IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV2006/0293

IN THE MATTER OF THE WINDING-UP ORDER OF CARIBBEAN VENTURES INTERNATIONAL LTD (IN LIQUIDATION) BY THE HIGH COURT OF JUSTICE OF DOMINICA IN THE 29TH DAY OF JULY 2005

AND

IN THE MATTER OF THE COMPULSORY LIQUIDATION ORDER OF BANK CARIBE LIMITED (IN LIQUIDATION) BY THE HIGH COURT OF JUSTICE OF DOMINICA IN THE 2ND JULY 2004

BETWEEN:

CARIBBEAN VENTURES INT'L LTD (In Liquidation)
MARCUS A. WIDE, Liquidator of Caribbean Ventures Ltd

Claimant

AND

CAROSELLO ESTABLISHMENT
DAVID ALAN POLLOCK
KELLY IVERSON POLLOCK

Defendants

Appearances :

Mr. B. Mc Namara for Claimant
Mrs. Kim St Rose for Defendants
David and Kelly Pollock

2006: November 29,
December 20

INTRODUCTION

[1] **EDWARDS J:** This is a judgment on the Application of 2 Defendants to set aside, and the Application of the Claimants to continue, a freezing order made in relation to assets belonging to the 3 Defendants. The Application of the 2 Defendants also requested that the Claimants give security for costs; and for items removed from their residence to be returned to them. The Applications raise collateral issues concerning the recognition and powers of a foreign liquidator in the Member States of the Eastern Caribbean Supreme Court; and the impact of the liquidation order of one State on civil actions subsequently brought in the foreign State.

BACKGROUND FACTS

[2] Caribbean Ventures International Ltd (CVIL) is a body corporate duly organized and registered under the International Business Companies Act No. 10 of 1996 of the laws of the Commonwealth of Dominica, on the 19th May 1998, with registered office at 40 Hillsborough Street, Roseau, Dominica. CVIL was the original holding Company for another Dominican Company Banc Caribe Ltd which operated under an Offshore Banking license from October 1998 to February 2003. In February 2003 Mr. Marcus Wide was appointed by the Government of Dominica as the Bank's Controller and Receiver. On the 16th April 2003, on the Application of the Attorney General, the High Court in Dominica ordered that Banc Caribe be compulsorily wound-up. Mr. Marcus Wide was then appointed as its Liquidator, Prior to the appointment of Mr. Wide as Controller and Receiver of Banc Caribe, Mr. David Pollock was its Managing Director and Chief Financial Officer. The other principal and director of Banc Caribe was Mr. Paul Jones.

[3] On the 27th April 2005 Mr. Marcus Wide as Liquidator for Banc Caribe Ltd petitioned the Court for the Winding-Up of CVIL. By a Winding-Up Order made on the 29th July 2005 by the High Court in Dominica, CVIL is being compulsorily

wound-up. By the said Order, Mr. Marcus A Wide, a certified insolvency practitioner and chartered accountant was appointed Liquidator. Mr. Wide resides in Halifax Regional Municipality, Nova Scotia, Canada.

[4] This Winding-Up Order and Mr. Wide's appointment as Liquidator were recognized by the High Court of St. Lucia on the 26th April 2006 as having full force and effect in St. Lucia.

[5] Carosello Establishment (Carosello) is a corporate entity formed in Vaduz, Liechtenstein. Since approximately March 2000 Mr. David Pollock has been principal of Carosello.

[6] Mrs. Kelly Iverson Pollock is the wife of Mr. David Pollock and is alleged to be a principal or beneficial owner of Carosello.

[7] Carosello owns 2 parcels of immovable property in St. Lucia situate at Seagrape Crescent Road, Rodney Bay registered as Block 1255B-441 and 442 since March 2000. There is a dwelling house on this property known as **"Villa Caribe"** which was built after Carosello acquired the property. Mr and Mrs Pollock have resided at Villa Caribe for several years.

[8] The Statement of Case in this suit alleges that by a scheme of fraudulent activity involving misappropriation and/or conversion, breaches of trust and breaches of his fiduciary duty as Managing Director and Chief Financial Officer of CVIL, Mr. Pollock caused CVIL to discharge Carosello's indebtedness to Banc Caribe through a series of loans, for the acquisition and construction of Villa Caribe in St. Lucia; and that by other machinations including conspiracy and fraud, he misappropriated, converted, advanced or loaned to the Defendants over the period 2000 to 2003 a sum in excess of US$3,400,000.00.

[9] The Claimants contend further that as a result of Mr. Pollock's breaches of his fiduciary duties and breaches of trust, CVIL is entitled to trace any of the funds, profits or any other benefit wrongfully obtained by Carosello, Mr Pollock and Mrs Pollock. By their Statement of Claim, they claim an accounting, tracing of all funds into the hands of Carosello and the Pollock, repayment of all monies owed, US$3,400,000.00, general damages, punitive and exemplary damages, pre-judgment and post judgment interest, costs, and such further or other relief as the Court deems fit to award.

THE FREEZING ORDER

[10] On the 26th April 2006 the Court made a Freezing Order against the assets of the 3 Defendants on an Amended Application filed on the 25th April 2006 Without Notice.

By paragraphs 1 to 6 of this Order it was ordered as follows –

> **"1. That [there be] an Injunction forthwith restraining the Defendants/Respondents until the return date or further order of the court whether by themselves, their servants, their agents, (and where applicable its directors, officers, partners, employees) or otherwise from selling, transferring donating or otherwise disposing (or agreeing to dispose) of the assets listed in paragraph 2 and 3 below.**
>
> **2. The prohibitions contained in paragraph 1 affect the following assets in particular as well as those contained in paragraph 3 below.**

(i) All that parcel of land registered in the Land Registry of Saint Lucia as Block 1255B 441 together with the building erected thereon.

(ii) All that parcel of land registered in the Land Registry of Saint Lucia as Block 1255B 442 together with the building erected therein

(iii) All the fixtures, fittings and furniture of all and every kind found in, on and about the properties and buildings mentioned in (i) and (ii) above.

(iv) The 43′ Scarab boat called "Thunder", the 32′ Luhrs boat called "Reel Time", the 14′ Boston Whaler called "Lil Reel Time", two Yahama 1200XL Waverunners and the 47′ Swan Yacht called "Petrel".

(v) A 2001 Suzuki Grand Vitara, a 1997 Mitsubishi 4 door four wheel drive truck and a 1995 Harley Davidson Wide Glide.

3. Further to paragraphs 1 and 2 the Defendants/Respondents assets shall be any and all of the Defendants/Respondents assets whether or not they are in their own name and whether they are solely or jointly owned. For the purpose of this order the Defendants/Respondents assets include any asset which they have the power, directly or indirectly, to dispose of or deal with as if it were their own. The Defendants/Respondents are to be regarded as having such

power if a third party holds or controls the asset in accordance with their direct or indirect instructions.

4. Costs of this application are reserved for the hearing of the application on the return date.

5. The return date for this Injunction shall be Monday 15th May 2006.

6. That the Liquidator is entitled to administer and take possession of and gather all present and future property, assets and undertakings of the Applicants within the jurisdiction, including all property and records now or formerly under the control, management and administration of directors, officers, agents and employees of the Applicants, and to do all such things as may be necessary or expedient for the protection of the Applicants' property located in St. Lucia."

[11] The return date for this freezing order was the 15th May 2006.

[12] On the 8th May 2006 the Claim filed by the Liquidator for Caribbean Ventures Int'l Ltd (CVIL), pleaded that the Liquidator Mr. Marcus Wide –

> ". . . claims against the Defendants . . . the sum of US$3,400,000.00 (E.C.$9,214,000.00) together with pre and post judgment interest at the rate of 6% per annum . . . due and owing by the Defendants to the Claimants by virtue of . . . (1) loans granted by . . . [CVIL] to the Defendants of which the sued balance remains unpaid; (2) conversion by the Defendants of sums of monies that belonged . . . [CVIL]; (3) misappropriation of . . . [CVIL's] monies; breaches of trust and fiduciary duties owed to . . . [CVIL]."

[13] As a result of the freezing order the residence of the Pollocks known as Villa Caribe, situate at Seagrape Crescent Road at Rodney Bay St. Lucia, registered as Block 1255B-441 and 442 is among the assets frozen. The Police have assisted the Liquidator in securing this property by maintaining 24 hours guard duty on the premises.

[14] Six of the 7 boats/marine vessels mentioned at paragraph 2 (iv) of the freezing order have been secured on dry dock at Rodney Bay, while the Swan Yacht "Petrel" was allowed to remain in the water under the watchful eyes of the police/security officers.

[15] It appears that apart from bringing the present civil action against the Defendants, the Liquidator Mr. Wide had made a report to the Police in St. Lucia in 2005 against Mr. Pollock. Mr. Wide has admitted that as Liquidator of Banc Caribe, he had filed a complaint against Mr. Pollock **"arising from the factual circumstances leading to the misfeasance and Breach of Trust Orders issued by the Dominican High Court."** At paragraph 80 of his Affidavit sworn to on the 30th June 2006 and filed on the 4th July 2006, Mr. Wide deposed **– "I felt duty bound to lodge such a complaint given that, among other things, Pollock had perpetrated his misfeasance and breach of trust on the Banc Caribe estate involving the marine vessel from his address in St. Lucia; having improperly used Banc Caribe letterhead and citing that as a current address for the Bank in St. Lucia even though the Bank had no such office and was actually in liquidation at the time."**

[16] As a result of this Complaint the Police in St. Lucia apparently executed a search warrant at the Pollocks residence; and seized their personal and other items apparently in April 2006 prior to the grant of the freezing order.

[17] By their Application filed on the 26th May 2006, the Pollocks are seeking to set aside the freezing order on the following grounds:

> "1. That they are parties in respect of whom the order was made
>
> 2. The items seized do not belong to the Claimants, nor are the Claimants entitled to them
>
> 3. The 2nd and 3rd Defendants have a good and arguable case
>
> 4. There has been substantial non-disclosure and withholding of information on the part of the Claimants
>
> 5. There is a failure to serve the correct owners of the property seized; the 2nd and 3rd Defendants are not the legal owners of much of the property seized, nor are the Claimants entitled to the said property.
>
> 6. The Claimants have insufficient evidence of any risk of dissipation of assets belonging to the 2nd and 3rd Defendants.
>
> 7. This Court is the improper forum for this suit; which arises entirely in Dominica.
>
> 8. There is absolutely no relationship between the Claimants and the 3rd named Defendant and the allegations against her are insubstantial.
>
> 9. That the Claimants are not resident in the jurisdiction and ought to secure the undertaking they have given to the Court as well as provide security for costs in addition."

[18] On the 31st May 2006 the Pollocks filed their Defence and Counterclaim. They admit that they are beneficiaries of Carosello but contend that it is controlled by a founder who has never been served with this claim. They averred that Villa Caribe is only a vacation home at which they are temporarily resident. Mr. Pollock has denied the wrongdoing alleged by the Claimants. He alleges that he was entitled to certain sums of money which he left in CVIL's account to be taken at a later date; and that the sum of money that he took were from the monies which were lawfully due to him and not the CVIL's money.

[19] Mr. Pollock alleges that the Claimants have unlawfully and deliberately hampered him in defending his claim by wrongfully causing the Police to remove all his documentation from his possession by virtue of a search warrant improperly obtained prior to obtaining the freezing order. He alleged that Mr. Wide has brought another suit against him in Dominica, which required that he file statements and proof by the 22nd May 2006. Further, that as a result of the seizure of his documentation, he was unable to file the statements which is likely to cause him to suffer loss.

[20] He averred also that all funds that were paid at his instance were properly paid or repaid from funds legitimately obtained.

[21] The Pollocks deny that Mrs. Pollock had any involvement in Mr Pollock's personal employment or business, neither did she know of or participate in any of his work or employment or in any way had any right to know or participate in any aspect of his business or employment. She contends that having only been married to Mr. Pollock for the last 5 years, and having never lived in Dominica, she was never involved in or participated in the conduct alleged against Mr. Pollock concerning his employment or business.

[22] Mr and Mrs Pollock have counterclaimed for damages exemplary damages against the Claimants for trespass to property and possessions, wrongful detention of their belongings, damaging their reputation and good standing in the community, including their privacy, and hampering them in the conduct of their defence.

[23] On the 5th July 2006 a Reply to the Defence and a Defence to the Counterclaim were filed by the Claimants. They pleaded that Mr. Pollock is noted in the Aliens Landholding Licence registered in the Land Registry and the Deed of Sale for the Villa Caribe property as the Principal of Carosello; and that since both Mr and Mrs Pollock exercise power directly or indirectly to dispose of or deal with the assets of Carosello as if it were their own; they are the beneficial owners of Villa Caribe.

[24] The Claimants have denied that they participated in the police actions pleaded by the Pollocks. They averred that Mr. Pollock has failed to turn over all books, records, files, property and assets, be they electronic or otherwise of CVIL upon the demand being made in Dominica on the 25th August 2005. They allege that Mr. Pollock has failed to attend a Court ordered examination in Dominica on 3 occasions since December 2005.

[26] Concerning Mr. Pollock's denial of any fraud, breach of fiduciary duty, misappropriation of funds or conspiracy with the other Defendants, the Claimants have pleaded the following –

> "**6. . . the Second Named Defendant, by virtue of an Order dated June 10th, 2005 in Claim DOMHCVIII of 2003, has already been found "guilty of misfeasance and a breach of trust in relation to "Banc Caribe Limited, a company that the Second Named Defendant used in a similar manner as the First Named Claimant for the purposes of defrauding and misappropriation of funds, and there by breach of fiduciary duty."**

"7. . . both the First Named Claimant and Banc Caribe Limited (collectively "the companies") were, at certain times run, and operated from their given address in Dominica and from the St. Lucia address that the Second and Third Named Defendants have admitted residing herein. The location of the companies coupled with the length of marriage to the Second Named Defendant would have allowed the Third Named Defendant access and knowledge of the affairs of the companies. Morever the Third Named Defendant directly benefited from the business operations carried on by the Second Named Defendant specifically his conduct of the First Named Claimant's affairs."

[26] As for the Counterclaim, the Claimants pleaded that all actions taken by them in St. Lucia have been done under the Order of this Honourable Court. They deny wrongfully commencing this claim and the other allegations of wrongdoing pleaded by the Defendants. On the 10th November 2006 the Claimants filed an Application for an Order that the Freezing Order Injunction dated the 26th April 2006 together with the undertakings and penal notice contained therein do remain in force and valid until further order of the Court. On the 5th July 2006 the Court granted permission to the Pollocks to use the 2 vehicles, namely Suzuki Vitara and Mitsubishi 4 door 4-wheel drive truck.

APPROPRIATE FORUM

[27] It is convenient to deal first with ground 7 of the Pollock's Application which raises 2 issues –

(i) Whether the St. Lucia Court is the most appropriate or proper forum for the claim brought against the Pollocks?

(ii) Whether concurrent proceedings are an abuse of process of the Court?

Though the Application of the Defendants have not asked for a stay of the action in St. Lucia, ground 7 suggests that they are also requesting a stay.

[28] Learned Counsel Ms. St. Rose argued that the Claimant's use of the findings of the Court in Dominica regarding the actions of Mr. Pollock and the liquidation as a whole, against Mr. Pollock, in the present proceedings, amounts to a re-litigation of those issues and an abuse of process. Having regard to the necessity for the Defendants to put forward their defence without being hindered by reference to the contrary findings of another Court, Ms. St. Rose questioned whether the rulings of the Dominica. High Court in the Liquidation proceedings preclude the Defendants from raising these matters in the St. Lucia Court.

[29] Ms St Rose has regarded the Claimants' conduct in the presentation of their cases in the liquidation proceedings in Dominica, and the current action in St. Lucia as a bifurcation of the matter in order to prevent the Defendants from raising issues connected with their defence of the present suit in St. Lucia.

[30] Counsel for the Pollocks has pointed to the numerous, excessive and unnecessary Applications brought by the Claimants in St. Lucia. She has described them as an abuse of the Court's process.

[31] She concluded that the Orders of the Dominica High Court if allowed to be used by the Liquidator to counter the defence of Mr Pollock, will cause severe prejudice to the Defendants, since the effect of the Orders suggests that there is no basis for pursuing an investigation of the Defendant's defence. If this matter is allowed to continue, Counsel argued, Defendants run the risk of severe prejudice.

[32] Counsel Ms. St Rose in support of her submissions, relied on the exposition of CONCURRENT CIVIL PROCEEDINGS in **Blackstones Civil Procedure 2001** Vol. 2; para 9A-168. I have formed the view that the statements at paragraph 9A-168 concern situations where there are multiple claims existing in the same or different Courts related in some material way. In such circumstances the Court may have to decide whether to consolidate the claims or, stay one set of proceedings while proceeding with the other Blackstone's states –

> **"Perhaps the clearest example of a situation in which the Court might be persuaded to order a stay would be where the several sets of proceedings, involve the same parties and raise the same issues (Slough Estates Ltd v Slough Borough Council [1968] Ch. 299; [1967] 2 All E.R. 270. The advantages to be gained in avoiding a duplication of proceedings are obvious; they include the avoidance of unnecessary costs and delays and of a party being vexed more than once with, in effect, the same claim .... The case for a stay is less strong where there is merely a considerable degree of common ground between the two claims [J Bollinger S.A v Goldwell Ltd . . . [[1971] RPC 412 at 423 per Megarry J] . Some of the earlier authorities suggest a stay will not be granted if the issues in the several proceedings are not the same [Adamson v Tuff (1881) 44 L. T. 420; Higgins v Woodhall (1890) 6- T. L.R; Perry v Croydon Borough Council [1938] 3 All E. R. 670) but this cannot be stated as a strict rule. If there are two Courts faced with substantially the same question or issue, it is desirable that question shall be determined in only one of those two Courts if by that means justice can be done, and the Court will if necessary stay one of the actions (Royal Bank of Scotland v Citrusdal Investments Ltd. [1971] 1 W. L. R. 1469; [1971] 3 All E. R. 558 applying Thomas Launches Ltd. v Trinity House Corporation (Deptford Strond [1961] Ch. 197; [1961 1 All E. R. 26. A second action dealing with the same events as in the first action but alleging a different contract with different terms will not be**

stayed (Hardy v Elphick [1974] Ch. 65; [1973] 2 All E.R. 194, CA). Where there are multiple sets of proceedings against the same Defendant raising the same issues one may be selected as a "test" case the other proceedings stayed pending the outcome of that case (Ashmore v British Coal Corporation [1990] 2 W.L.R. 1437; [1990] 2 All E.R . 98; C.A .)"

[33] Learned Counsel Mr. Mc Namara countered by relying on Section 9 (3) of the Supreme Court Order Cap 2:01 of The Revised Laws of St. Lucia 2001. Section 9 (3) states:

" **(3) The process of the Supreme Court shall run throughout the State and any judgment of the Court shall have full force and effect and may be executed and enforced in any of the States."**

[34] He therefore argued that since the Court process in the case at bar can run equally before the High Court sitting in Dominica or St. Lucia, the location of the sitting for the hearing of the case in the Eastern Caribbean Supreme Court seems superfluous.

[35] He submitted further that given Mr. Pollock's admission that his residence is at Rodney Bay in St. Lucia, this coupled with the location of the immovable and movable assets of the Defendants being in St. Lucia is sufficient reason why St. Lucia is the appropriate forum. Mr. Mc Namara also referred to the cost effective advantage for the Pollock's in the claim being brought in St. Lucia where they reside, and the evidence that Mr. Pollock on many occasions has failed to attend the hearings of proceedings in Dominica.

[36] As for the question of the concurrent proceedings causing prejudice to the Defendants and being and abuse of process of the Court, Mr. Mc Namara focused on the difference in the Liquidation proceedings in Dominica, and the action in St. Lucia. He submitted that the Liquidation proceedings for CVIL and Banc Caribe

Ltd. were pursuant to the Companies Act of Dominica, while the case at the bar is a Claim brought by CVIL against its known debtors who reside or have assets in the jurisdiction of St. Lucia.

[37] Mr. Mc Namara referred to the Dominica Winding Up Order appointing Mr. Wide as Liquidator of CVIL. Paragraphs 13, 14, and 16 of the Order states –

> "13. **The Liquidator shall have the authority as an officer of this Honorable Court to act in the Commonwealth of Dominica or in foreign jurisdiction where he believes assets, property and papers of the Company may be situate or traced at equity or otherwise, and shall have the right to bring any proceeding or action in Dominica and/ or in a foreign jurisdiction for the purpose of fulfilling his duties and obligations under this Order and to seek the assistance of a foreign jurisdiction in the carrying out of the provisions of this Order, including without limitation, an Order of examination of persons believed to be knowledgeable of the affairs, assets, property and papers of the Company and to assist the liquidation in the recovery of the assets and property of the Company."**

> "14. **The liquidator is hereby constituted as a foreign representative for the purposes of any proceedings with respect to the Company that may be commenced or taken under any applicable law outside of Dominica, including but not limited to bankruptcy, trust, insolvency, company or other applicable law."**

> "16. **This Honourable Court requests the aid, assistance and recognition of any foreign Court, tribunal, governmental**

> **body or other or other judicial authority, howsoever styled or constituted, in any other jurisdiction where property and assets of the Company may be found (or traced) to assist in carry out the terms of this Order and the duties and responsibilities of the Liquidator hereunder and to act in aid of and to be complimentary to this Court in carrying out the terms of this Order."**

[38] Relying on these provisions, Mr. Mc Namara argued that it would be amiss to state that CVIL through its Liquidator was unable to pursue assets and debtors of CVIL in jurisdictions other than Dominica, say in USA, Bermuda or Switzerland, by virtue of claims brought in those jurisdictions. It would further be amiss to state that CVIL was limited to bringing claims only in Dominica, he argued.

[39] Accepting the submissions of Counsel Mr. Mc Namara, in my view Counsel Ms St Rose has mischaracterized the nature of the Winding-Up proceedings in Dominica and the Recognition of the Liquidation in St. Lucia. The fact that the remedy of Compulsorily Winding-Up CVIL was invoked by Mr Wide as Liquidator of Banc Caribe does not transform the present claim against the Defendants into an action between Banc Caribe and the Defendants.

[40] The Winding-Up Order for CVIL operates in favour of all the creditors and contributors of CVIL. The Winding-Up Order for Banc Caribe operates for the benefit of depositors, creditors and investors.

[41] On the other hand the instant claim has been brought in St. Lucia for breach of trust, and or the payment of debts. The reason why it was brought is not to harass the Defendants or oppress them, but because of allegations that CVIL has equitable interests in the property of the Defendants in St. Lucia because the funds of CVIL were wrongfully used as loans, and or misappropriated fraudulently

by Mr. Pollock for his personal use and use in the acquisition and construction of the Villa Caribe in St. Lucia.

[42] In such circumstances the Claimants would have the right to trace in equity the property in the hands of Defendants, wherever this property is.

[43] Mr. Wide as Liquidator is performing his duties as an officer of the High Court of Dominica and not as an agent of the Attorney General of Dominica or an agent of CVIL or Banc Caribe.

[44] The Winding-Up proceedings are governed by a different procedure from the Civil proceedings in this case. To argue therefore as Learned Counsel Ms. St Rose has done, suggesting that Mr. Pollock has been facing 2 sets of cases involving the same issues and parties for the same relief, is an inaccurate characterization of the Winding-Up proceedings.

[45] The Order of the Court in Dominica dated 10th June 2005 declared that there was misfeasance and breach of trust in relation to certain actions of Mr. Pollock in or about April 2004 by misapplying US$247,477.70 belonging to Banc Caribe.

[46] The other Order of the Court in Dominica against David Pollock and Paul Morgan Jones dated 10th June 2005 also declared that they wrongfully and in breach of trust misapplied amounts received by them by virtue of an assignment of mortgage pertaining to real property as exceeded in favour of Paul M Jones on or about September 14, 2004.

[47] The allegations in the instant claim in St. Lucia relate to a period between approximately March 1999 up to January 2003. I therefore cannot see how the Defendants can suffer any prejudice because of these 2 Orders of the High Court in Dominica. I can see no re-litigation of issues taking place. The present Claim and Counterclaim must be proven by the parties according to the relevant rules of evidence.

[48] I have considered the principles stated by Lord Goff in **Spiliada Maritime Corporation v Cansulex** [1987] 1 A.C. 460 at 476, which I should apply in dealing with issues touching on forum conveniens contentions.

[49] The Defendants have not persuaded me to exercise my discretion in their favour by staying the proceedings in St. Lucia.

[50] The Court in St. Lucia is required to actively assist the Liquidator Mr. Wide in collecting the assets of CVIL in St. Lucia.

[51] PART 8.3 (2) and (3) of the CPR 2000 states:

> "**(2) Where proceedings relate to land they may be commenced only in the Court office for the Member State, Territory or Circuit in which the land is situated.**
>
> **(3) Any other proceedings may be commenced only in the Court office for the Member State, Territory or Circuit where either the -**
>
> > **(a) cause of action arose; or**
> > **(b) defendant resides or carries on business.**

[52] Article 5 of the Civil Code of the St. Lucia states that: "**The Laws of . . . [St. Lucia] govern the immovable property situated within its limits. Movable property is governed by the law of the domicile of its owner. But the law of . . . [St. Lucia] applies to determine the nature of the property and in cases of disputed possession, and also in questions with reference to privileges and rights of lien, to the jurisdiction and procedure of the Courts, to the mode of execution and attachment . . . and other cases specified in this Code.**"

[53] I therefore conclude that St. Lucia is the proper forum for commencing this claim; and the present proceedings are not an abuse of process of the Court.

SECURITY OF COSTS AND UNDERTAKING

[54] I turn now to deal with the ground relating to Security to Costs.

[55] Since CVIL and Mr. Wide are foreigners and CVIL is in liquidation, Learned Counsel Ms. St. Rose has invoked PART 24 of CPR 2000. The Dominica Winding-Up Order states at paragraph 22 and 23 and 9:

> "**22. The Liquidator is not required to post security in respect of his appointment.**
>
> **23. The Liquidator acts solely in his capacity as Liquidator and without personal liability.**
>
> **9. The Liquidator is empowered and hereby authorized to borrow such money from time to time as he may consider necessary or desirable including any monies borrowed or to be borrowed for expenses incurred by the Liquidator while operating by virtue of his appointment hereunder, saving such borrowings shall not exceed EC$1 million at any time, and, pledge by way of a first charge in priority to all other claims or charges, the assets of the Company as security for such borrowings."**

[56] PART 24.2 (1) authorizes a defendant in any proceedings to apply for an order requiring the Claimant to give security for the defendant's costs of the

proceedings. PART 24.3 empowers the Court to make an order for security for costs under-rule 24.2 against a defendant only if satisfied; having regard to all the circumstances of the case, that it is just to make an order in any of 7 sets of circumstances. They include –

> "(a) . . .
>
> **(b) the Claimant –**
>
> > **(i) failed to give his or her address in the claim form**; . . . **with a view to evading the consequences of the litigation**;
>
> (c) . . .
>
> **(d) the Claimant is acting as a nominal Claimant, other than as a representative Claimant under PART 21, and there is reason to believe that the Claimant will be unable to pay the Defendant's costs if ordered to do so;**
>
> (e) . . .
>
> **(f) the Claimant is an external company**; **or**
>
> **(g) the Claimant is ordinarily resident out of the jurisdiction."**.

[57] Where the Court makes the Order for security of costs, PART 24.5 states that the court must also order that the claim be stayed until such time as it is provided; and that if it not provided by a specific date, that the claim be struck out.

[58] Ms. St Rose has referred to the multiple unnecessary applications which the Claimants have filed in St. Lucia, their financially debilitating effect on the Pollocks' in St. Lucia, the freezing of the Pollocks' funds for day to day existence in another suit, and their disadvantage and handicap in mounting a proper defence because of the seizure of Mr. Pollock's documents. She contended that collectively, all of these occurrences are clearly designed to intimidate and harass the Defendants into submission. These occurrences she said, along with the existing facts and the

relevant rules, provide compelling reasons for the Court to order security of costs and/or a satisfactory undertaking.

[59] Ms. St Rose has relied on the statements on the law concerning Undertaking in Damages in the treatise "**Injunctions and Similar Orders**" by L.A. Sheredan at page 200-201. There it is stated:

> "**The plaintiff is normally required as a condition of obtaining a Mareva injunction, to give the cross-undertaking in damages which is usual on seeking interlocutory relief . . . The undertaking is to pay damages, if ordered by the Court, to a Defendant who has incurred loss by complying with the injunction. If a satisfactory undertaking cannot be given because the plaintiff has insufficient assets, that is a matter to be taken into account in exercising the discretion whether or not to grant the injunction. An undertaking offered by a limited liability company can only be enforced against the assets of the Company, which may be extensive or small. In Re DPR Futures Ltd,** [[1989] 1 WLR 778] **Millet J regarded as satisfactory an undertaking by liquidators limited to two million pounds worth of the assets of the Company, a sum foreseen as adequate to compensate for any loss that might be sustained by the Defendants as a result of the grant of a Mareva Injunction against them. The liquidators were not required to hazard their personal assets. The learned judge pointed out that, if it turned out that two million pounds was insufficient to cover a realistic estimate of their likely loss, the defendants could apply, with evidence to support their claim, for an increase in the amount of cross undertaking, and the Court would then consider whether to require fortification in an appropriate amount; and that they could also apply if the value of the Company's assets rose.**"

[60] At page 201 to 202 (op.cit.) in dealing with the subject matter "**Security for the Undertaking**", the writer states –

"An applicant should be required, in an appropriate case, to support his cross-undertaking in damages by a payment into Court or the provision of a bond or guarantee by a reliable company. Alternatively, the judge may order a payment by way of security to the applicant's Solicitor to be held by the Solicitor as an officer of the Court pending further order.

If an undertaking without security is accepted, security cannot be required later."

[61] Counsel for the Pollocks therefore contends, that if the freezing order is to be renewed, the liquidator Mr. Wide should be made to set aside a specific sum, or pay it into Court to satisfy his undertaking.

[62] On the other hand Learned Counsel Mr. Mc Namara has anchored his countervailing submissions to the relevant principles considered by Mann J in the following case, where he had to determine whether a cross-undertaking should be fortified by appropriate security; and whether the Claimant Company should provide security for costs to a Defendant Mr. Cushnie: (**Sinclair Investments v Carlton Cushnie and Others** [2004] EWHC 218 (CL).

[63] Mann J. at paragraph 37 of his judgment stated –

"The paragraphs that I have to bear in mind, and that I do bear in mind, are as follows:

i. **Whether the claim is bona fide – Sir Lindsey Parkinson and Co Limited v Triplan Limited** [1973] QB 609.

ii. Whether there is a reasonably good prospect of success **(Parkinson)**; but an extensive debate on the merits is usually inappropriate **(Porzelack KG v Porzelack Ltd**

iii. The rationale behind the jurisdiction is that a Defendant should have security if there is reason to believe that there will be real difficulty in enforcing a costs order, either because of insolvency of the Claimant, or because of the Claimant, or both (See for example, De Bry v Fitzgerald [1990] 1 WLR 552).

iv. Whether the application for security is being used oppressively or so as to try to stifle a genuine claim (Parkinson).

v. Whether the Claimant's lack of means have been brought about by any conduct of the Defendants (Parkinson).

vi. Where it seems that the Claimant could not satisfy any requirement for security itself, it may be appropriate to consider whether it could raise the security from its shareholders or from other backers or interested persons Keary Developments Ltd v Tarmac Construction Limited [1995] 3 All E.R. 534.

[64] At paragraph 22 of his judgment while dealing with the Application for Fortification of the Cross-Undertaking , Mann J observed: **"The point of a cross-undertaking in damages is to provide a means of compensation for loss if it occurs in relation to the Injunction or undertaking to which it relates. To that extent the Court has, if necessary, to form a view as to the kind and degree of loss that may result in deciding whether a cross-undertaking has sufficient value**

(with or without fortification). In re DPR v Futures Limited [1989] 1 W.L.R. 778 Millett J had to consider the extent and nature of the cross-undertaking to be given by liquidators. In that context he said at page 786:

> "In my judgment a liquidator cannot be criticized for refusing to risk his personal assets by giving an unlimited cross-undertaking. It is right to require him to give an undertaking of an amount commensurate with the size of the Company's assets and should take the risk that he may not be authorized by the Court to have recourse to them to meet his liability. If the value of such an undertaking is considered insufficient in any particular case he should be required to fortify it by obtaining a bond or indemnity from a substantial creditor, but in either case of a fixed amount. The Court cannot avoid the need to make an intelligent estimate of the likely amount of any loss which may result from the grant of the injunction. There is nothing unusual in this. It is so in every case where the balance of convenience has to be considered. A Plaintiff's resources are not infinite. But any such estimate can be reviewed from time to time and further fortification required if necessary. If fortification cannot be obtained this will affect the balance of convenience between granting or refusing the injunction. But the Court cannot abdicate the responsibility for deciding where the balance of convenience lies (Mann J's emphasis).

[65] I note that the only evidence before me as to the value of the Villa Caribe and other property frozen is the Internet Sale Advertisement of the Pollocks, which describes the residence and its contents, motor vehicles and dock equipment and marine vessels as a **"Luxury Estate Villa for US$6,875,000.00 Everything Included".** Mr. Wide's Witness Mr. Jonathan Mc Namara deposed that a figure in the order of US$4 million might be a reasonable estimate of the value of the residence.

[66] Mr. Pollock has deposed in his Affidavit filed on the 26th May 2006 that the Claim of the CVIL and Mr. Wide is for just about half of the value of the assets frozen, and that they have seized assets in excess of that value.

[67] The Pollocks and their Counsel have put forward no figure as to the loss which might result from the general freezing order. The undertaking given by Mr. Wide is of uncertain value, but this does not automatically mean that fortification is required. Having considered the extent to which a risk of loss has been shown by the Pollocks. I have concluded that it is not sufficiently apparent from the evidence that there is sufficient risk of loss to require fortification in all the circumstances.

[68] It would seem however from the authorities that the absence of sufficient risk of loss though providing a reason for not requiring fortification provides no reason for not extracting a cross-undertaking. Counsel Mr. Mc Namara has submitted that the Claimants have already given such an undertaking. In that regard there would be no need for any further undertakings.

[69] Concerning the question of Security for Costs, Mr. Mc Namara described the Claimant's case as a bona fide claim with a reasonably good prospect of success. He submitted that since the Claimants are based within the jurisdiction of the Eastern Caribbean Supreme Court, there is no reason to believe that there will be any real difficulty in enforcing any costs or damages orders since the Claimants by the Liquidation Order are firmly in the hands of the Court.

[70] Concluding that there was no real basis for the Pollocks Application for Security of Costs, Mr. Mc Namara argued that they were in fact attempting to oppress the Claimants further after abusing CVIL, and bringing about the present state of affairs with CVIL.

[71] Mr. Mc Namara has invited the Court to have regard to the observations of Judge Ronald A. Guzman in his Bench opinion which was exhibited by Mr. Wide in his

Affidavit filed on the 10th November 2006. Mr. Mc Namara has directed my attention to particular pages – 22, 24, 25, 32, 33, 35-37, 39-41, 45, 47, 49, 50-52. Suffice it to say I have read the opinion of Judge Guzman concerning the Evidentiary Hearing held for Mr. David Pollock and Paul Jones on the 1st February 2006 in the United States District Court For The Northern District of Illinois Eastern Division, in Suit No. 99 C 6895; Between Securities and Exchange Commission v Charles Richard Homa and Others.

[72] Before Judge Guzman was the Receiver's Motion for a rule to show cause why David Pollock and Paul Morgan Jones should not be held in contempt of Court for violating the freeze orders of the Court when they transferred, hid and dissipated assets.

[73] Having regard to Section 78 (1) of the Evidence Act No. 5 of 2002, I will ignore the exhortations of Counsel Mr. Mc Namara to take into account the Bench Opinion of Judge Guzman. Section 78 (1) states that **"Evidence of the decision in proceedings is not admissible to prove the existence of a fact that was in issue in the proceedings."** I am further of the view without hearing Counsel on his point, that Judge Guzman's opinion is a judgment in personam and which is not saved by Section 80 of the Evidence Act. In the event I have erred, I err in favour of the Pollocks for now. I will disregard Judge Guzman's opinions of Mr. Pollock.

[74] Having applied the principles stated at paragraph 63 above to the evidence, and taking into account the submissions of Counsel, and the pleadings, my findings are as follows:

(1) The claim of CVIL and Mr. Wide is bona fide and it appears to stand a reasonably good prospect of success.

(2) Having regard to the Winding-Up Order of the Dominica High Court, and Section 9 (3) of the Courts Order, I do not envisage that the Pollocks, where they are successful on the claim and counterclaim, would have any real difficulty enforcing a costs order since the Liquidator is under the supervision of the Court.

(3) In my opinion the application for security is an attempt to stifle a genuine claim.

(4) The evidence does show that the liquidation of CVIL has occurred because of the conduct of Mr. Pollock.

(5) There is no evidence disclosing that the Claimants are in a position to satisfy any requirement for security for costs by raising it from shareholders or interested persons.

[75] I therefore conclude that I should order no security for costs in all the circumstances.

[76] Concerning the Ownership of the Assets frozen, there is sufficient evidence to establish prima facie that Mrs. Pollock has been correctly joined as a party to the claim. In that regard therefore, given the nature of the allegations against Mrs. Pollock the claim for general and other damages and interest, and the prima facie evidence, the real and personal property of Mrs. Pollock may be frozen.

[77] I accept the evidence of Mr. Wide and find that the seizure of certain property belonging to Mr & Mrs Pollock, by the Police, was done independently by the Police. Since the criminal proceedings are not connected with the Claim brought by CVIL and Mr. Wide, this Court has no jurisdiction to make any order concerning the police seizure of the Pollock's personal items.

[78] I have already indicated at the hearing that there was no evidence before this Court that Carosello has been properly served with the Statement of Case of Claimants and the Freezing Order. However, in light of the evidence regarding the ownership of Villa Caribe any subsequent freezing order issued by this Court would still be addressed to all 3 Defendants.

[79] I shall therefore now consider the submissions of Counsel concerning the Freezing Order.

REMOVAL/CONTINUATION OF FREEZING ORDER

[80] I consider the principles relating to the grant of a freezing order, too well known, so I will not mention them. What I propose to do is to address the points raised by Counsel Mrs. St Rose in her submissions.

[81] Mrs St. Rose, in applying the law that Applicants for freezing orders must prove that there is a real risk of dissipation of the Respondent's assets, has argued that the Claimants have provided no proof of assets in the names of Pollocks. She contended that in company law there are well known reasons for the preservation of corporate identities, separate and distinct from identities of individuals. Piercing the corporate veil is not a step to be taken lightly, she said, and literature documents the hesitancy of the Courts to do so generally, except in cases where the evidence is overwhelming or there is large scale fraud.

[82] She contended that at the time the Claimants applied for the freezing order, they did not establish that the Villa Caribe property and the marine vessels were owned by the Pollocks.

[83] Mr. Mc Namara has referred to paragraph 86 of Mr. Wides Affidavit filed on the 4th July 2006, paragraph 2 and 4 of Mr. Wide's Affidavit filed on the 10th November 2006 as providing evidence that the Pollocks own and control either directly or

indirectly through the façade of establishments and corporations the assets that are the subject of the freezing order. He has not referred to the Affidavit or Mr Wide sworn to on the 13th April 2006 and the Affidavit of Mr. Bota Mc Namara filed on the 19th April 2006. Both of these Affidavits were the Supporting Affidavits for the Application for the freezing order.

[84] It is therefore necessary to consider the evidence which was before the Court on the 26th April 2006 when the freezing order was made.

[85] At paragraph 3 of Mr. Mc Namara's Affidavit he deposed that "**Carosello holds title to (i) All that parcel of land registered in the Land Registry of Saint Lucia Block 1255B-441 together with the building erected thereon and (ii) All that parcel of land registered in the Land Registry of Saint Lucia as Block 1255 B442 together with the building erected therein pursuant to an alien's landholding licence. Copies of the Land Registry Certificates are attached hereto and exhibited as "CABM2." The licence, attached hereto and exhibited as "CABM3", denotes Pollock as the Principal of Carosello. I further believe that since Pollock resides in St. Lucia, he holds personal assets there. I believe that Pollock is the true beneficial owner of Carosello property in St. Lucia and I have viewed an internet website www.ourvillacaribe.com which confirms same. I have identified Pollock on the website which bears the title "David and Kelly Pollock's Villa Caribe" on the home page. A true copy of the information I viewed from the internet is attached hereto as "CABM4." indicating that Pollock has posted the Carosello property and numerous chattels for sale for the all-inclusive amount of US$6,875,000.00. A true copy of the information I viewed from the internet is attached hereto as "CABM5". In this website contact information of the owner of all movable and immovable property is provided. It is the contact information for David and Kelly Pollock as provided for in www.ourvillacaribe.com website and in the telephone directory of St. Lucia as noted from the exhibit attached hereto and marked "CABM6."**

[86] Mr. Wide by his Affidavit at paragraphs 7 and 8 refers to Mr. Mc Namara's information concerning the advertisement for sale of the Defendant's known assets on the internet website **www.villacaribebiz** ; and that the phone number for contact purposes on that website is David Pollock's phone number in St. Lucia as confirmed through the St. Lucia Telephone Directory.

[87] Having considered all of this evidence along with the documentary exhibit, I cannot agree with Counsel Mrs. St Rose that there is no proof of assets of the Pollocks. I find on a balance of probability that the immovable and movable property advertised by the Pollocks on the internet website www.villacaribe.biz and www.ourvillacaribe.com are their assets. There was therefore before the Court on the 26th April 2006 sufficient evidence that the Pollocks were the probable owners of those assets.

NON-DISCLOSURE

[88] The law requires that Applicants for freezing orders should make full and frank disclosure of all the matters in their knowledge which are material for the judge to know even where such matter goes against the grant of the freezing order. The Applicants must make proper inquiries before making the Application. Hence the duty of disclosure applies to facts which Applicants would have known had they made inquiries: **Bank Mellat v Nickpour** [1985] F.S.R. 87.

[89] Where there is material non-disclosure, the freezing order may be discharged. The Court has a discretion in the face of material non-disclosure to discharge the order or nevertheless to continue the order, or to make a new order on terms "**When the whole of the facts, including that of the original non-disclosure, are before [the Court it] may well . . . grant a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:**" (Per Glidewell L.J. in **Lloyds Bowmaker**

Ltd v Britannia Arrow Holdings Plc [1988] 1 W.L.R. 1337 at pages 1343H-1344A).

[90] Learned Counsel Ms. St. Rose contended that Mr. Wide in his Affidavit of the 13th April 2006, failed to disclose that Mr. Pollock had an arguable defence of set-off. The test of a good arguable claim may not be satisfied if there is a good arguable defence she submitted.

[91] Mr. Pollock has deposed in his Affidavit, at paragraph 11:

> **"The outstanding issue which I have with the bank is with respected to my employment contract, which I negotiated to extend over a 5 year period. That issue has not been dealt with and the value of that contract is US$750,000.00. CVIL indeed arranged a loan from Banc Caribe Ltd with an outstanding principal balance of approximately US$730,000.00 as of February 1, 2003. The said loan secured by the assignment of a portion of my employment agreement with Banc Caribe Ltd. Details of this transaction were brought up by and known by the liquidator at a December 2004 deposition I gave to him in Dominica. This is the only creditor of CVIL and is secured. There has been no misappropriation or removal of funds to the detriment of CVIL in that I was to have benefited from those funds in the first place."**

[92] These allegations of Mr. Pollock apparently form the basis of paragraph 10 of his Defence filed on the 3rd May 2006.

[93] Mr. Wide's Affidavit of the 13th April 2006 at paragraph 6 stated: **"As of this date, none of the Defendants/Respondents has submitted or filed any claim with me as the Liquidator in the Dominican liquidator proceedings involving the Company so I am unaware of any other facts which might support a counter-claim or claim for set-off in favour of the Defendants/Respondents."**

[94] On reading paragraphs 29 to 38 of Mr. Wide's Affidavit filed on the 4th July 2006, Mr. Wide appears to have treated these assertions of Mr. Pollock dismissively, based on the Ruling of the High Court in Dominica. At paragraph 38 Mr. Wide stated: **"Accordingly the High Court ruled that since Pollock failed to give any evidence of such assignment, failed to oppose the application, failed to appear and failed to respond to the Liquidator's letter to him dated August 25 2005 requesting, among other things, copies of all contracts relating to CVIL, the Liquidator need not pursue any further investigations with regard to Pollock's claim of an alleged assignment of employment agreement. The Court ruled that the Liquidator's investigations to date indicated that no basis exists for further pursuing the matter and any further action would be a waste of estate resources". The Order of the Court dated 2nd June 2006 was exhibited as "MAW11".**

[95] Despite the Order Exhibit **"MAW11"**, it is my view that Mr. Wide ought to have disclosed that Mr. Pollock had made claims concerning the assignment of his employment agreement and thereafter explain what was happening in the Dominica High Court concerning Mr. Pollock's assertions. His failure to do this in his Affidavit of the 13th April 2006 is a material non-disclosure in my view.

[96] Mrs. St. Rose has identified Mr. Wides failure to disclose that he had made, a criminal complaint in St. Lucia against Mr. Pollock. However I accept the evidence of Mr. Wide that he had filed a Complaint with the Police in St. Lucia as Liquidator for Banc Caribe and not CVIL. Since the Application for the freezing order was in respect of CVIL, there would be no need for Mr. Widle to disclose about this complaint in my view.

[97] I do not regard the Application Without Notice made on the 22nd August 2006, or the order made, or the Claimant's breach of their undertaking in that Order as a non-disclosure to be considered for the Claimants' Application to continue the

freezing order. There is no Affidavit from the Pollocks addressing this matter or making it an issue of non-disclosure. It therefore cannot be made an issue by Counsel from the Bar table in my view.

[98] Ms. St Rose also focused on the draft Statement of Claim which was exhibited with the Application for the freezing order on the 19th April 2006. She compared that draft Statement of Claim with the Statement of Claim filed subsequently on the 8th May 2006. She submitted that another area of non-disclosure is that in seeking the injunction, the Statement of Claim that was exhibited revealed fraud, plain and simple, thus laying the justification for tracing of the funds or what in effect is the lifting of the corporate veil. She complained that upon the order being made on that basis, the Statement of Claim filed on the 8th May 2006 was different in that it had an extra paragraph which read:

> **"In the alternative the Claimants say that the Defendants were loaned by and borrowed from CVIL and that the Defendants remain in debted to CVIL for the sums as stated above together with interest."**

[99] Looking again at the Draft Statement of Claim, the pleadings there relating to the allegations concerning the loan were identical to the Statement of Claim filed subsequently. The pleading in the alternative at paragraph 35 of the Statement of Claim was based on facts already disclosed and pleaded in the Draft Statement of Claim. This is therefore not similar to the example cited by Mrs. St. Rose at page 65 of the treatise **Commercial Litigation Pre-emptive Remedies 3rd** ed in my view. There, addressing the subject of Disclosure, the authors states that: **"The point arose for consideration also in Bank of Mellat v Nikpour [1985] F.S.R. 87. In ex parte proceedings: (a) The original writ disclosed no cause of action; (b) the first amendment pleaded a "loan"; (c) the second amendment pleaded that monies had been wrongfully credited to the Defendant (a former chief executive of the plaintiff bank). The injunction was discharged**

on the grounds that there had not been full and proper disclosure on the original ex parte application . . ."

[100] The absence of pleadings disclosing a **"loan"** is not present in the draft Statement of Claim in the instant case, so the example cited must be distinguished. In the circumstances therefore it is my respectful opinion that there is no merit in the submission.

[101] Mrs. St Rose also submitted that non-disclosure arises in considering the present Applications, because on the 17th November 2006 another suit against the proper owner of the Vessel "**Reel Time"**, Caribbean Ventures Int'l Inc (CVIL) was filed by Counsel for Claimants which is inconsistent with the freezing order obtained on the 26th April 2006 in the instant case. This she argues, confirms that the vessel does not belong to the Pollocks.

[102] Though Mr. Pollock has denied that the Swan Yacht does not belong to him at paragraph 21 of his Affidavit filed on the 26th May 2006, he has not denied that the "**Reel Time"** is owned by him. There is therefore no evidence before me which makes this an issue, except for the submissions of Counsel Ms. St. Rose. I would have expected to see an Affidavit filed by the Pollocks concerning this latest development, bearing in mind that the duty to make full and frank disclosure is a continuing one until the hearing of the Application. The law is that the Claimants have a duty to bring to the attention of the Court any material changes in the circumstances after injunction is granted **Blackstones Civil Practice 2000** at para 38.26. By filing such an Affidavit, this would make it an issue for my consideration. In the circumstances therefore there is no evidence before me concerning this recent non-disclosure of the Claimants.

[103] The question therefore concerning the non-disclosure found at paragraph 95 above, is what should be the consequences of this.

[104] I am guided by the judicial statement of Balcombe L.J. in **Brink's Mat Ltd v Elcombe and Others** [1988] 1 W.L.R. 1350. There, he stated –

> "The rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a two-fold purpose. It will deprive the wrong doer of an advantage improperly obtained. See Rex v Kensington Income Tax Commissioner, Ex parte Princess Edmond de Polignac [1917] 1 U.B. 486, 509. But it also serves as a deterrent to ensure that persons who make ex parte applications realize that they have this duty of disclosure and of the consequences (which may include a liability of costs) if they fail in that duty. Nevertheless, this judge made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the Court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained. I make two comments on the exercise of this discretion. (1) Whilst, having regard to the purpose of the rule, the discretion is one to be exercised sparingly, I would not wish to define or limit the circumstances in which it may be exercised. (2) I agree with the views of Dillon L.J. in the Lloyds Bowmaker case at p. B 49C-D, that, if there is jurisdiction to grant a fresh injunction, then there must also be a discretion to refuse, in an appropriate case, to discharge the original injunction."

[105] Having applied these principles to my findings, I am of the view that this past non-disclosure should not be allowed to operate so as to prevent the continuation of the freezing order.

[106] Having considered all of the relevant circumstances, I have concluded that the Claimants have proven that they have a good arguable case against the

Defendants, and that there is a reasonable apprehension that the Defendants are in the process of dissipating the relevant assets which will prevent the Claimants from enforcing their judgment.

[107] I am of the view that the freezing order should continue until the substantive claim is tried and determined by this Court.

[108] I therefore order that the Freezing Order Injunction dated the 26th April 2006 together with the Undertakings and penal notices contained therein must remain in force until the substantive claim is tried and a judgment delivered by the Court. The permission given to the Pollocks that they may use the 2 motor vehicles shall continue.

[109] The Costs of the Application to be Costs on the cause.

Dated the 14th day of December 2006

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OLA MAE EDWARDS
HIGH COURT JUDGE