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

CLAIM NO. 624 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
	(GREEN GOLD FARMS LIMITED	2nd DEFENDANT
	(RIA LTD	3rd DEFENDANT
	(M.E.L. INVESTMENTS LTD	4th DEFENDANT
	(RICHARD DYKE ROGERS	5th DEFENDANT
	(REGISTRAR OF COMPANIES	1st INTERESTED PARTY
	(REGISTRAR OF LANDS	2nd INTERESTED PARTY

BEFORE THE HONOURABLE MADAM JUSTICE LISA SHOMAN

HEARINGS: December 02, 2020
December 21, 2020
February 05, 2021
February 18, 2021

Written Submissions 2020/2021
26th November 2020 – Claimants
3rd February 2021

1st February 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 in this Claim are two applications – one is an Application by the Claimants for an interim Freezing Order, which was 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 are seeking, in this Claim several declarations and reliefs against the Defendants for breach of fiduciary duty and breach of trust; declarations that the Airport Property is held on trust; Orders for various things including for transfer of title to the Airport Property, surrender of original Transfer Certificate of Titles (TCTs), cancellation of Notice of Appointment of a Director, damages, interest and costs.

3. The Claimants are Bella Group LLC, a limited liability corporation duly incorporated in St Christopher and Nevis with registered office situated at Hunkins Waterfront Plaza, Suite 556, Charlestown, Nevis ("**Bella Group**"); Brent Borland, a director of MEL Investments Ltd. of 48 North Haven Way, Sag Harbour, New York 11963, a member and beneficial owner of Bella Group LLC **("Brent");** Alana Latorra Borland, a director of MEL Investments Ltd of 48 North Haven Way, Sag Harbour, New York 11963, a member and beneficial owner of Bella Group LLC **("Alana");** and Copper Leaf LLC, a limited liability company incorporated in the State of Washington, USA with its principal place of business in Normandy Park, Washington USA ("**Copper Leaf**").

4. The Defendants are Marco Caruso, a businessman who resides at The Placencia Resort, Placencia Road Stann Creek District, Belize and a director of M.E. L. Investments Limited, **("Marco");** Green Gold Farms Limited, a company duly incorporated under the Companies Act, Chapter 250 of the Laws of Belize with registered office situate at No. 8 St. Vincent Street, Dangriga Town Stann Creek District, Belize **("Green Gold Farms");** R.I.A. Ltd. , a company duly incorporated under the Companies Act, Chapter 250 of the

Laws of Belize with registered office situate at Mile 13 Placencia, Stann Creek District, Belize **("RIA");** M.E.L. Investments Ltd, , a company duly incorporated under the Companies Act, Chapter 250 of the Laws of Belize with registered office situate at Placencia Inn and Resort, Placencia Road, Stann Creek District, Belize **("M.E.L.");** and Richard Dyke Rogers, a businessman who resides 1205 Olive Avenue, Dalhart Texas 79022 **("Rogers").**

5. The Registrar of Companies and the Registrar of Lands are both joined to the Claim as an Interested Parties.

SCOPE OF THE CLAIM

6. The Claimants seek a declaration that Marco was in breach of his fiduciary duties and in breach of trust when he entered into the Memorandum and Subscription Agreement and when he instructed Green Gold Farms to transfer title to the Airport Property to RIA instead of procuring a transfer of title to M.E.L; and a declaration that the Memorandum and Subscription Agreement are unlawful and without legal authority;

7. The Claimants also seek a declaration that at all material times subsequent to the Deed of Rectification, Green Gold Farms held the Airport Property in trust for M.E.L. and is liable to account therefor, or the value thereof.

8. The Claimants seek an Order that Green Gold Farms transfers title to the Airport Property to M.E.L. and if the officers refuse to do so within 14 days that the Registrar of Lands in favor of M.E.L.

9. A Declaration that RIA Ltd. holds title to the Airport Property on trust for M.E.L. and is liable to account for the Airport Property, or the value thereof.

10. An Order that RIA surrenders to the Claimants the original duplicate Transfer Certificate of Title dated 5th day of February 2019, being title to the Airport Property.

11. An Order that the Registrar of Companies do cancel the Notice of Appointment of Richard Dyke Rogers as Director of RIA and the Returns of Allotment of 1 share to Rogers, both dated the 21st day of December 2018.

12. An Order that the Registrar of Lands do cancel in the Land Titles Register, the Transfer Certificate of Title held by RIA Ltd, dated 5th day of February 2019, being title to the Airport Property, together with all ancillary documents accompanying the application to transfer title.

13. The Claimants also claim an order restraining the 3rd Defendant, whether by itself, its officers, servants, agents or assigns or otherwise from transferring, disposing otherwise alienating ownership of encumbering the Airport Property, title to which is a TCT dated the 5th day of February 2019 TCT -201990009 registered in its name, until further order of the Court. The Claimants also seek damages, interests and costs.

14. According to the Claimants, the factual background is as follows:

    (a) that M.E.L, the 4th Defendant, of whom Brent and Alana are Directors, acquired a beneficial interest in the land known as the Airport Property via a Deed of Rectification entered into between M.E.L and the 2nd Defendant, Green Gold Farms.

    (b) Pursuant to the terms of the said Deed of Rectification, Green Gold Farms was to transfer title to the Airport Property to M.E.L in exchange for M.E.L transferring a 1,125 acres parcel of land to the nominee of Green Gold Farms, Sagitun Farms Limited, which M.E.L did.

    (c) In or about April, 2018, the shareholders of M.E.L agreed to incorporate an entity to be called RIA Limited, which would take title to the Airport Property, with Marco and Brent being 50/50 partners in the said entity. The minutes of that meeting were purportedly not registered at the Belize Companies and Corporate Affairs Registry.

(d) RIA Ltd was incorporated and on the 24th December, 2018, Marco caused minutes to be recorded naming Richard Dyke Rogers as the sole director of RIA Ltd and caused one share to be allotted to him.

(e) Marco and Green Gold Farms then transferred the Airport Property to RIA Ltd, which is owned and controlled by Rogers.

(f) Prior to the transfer to RIA Ltd, Marco did not obtain the approval of the Group No. 2 directors of M.E.L, Brent and Alana Borland as purportedly required by Article 143 of M.E.L.'s Articles of Association.

(g) The Claimants say that the stated consideration for the transfer of the Airport Property was BZ$500,000.00, notwithstanding that the Airport Property was valued at US$50,776,000.00, as at the 5th February, 2015, and that Marco had full knowledge of the same. The true consideration for the transfer according to the Claimants was the release of Marco from claims by an Investor Group in relation to monies owed by Brent pursuant to a Memorandum of Understanding between Marco and Rogers,

(h) The Claimants allege further that Marco also entered into a Subscription Agreement, without the notice or approval of M.E.L.'s Group No. 2 directors, Brent and Alana, with Rogers in regards to Ria Partners LP, in which they agreed to transfer the Airport Property to Riversdale International Airport LLC, an entity that would be owned 23.5% by RIA Partners LP, and 76.5% by Caruso and another entity owned by Rogers.

(i) The Claimants claim that the Defendants' actions, and the subsequent transfer of the Airport Property to RIA Ltd was carried out after Copper Leaf had commenced a claim against Belize Infrastructure Fund I LLC, Marco and Brent in the Southern District of New York on the 13th July, 2018, and thereafter, obtained a default

judgment against both Marco and Brent in the sum of US$10,235,711.93 plus attorney's costs.

(j) The default judgments obtained in that Claim were used to file *in personam* claims in the Supreme Court of Belize in *Claim No. 141 of 2019 Copper Leaf LLC v Belize Infrastructure Fund 1, LLC, Brent Borland and Marco Caruso* A default judgment was obtained against Brent in Claim No. 141 of 2019, but Marco is defending the said claim.

15. The Defendants responded by 2 Affidavits and dispute those facts, as set out below:

(a) Bella Group as a member of M.E.L. seeks on behalf of M.E.L., the cancellation of the Transfer Certificate of Title TCT - 201900008 dated February 5th, 2019 held by RIA.

(b) The net effect is that the Airport Property transferred on February 5th, 2019 from Green Gold to RIA will revert to Green Gold. Thereafter, the Airport Property will be transferred to M.E.L.

(c) Interwoven, in the foregoing is a claim:

i) "against Marco… for fraud, breach of fiduciary duty in relation to M.E.L. and breach of the Articles of Association of M.E.L.;"

ii) "against Green Gold Farms…for breach of contract, being the failure to transfer the Airport Property to M.E.L. in accordance with the Deed of Rectification;"

iii) "against RIA Ltd…for fraud and an order that RIA Ltd holds the Airport Property in (sic) constructive trust for M.E.L.:"

iv) "the case against Rogers is for fraud in relation to his part in the fraudulent scheme by Marco"

(d) Thus Brent and Alana along with Copper Leaf do not have any standing to make any other claim to the Airport Property and are limited to claims in damages, if any.

A. CLAIMANTS' APPLICATION FOR A FREEZING ORDER

16. The Claimants applied via an *Ex Parte* Notice dated on 10th October 2020, supported by the Second Affidavit of Brent Borland dated the 10th day of October 2020, and filed on October 26, 2020 sought a freezing order pursuant to Section 27 of the Supreme Court of Judicature Act, Chapter 91 of the Substantive Laws of Belize, Revised Edition 2011, and Rule 17.1(f) Supreme Court (Civil Procedure) Rules, 2005 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, an order restraining the 1st, 3rd, and 5th Defendants, whether by themselves, their servants, agents, assigns or otherwise, from transferring, disposing, otherwise alienating or encumbering the 415.63 acres and the 148.54 acres parcels described in the Deed of Rectification situated between Riversdale Area, Stann Creek District, Belize ("**the Airport Property**"), until the determination of the proceedings herein;

(2) Pursuant to section 27 of the Supreme Court of Judicature Act and rule 17.1(f) of the Supreme Court (Civil Procedure) Rules, an order restraining the 1st and 3rd and 5th Defendants, whether by themselves, their servants, agents, assigns or otherwise, from transferring, disposing, otherwise alienating or encumbering the shares in the 3rd Defendant in the event that damages are awarded against the 5th Defendant;

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

(4) Costs in the cause.

17. On December 2nd, 2020, (perfected on December 8th, 2020) the Court granted, (upon the undertaking of the Claimants to abide by any order that the Court might make as to

damages should the 1st, 3rd and 5th Defendants sustain by reason of the Order) orders (**Freezing Injunction**) against the Defendants in the following terms:

a. The 1st, 3rd, and 5th Defendants, are restrained whether by themselves, their servants, agents, assigns or otherwise, from transferring, disposing, otherwise alienating or encumbering the 415.63 acres and the 148.54 acres parcel as described in the Deed of Rectification, ("the Airport Property") until 5'o clock in the afternoon on the 23rd December, 2020 or until the determination of these proceedings herein or further order of the Court;

b. The 1st, 3rd and 5th Defendants are restrained whether by themselves, their servants, agents, assigns or otherwise, from transferring, disposing, otherwise alienating or encumbering , to a place beyond the reach of the Court, the shares in the 3rd Defendant, in the event that the damages are awarded against the 5th Defendant until 5'oclock in the afternoon on the 23rd, December, 2020 or until the determination of these proceedings herein or further order of the Court;

c. A further hearing of the matter for December 22, 2020 at 10.00 am;

d. Costs to be in the Cause

18. On December 22, the Parties agreed to an Order made by Consent to a continuation of the Freezing Order granted on December 2nd, 2020, and to an inter partes hearing on February 5th, 2021, and for directions for filing of Affidavits in response and written submissions to be filed.

19. On February 5th, Parties were given liberty to explore and/or settlement of the terms of an undertaking acceptable to all. The Freezing Order was continued and still holds.

DERIVATIVE CLAIM

20. On the 10th of October, 2020, the Claimants also filed an ex-parte Application supported by the First Affidavit of Brent Borland for permission for the 1st Claimant, Bella Group to bring and continue a Derivative Claim; for leave to serve the Claim Form and the Statement of Claim on the 5th Defendant Richard Dyke Rogers by personal service outside of the jurisdiction at 1205 Olive Ave, Dalhart Texas USA; and to serve all applications, affidavits, orders and notices in the Claim by personal service at the same address.

21. On December 2nd, 2020, (perfected on December 8th, 2020) the Court granted orders as follows :

(a) The 1st Claimant is granted permission to bring and continue a derivative Claim in relation to the 4th Defendant, M.E.L Investments Ltd.;

(b) The Claimants are granted permission to serve the Claim Form and Statement of Claim on the 5th Defendant Richard Dyke Rogers by personal service outside of the jurisdiction at 1205 Olive Ave, Dalhart Texas 79022, USA

(c) All applications, affidavits, orders and notices in the Claim herein to be served by personal service outside of the jurisdiction at 1205 Olive Ave, Dalhart Texas;

(d) The 5th Defendant is to file an Acknowledgement of Service within 42 days from the date of personal service and a Defence within 56 days;

(e) Costs of the Application to be costs in the cause.

22. On the 17th day of December 2020, Acknowledgement of Service was filed on behalf of all Defendants.

THE LAW ON GRANTING FREEZING ORDERS

23. In the Belizean case of **Internet Experts S.A. D.B.A. Insta Dollar v. Omni Networks Limited (In Liquidation) et al,**[1] Madam Justice Young sets out the jurisdictional foundation for freezing orders as follows:

"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. "

24. Young J refers in the same paragraph, to freezing orders as being ***"...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."***

25. 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** [2]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,

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[1] Claim 803 of 2010 (unreported), at paragraph 7

[2] [1975] 2 Lloyd's Rep 509

26. 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."***

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

27. 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. The Claimants submit that the facts relied on as stated in the Second Affidavit of Brent Borland show that there are serious issues to be tried as follows:

(1) The case against Marco is for fraud, breach of fiduciary duty in relation to M.E.L and breach of the Articles of Association of M.E.L;

(2) The case against Green Gold Farms is for breach of contract, being the failure to transfer the Airport property to M.E.L in accordance with the Deed of Rectification;

(3) The case against RIA Ltd is for fraud and an order that RIA Ltd holds the Airport Property in constructive trust for M.E.L; and

(4) The case against Rogers is for fraud in relation to his part in the fraudulent scheme by Marco.

28. The Claimants need to show, however 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** [3]which

[3][1983] 1 WLR 1412

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.

29. In the **Internet Experts** case at paragraph 10, Justice Young observes, ***"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."***

30. This Court must examine the affidavit evidence which has been put before by the Claimants as well as by the Defendants put before it to see if the Applicant(s) have been able to meet the required standard.

31. I accept, without conducting any manner of "mini-trial" of the competing facts and issues in this claim that the Claimant has crossed the necessary hurdle of showing this Court that a good arguable case exists - particularly given the Claimants' vigorous contention that Marco acted for an improper purpose by entering into the Memorandum and the Subscription Agreement with Rogers and his Investor Group, by which he was to obtain personal benefit, and the assertion that that he was to be given a majority interest in an entity which was to acquire the Airport Property as well as the benefit of being released from any liability in relation to monies owed by Brent and/or himself - pursuant to the said Memorandum. Marco also allegedly obtained a personal benefit. Whether that is so or not, at this stage is not for me to decide. But there is clearly a good arguable case.

32. Additionally, the issue of the fiduciary duty owed to M.E.L by Marco and whether the transfer of the Airport Property pursuant to the Memorandum and the Subscription

Agreement was to give Rogers and "the Investor Group" an unfair advantage over other creditors is an integral ingredient of the "good arguable case".

A REAL RISK OF DISSIPATION OF THE ASSETS

33. The test is an objective one and in **Lakatamia Shipping Co v Morimoto**[4], 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**[5] 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.*

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[4] [2019] EWCA Civ 2203

[5] [2018] EWHC 2199 (Comm)

(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)**

34. 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 **Kaefer v AMS**[6]

35. The Applicants do not have to prove the risk of dissipation on the balance of probabilities, though the Applicants have to show that the risk is ***"more than barely capable of serious argument."*** 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."***

36. The Applicants in this Claim do, in my view, do provide a plausible evidentiary basis for risk of dissipation.

37. The Claimants have sought an injunction against the 1st, 3rd and 5th Defendants herein, inter alia, restraining them from dealing, transferring or alienating in any way the Airport Property and any of the shares in RIA Ltd. They assert that this claim is concerned with the fraudulent transfer of the Airport Property, which fraud was committed against M.E.L and its shareholders, as well as Copper Leaf, a creditor.

38. The Second Affidavit of Brent Borland provides a sufficient basis for showing that there is risk of dissipation, and neither the Affidavit of Marco Caruso or that of Richard Dyke Rogers provides a sufficient basis for displacing that basis.

39. There is no dispute that the transfer of the Airport Property to RIA Ltd. took place, and the meat of this dispute is really why the transfer took place, under what terms. Those are all matters for trial and one of the main subject matters of this claim is eminently the Airport Property, and its ownership.
At this stage, the primary concern of the court is to ensure "***that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation***

[6] [2019] 3 All ER 979.

means putting the assets out of reach of a judgment whether by concealment or transfer."

40. The Defendants do not deny the transfer of the Airport Property from Green Gold Farms to RIA Limited, which Rogers claims to own and which he says is operated for the benefit of Riversdale International Airport LLC which includes "the Group."

41. The Airport Property asset has changed hands once already, and this is a fact. The duty of the Court is to preserve the asset, and ensure that it remains within the reach of a judgment, during the resolution of disputes under this claim.

42. I also accept that since this Claim is based on allegations of fraudulent actions taken by the Defendants, that there is a sound basis for inferring a general risk of unjustified dissipation of assets.

BALANCE OF CONVENIENCE – "JUST AND CONVENIENT"

43. In my assessment, the balance of convenience at this stage does lie in favor of the grant of the freezing order, in respect of the Airport Property, as well as the shares in RIA, which are the subject matters of the interim order granted and of the declarations and orders prayed in the claim, and it would therefore be just and convenient to grant the Freezing Order at this stage of proceedings.

ADEQUATE PROTECTION BY THE CLAIMANTS' UNDERTAKING

44. 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. The Claimants in this claim have all given an undertaking.

45. The Defendants in their written submissions to their application to discharge, refer to the undertaking being given by the Claimants as "a farce" and ask "how can the Claimants

will make good all these undertakings". The First Affidavit of Marco Caruso at paragraph 92 claims that as far the Defendants are aware "Brent does not have any assets in Belize, and that they "are not aware that any of the Claimants have any assets within the jurisdiction."

46. Counsel for the Claimants in response, argues that the Undertaking is made by all the Claimants (including Copper Leaf LLC), that the Defendants have not provided sufficient basis to justify their belief that the undertaking is insufficient, and further, that if they are not satisfied as to the undertaking, they should apply for fortification of the same.

47. It is the clear and settled 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**[7]. The Defendants have not in fact applied for the fortification of the undertaking given by the Claimants in this case.

48. 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.***

[7] BV1HCVAP2104/0004

49. In the Jamaican Court of Appeal case of **TPL Limited v Thermo-Plastics (Jamaica) Limited**[8], the Court of Appeal of Jamaica concluded that the proper practice is to require evidence of willingness and an ability to provide a proper undertaking as to damages. In this claim, such evidence can be found on behalf of the Claimants in the Second Affidavit of Brent Borland, and in fact, this Court accepts that the Claimants have all given a complete binding written undertaking in this claim.

50. Furthermore, even the Defendants' evidence per the Affidavit of Richard Dyke Rogers which was filed in this claim, is that the Defendants know of assets which Brent possesses or may possess within the jurisdiction. At paragraph 54 of his Affidavit, Mr. Rogers states as follows: ***"This same fraudster, Brent, benefits from the settlement that the Group has made. Because the settlement was reached Brent retains his ownership in PED which still owns property which should become more valuable as surrounding properties are developed by our group."***

51. I agree that the effect of the undertaking which is expressly given in the interim Freezing Order is sufficient to protect the Defendants if they suffer any damages as a result of the Freezing Order being wrongfully granted, and I therefore find that the requirements and the basis for the Freezing Order is met.

B. DEFENDANTS' APPLICATION TO DISCHARGE THE FREEZING ORDER

52. The Defendants filed their Application dated January 18, 2021 and filed January 18, 2021 on behalf of the 1st to 5th Defendants, seeking the discharge of the freezing injunction granted by the Court without notice on December 2nd, 2020 continued December 21st, 2020, and seeking an inquiry into the damages caused by the freezing injunction in the matter. The Application is supported by the First Affidavit of Marco Caruso dated

[8] [2014] JMCA Civ 50

January 18, 2021 and by the Affidavit of Richard Dyke Rogers sworn on January 15, 2020 and filed that same day.

53. The Defendants are applying for the following reliefs:

1. ***The Freezing Injunction contained in the Order December 2nd, 2020 continued December 21st, 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.***

54. 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 December 2nd , 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

55. The Defendants/Respondents say that the Claimants are seeking to use the Freezing Injunction as an "instrument of oppression". At paragraph 41 of their written submissions, the Defendants say that the Claimants, "...are seeking to use this claim as a vice to hold the Airport Property until Claim 141 of 2019 is completed."; and say that it is a "Rank abuse of the Freezing Injunction".

56. In his First Affidavit, Marco deposes at paragraphs 88 that the current injunction "could potentially upset the Belize Infrastructure Fund 1 investors settlements" and says that this could cause harm not only to the Defendants but also to the Claimants.

57. Marco avers that that there is "no gain at all for such malicious action from the Claimants other than furtherance of their ongoing scheme and opposition of the Defendants". Marco does not, however, provide this Court with detail (other than a bald assertion) as to how the action is malicious to him or the other Defendants, nor how it is oppressive.

58. Furthermore, Marco also says at paragraph 90 that "the various injunctions are being spread out so as to pressure and oppress the Defendants to settle". Whether that is so or not, the Court must focus on the freezing order in this particular claim, and whether the

Claimants herein have met the tests required to sustain this Order until further order of the Court. In my view, they have done so.

59. Marco complains that since the order made in this claim, "the Belize Bank Limited has called in ALL the personal loans of which Marco a party". There is no further elaboration on the theme, nor any evidence offered as to how this is calculated oppression by the Claimants or how it affects any other Defendant - other than Bank Letters which are attached at Tab R of Marco's Affidavit. While this may well be painful, there is no nexus to prove causation, nor is the action of the Bank it is not determinative of oppressive conduct by the Claimant. This does rise to the proof needed that the Order is oppressive.

NO REAL RISK OF DISSIPATION

60. I have assessed the evidence provided by both the Claimants and the Defendants and I have found that there is a real risk of dissipation of the Airport Property and the shares in the 3rd Defendant and that the Claimants have satisfied the threshold test. I therefore decline to discharge the injunction on this basis.

MATERIAL NON-DISCLOSURE AND MISREPRESENTATION

61. The Defendants argue in their written submissions in support of their application to discharge at paragraphs 68 to 72 that the Claimants "seek the aid of the Court but have not come to the Court with clean hands".

62. The Defendants say that the "Claimants have misled the Court by suppressing relevant information and distorting material to produce a jaundiced view of the matters herein. The Claimants have purposely withheld information and communication between the Claimants and Defendants that would have shown that the Claimants were always aware of the matters they now complain of."

63. The Defendants say further that the Claimants' "actions are wilful and go beyond mere non-disclosure" and deserve rebuke. They claim that the "Claimants have set out to mislead this Court and have used its processes in an abusive manner".

64. The Respondents say additionally that the Claimants have sat back at least since September 2018 and May 2019, knowing of the materials of which they now complain. Instead of acting promptly, the Claimants have waited to file multiple claims and injunctions having had ample time to devise this stratagem.

65. According to the Defendants, this would justify the discharge of the Freezing Order made on December 8, 2020.

66. In the UK Court of Appeal case of **PJSC Commercial Bank v Kolomoisky** [9] the Court 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:

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;

[9] [2019] EWCA Civ 1708, at paragraph 249 onwards

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;

67. 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.

68. 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.

69. In the current case, there was voluminous disclosure by both Claimants and Defendants which was not material, but which was purportedly background material for this claim as well as for a series of other claims.

70. I am obliged to note (and not for the first time) that the parties to this claim have not requested the consolidation of any or all these claims, and, thus, while the background is useful to understanding the relationship of the Parties, the real issue is importance of the

non-disclosed material to the current issues which are to be decided by the Court in this claim.

71. Brent, Marco and Rogers, all omit certain details in their respective affidavits, but I do not consider them to be deliberate, and neither do those omissions amount to abuse of jurisdiction much less to material non-disclosure or misrepresentation of the facts by any of the Affiants, or of there being material non-disclosure or misrepresentation of the facts by the Claimants at the without notice hearing on on the 2nd of December 2020.

72. There are paragraphs of complaint in the Affidavit of Marco that make much 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 misleading the Court, failure to disclose all material facts, and using the Court process in an abusive manner.

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

74. At this juncture, the Court is not enabled or entitled to sift through the varied, colorful and fulsome narratives that is the affidavit evidence of the various deponents, as it will do at trial. There is a time and place for that exercise and we are definitely not there yet.

75. After a careful review of all affidavit evidence, I find that the Claimants/Applicants have made full and fair disclosure of all the material facts necessary at this stage to grant the Freezing Order made, and that there has been no abuse of the process of the Court.

WORTHLESS UNDERTAKING

76. The Defendants seek to discharge the injunction on the basis of an insufficiency of the undertaking.

77. They contend at paragraph 57 of their written submissions in support of their Application that the giving of an undertaking by the Claimants *"is not a flippant requirement that can be ignored"*, and that *"the undertaking is a venerated requirement of the common law without which an injunction will not be granted and without which an injunction will be discharged."* I agree.

78. The Defendants contend that the Claimants "have failed to give an undertaking" and that only Brent gave the undertaking, but a careful reading of the Freezing Order which was granted in this Claim the 2nd December, 2020, shows that all Claimants have specifically given an undertaking.

79. Having found above, that the undertaking which is expressly given in the interim Freezing Order is sufficient to protect the Defendants if they suffer any damages as a result of the Freezing Order being wrongfully granted, I therefore find that the requirements and the basis for accepting a similar undertaking for the Freezing Order until trial or further order of the Court is met.

UNDUE DELAY IN SEEKING EQUITABLE RELIEF

80. The Defendants provide only a rather tepid assertion that the Claimants "have sat back at least since September 2018 and May 2019, knowing of the materials of which they now complain. Instead of acting promptly, the Claimants have waited to file multiple claims and injunctions having had ample time to devise this stratagem.".

81. Despite the tepidity of the assertion, I have reviewed the available Affidavit Evidence of Brent, Marco and Rogers on the point, but I am not persuaded that the Defendants do prove that the Claimants did inordinately delay in either instituting a claim or in seeking an injunction.

82. I am guided, in any event by the Eastern Caribbean Supreme Court decision in the BVI case of **Hualon Corporation v Marty Limited**[10], where there was an application to discharge an injunction obtained without notice.

83. 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]

84. I do not find, as a matter of fact that there was either undue or inordinate delay in instituting this claim, or applying for an Injunction on the part of the Claimants and I therefore decline to discharge the Freezing Order on this ground.

JUST AND CONVENIENT

85. In all the circumstances, it is still, at this stage, just and convenient to maintain the freezing order which was made ex parte on December 2nd, 2020 and continued on December 21st, 2020

86. I sincerely thank all counsel and Senior Counsel for their advocacy, as well as the full written submissions provided to the Court which have been most helpful.

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[10] BVIHC(COM) 2014/0090

ORDERS

87. The following Orders are therefore made:

1. The Freezing Order which was made on December 02, 2020 shall continue and remain in force until further Order of the Court; and

2. Costs shall be costs in the cause

Dated April 28, 2021

Lisa M Shoman

Justice of the Supreme Court of Belize