project Entities into submission."

96. In the same vein, much is made of the failures of Brent, the fraud that he has been convicted of and the sentencing that is to take place. The Court is urged to penalize the Claimants by discharging the Freezing Order on the basis of his misrepresentation and a failure to disclose all material facts

97. What is material in this current claim is a matter must be weighed carefully by the Court, and the court must to determine what disclosure in the circumstance is "material" to this particular claim.

98. In my considered view, both Brent and Marco have done their best to present their evidence in the best possible light before the Court, and the deeds and misdeeds in as dastardly picture as can be painted. As Caruso says, "there is deep enmity".

99. The Court, at this juncture is not enabled or entitled to sift through the narratives as it will do at trial. There is a time and place for that exercise. We are simply not there yet.

100. After a careful review of all affidavit evidence, I find that the Applicants have made full and fair disclosure of all the material facts necessary at this stage to grant the Freezing Order made.

WORTHLESS UNDERTAKING

101. Having addressed the issue above, I do not propose to review the matter again. The Parties are invited to make submissions as to the kind, the scope and the quantum for the fortification of the undertaking by the Claimants.

102. This exercise of assessment of fortification of the Undertaking by the Claimants must also take into account the scope and magnitude of the Freezing Order which is to be maintained, including keeping 107 parcels of property owned by Mayan Lagoon frozen until resolution of this Claim.

UNDUE DELAY IN SEEKING EQUITABLE RELIEF

103. The Defendants say that the Claimants not in any way sought to fully address their delay to seek an injunction or institute the action. The Claimants state that they did not discover the forgery and fraudulent transfer in July – August of 2020 when they were able to conduct an asset search and a search at the Companies and Corporate Affairs Registry which "prompted this claim and application".

104. While I accept that **Tab BB 1-29** of Brent's Affidavit does contains a search requested by the Claimants dated March 2020 against a party that the Claimants have included as a defendant in other proceedings; and that Tab **BB1-24** of Brent's Affidavit also contains a search that was requested in February 2020; I am not persuaded that the Defendants do prove inordinate delay in seeking an injunction or instituting action by asserting that attorneys for the Claimants knew or should have known of corporate changes to Mayan Lagoon or discussed on behalf of Copper Leaf settlement and transfer of certain properties to investors in 2019.

105. I do not find accordingly, that there was inexcusable delay on the part of the Claimants to seek an injunction or institute the action.

106. In any event, I accept the guidance given by the Eastern Caribbean Supreme Court in the BVI case of **Hualon Corporation v Marty Limited** BVIHC(COM) 2014/0090, where there was an application to discharge an injunction obtained without notice. One of the grounds for discharge was a delay of five years without explanation.

107. In that case, Farara J says at paragraph 76, ***"The next ground relied on by the Defendant in discharge the injunction is in ordinate delay by the Claimant in bringing the application. This factor is not per se a 'technical' point. It is substantive factor to be taken into account by the court in determining the important question of whether there is a real risk of dissipation of assets A,B,C,DE,A v A. Civil Appeal No. 1 of 2011 per Webster, JA at paras [24] to [25]. Where the delay is inordinate and not properly explained, the court may conclude that there is no real risk of dissipation, and the interim relief ought not be granted or, where previously granted, ought to be discharged. However, there is no general rule that delay in applying for an injunction or freezing order is a bar simpliciter to obtaining such interim relief."*** [Emphasis added]

108. I do not find that there was either undue or inordinate delay in this claim on the part of the Claimants and I decline to discharge the Freezing Order on this ground.

JUST AND CONVENIENT

109. In all the circumstances, it is still, at this stage, just and convenient to maintain the freezing order which was made ex parte, albeit with a requirement for a fortified undertaking to be made by the Claimants.

ORDERS

110 The Following Orders are made :

1. The Freezing Order which was made on November 16, 2020 shall continue and remain in force until further Order of the Court;

2. The Undertaking by the Claimants shall be fortified, and parties are invited to make submissions regarding the scope, quantum as well as the manner in which fortification shall be effected;

3. Costs shall be costs in the cause

DATED MARCH 4, 2021

Lisa M Shoman
Justice of the Supreme Court of Belize