

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

**TERRITORY OF THE VIRGIN ISLANDS
BVIHCMAP2022/0074**

BETWEEN:

TOBAGO HOUSE OF ASSEMBLY

Appellant

and

**[1] RICHARD GRAHAM ALSO CALLED RICK
GRAHAM (trading as Original Canopy
Tours Enterprises Limited)
[2] DARREN HRENIUK (Trading as Original
Canopy Tours Enterprises Limited)**

Respondents

Before:

The Hon. Mde. Justice Gertel Thom	Justice of Appeal
The Hon. Mde. Justice Esco L. Henry	Justice of Appeal [Ag.]
The Hon. Mr. Robert Levy	Justice of Appeal [Ag.]

Appearances:

Ms. Hazel-Ann Hanaway-Boreland and Ms. Jhneil Stewart for the Appellant
Respondents in person

2023: October 4;
2024: March 11.

Interlocutory appeal – Application for injunction in support of foreign proceedings - Whether the judge applied the incorrect test for the grant of interlocutory injunctive relief in aid of foreign proceedings – Personal jurisdiction of court over respondents to grant an injunction – No address for personal service – Rule 7.3(2)(b) of the Civil Procedure Rules 2000 - Whether the judge erred in the exercise of her discretion by discharging the interim freezing injunction – Whether the judge failed to consider important facts relative to the risk of dissipation of assets - Whether the judge failed to have regard to the need for judicial comity – Whether the judge erred by failing to take into account several relevant matters thereby making errors of law and or of mixed law and fact

On 24th November 2021, the Trinidad House of Assembly (“the appellant”) filed a claim in the High Court of Trinidad and Tobago against Original Canopy Tours Enterprises Ltd.

("Original Canopy"). The appellant claimed that it had entered into a services agreement with Original Canopy for the design, development and construction of a high range canopy tour course and that Messrs. Richard Graham and Darren Hreniuk ("the respondents") were Original Canopy's principals. The appellant claimed that pursuant to the services agreement it advanced to the respondents just over US\$400,000.00 in four instalments and that in breach of the contract, the respondents failed to deliver the agreed services and had not delivered the materials or equipment for which payment was made. The appellant claimed damages for breach of contract and for continuing loss suffered as a result of breach of contract, interest and costs.

Leave was granted by the High Court of Trinidad and Tobago to serve the claim on Original Canopy in the British Virgin Islands ("BVI"). However, service was not achieved because searches conducted in the BVI revealed that Original Canopy was not registered under BVI laws. Relying on that information, the appellant filed another claim in the Trinidad and Tobago High Court against the respondents alleging fraud in that the respondents fraudulently misrepresented to the appellant that Original Canopy was duly registered as a company in the BVI; fraudulently represented that they were its founders and directors; and further, they thereby deceived the appellant into entering into the services agreement.

Based on those assertions, the Trinidad and Tobago High Court granted the appellant an *ex parte* injunction restraining the respondents from dealing with their assets in Trinidad and Tobago, the BVI and the United States of America ("USA") and expressly freezing an account held by the respondents with First Caribbean International Bank ("FCIB") in Road Town, Tortola and their account at First Citizens Bank in Scarborough, Tobago. The court also granted permission to serve the respondents outside of Trinidad and Tobago.

On 15th November 2022, the appellant applied *ex parte* to the BVI court for an interim freezing injunction to, among other things, restrain the respondents until further order from disposing of, dealing with or diminishing the value of the assets owned by the respondents within the BVI up to the value of the substantive claim in Trinidad and Tobago. The appellant also sought leave to serve the respondents with any such interim freezing order out of the jurisdiction pursuant to rule 7.3(2)(b) of the Civil Procedure Rules, 2000 ("CPR"). The appellant denied knowledge of the respondents' whereabouts but nonetheless gave the registered address of OCT Enterprises Ltd as the respondents' 'last believed country and general area of residence'. By order dated 16th November 2022 and entered on 18th November 2022, a judge granted the interim freezing injunction and leave to the appellant to serve the order on the respondents out of the jurisdiction at their last known residential addresses or to their last known email addresses or alternatively through substituted service.

As it turned out, the appellant made the services agreement not with Original Canopy as claimed but with OCT Enterprises Limited ("OCT") (a company incorporated in the BVI) acting through its directors Messrs. Graham and Hreniuk. It explained that when an initial search was conducted online at the Financial Services Commission ("FSC") for the details of the company's incorporation documentation, misleading information was unearthed which led it to believe that the entity with whom it had contracted was not duly registered. The appellant then applied for OCT to be added as a respondent in the proceedings; for the freezing injunction to be extended to OCT in the same terms as against the original

respondents and for the interlocutory freezing injunction to be continued against the respondents. By the time the *inter partes* hearing was conducted, the appellant had added OCT as a party to the proceedings in Trinidad and Tobago and had made an application to add it to the BVI proceedings. An application was also made in the BVI court to extend the interim freezing injunction to OCT.

The learned judge heard the application on 15th and 16th December 2022 and delivered an oral decision on 20th December 2022 (“the Discharge Order”) wherein she discharged the interim freezing injunction made against Messrs. Richard Graham and Darren Hreniuk; refused to make an interim freezing injunction against OCT; and awarded costs to be paid by the appellant. The learned judge ruled *inter alia* that the court had no personal jurisdiction over the respondents and could not grant a free-standing freezing injunction in aid of foreign proceedings against them; that the appellant’s claim as to misrepresentation about the identity of the contracting entity had little to no chance of success because the appellant was aware from 2015 of the relationship between the respondents and OCT by virtue of the corporate documentation supplied to them by OCT; that although there was a bona fide dispute between the appellant and the respondents based on competing allegations of breach of contract which disclosed an arguable case as to non-performance of the contract, she was not inclined to conclude that fraud was involved as alleged; and that the evidence advanced by the appellant of there being a real risk of dissipation of assets was thin and had not met the threshold of establishing solid evidence of such real risk of dissipation.

The appellant being dissatisfied, appealed the Discharge Order and costs award. In so doing, the appellant advanced five grounds of appeal from which the following two main issues arose: i) whether an incorrect test was applied to the availability of injunctive relief in support of foreign proceedings; and ii) whether the learned judge’s evaluation of the application was defective by reason of errors of law or mixed law and fact.

Held: dismissing the appeal, affirming the learned judge’s orders and awarding costs to the respondents on the appeal to be assessed by a judge of the Commercial Court if not agreed within 21 days, that:

1. The freezing order or *mareva* injunction is an order restraining a respondent from disposing of, dissipating, or removing assets from the jurisdiction where there are grounds for believing that the respondent would take steps to do so and thereby frustrate the enforcement of a later judgment against him. The court has very wide powers to grant interlocutory injunctive relief in aid of foreign and domestic proceedings once it is satisfied that it is just and convenient to do so, in view of the prevailing circumstances. The court cannot grant such relief unless it is satisfied that the respondent has been served with process in accordance with the applicable rules of court and that the court has personal jurisdiction over the respondent. In addition, an applicant has to demonstrate that it has a good arguable case for being granted a money judgment that is enforceable in a court of law and that the respondent has assets within the jurisdiction against which the judgment may be enforced. Further, the court has to be satisfied that there is a real risk that the respondent will deal with those assets in such a way as to deplete or impair them and thereby frustrate the recovery of the judgment sum.

Section 24A of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**, Cap 80 of the Laws of the Virgin Islands applied; **Broad Idea International Ltd v Convoy Collateral Ltd; Convoy Collateral Ltd v Cho Kwai Chee (aka Cho Kwai Chee Roy)** [2022] 2 WLR 703 considered; **Siskina (Owners of cargo lately laden on board) and others v Distos Compania Naviera SA** [1979] AC 210 applied.

2. CPR 7.3(2)(b) under which the appellant was granted leave to serve the respondents out of the jurisdiction, does not permit service out of a claim or process seeking a free-standing interim injunction in aid of foreign proceedings. The sub-rule applies only in relation to proceedings that include a substantive claim for final injunctive relief. Moreover, it was quite clear that the appellant had used OCT's registered address as the respondents' address. It simply did not supply any other address for the respondents. This is contrary to the express language of the rules of court. It was therefore quite in order for the learned judge to find that the evidence disclosed no address for the respondents in the BVI and therefore no basis existed on which to find that they resided or were domiciled in Tortola, BVI. By extension, service on them at OCT's registered office in the BVI would have been ineffective. Accordingly, the learned judge's determination that the BVI court does not have personal jurisdiction over the respondents and therefore could not grant a free-standing freezing injunction in aid of enforcement of foreign proceedings against them demonstrates that she appropriately considered and correctly applied the test for the grant of interim injunctive relief in support of foreign proceedings. It matters not that the respondents did not take the jurisdiction point at the hearing. The court is bound to exercise its discretionary power in accordance with the rules of court. It could not maintain a free-standing interlocutory injunction against either respondent which was obtained contrary to the service stipulation in CPR 7.3(2)(b).

Rule 7.3(2)(b) of the **Civil Procedure Rules 2000** applied.

3. In exercising the discretion to grant or discharge a freezing injunction, the court is required to act judicially and must seek to give effect to the overriding objective of the CPR to act justly. It is now settled in law that in order to satisfy the court that it is just and convenient to grant the freezing injunction, an applicant need not present a winning argument but must make out a good arguable case. The court does not conduct a mini-trial, instead the judge considers the affidavit testimony and evaluates the strengths and weaknesses of the case to assess whether a tenable evidentiary narrative is laid out.

Rules 24(1) and 17.1 of the **Civil Procedure Rules 2000** considered; **Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H. & Company K.G. (The Niedersachsen)** [1986] 1 Lloyd's Rep 397 considered.

4. The learned judge considered several factors in deciding whether injunctive relief should be granted including whether the appellant had a good arguable case. The learned judge was not satisfied that a good arguable case was made out in respect of the fraud claims as to OCT's existence or the alleged fraudulent performance of

the services agreement. However, she was persuaded that there was a bona fide dispute between the parties in relation to breach of contract. The learned judge also had regard to the evidence as to the risk of dissipation and concluded that the appellant had not met the threshold of establishing with solid evidence that there was a real risk of dissipation of assets. She took into account, inter alia, the protracted length of time after which the appellant pursued legal action against the respondents even though it contended that the respondents were intent on taking steps to dissipate their assets. In the circumstances of this case, the learned judge was entitled to ascribe significant weight to the appellant's delay and to find on the evidence before her that it reflected on the appellant's part, a remarkable level of indifference to the respondents' conduct. The court considers that the learned judge conducted a fair and balanced evaluation of the respective parties' cases, without attempting to conduct a mini-trial. There was more than sufficient evidence to justify the conclusion to which she arrived.

Mitsuji Konoshita and A.P.F. Group Co. Ltd v JTrust Asia PTE Ltd. BVIHCMAP2018/0047 and BVIHCMAP2018/0020 (delivered 18th December 2018, unreported) followed; **Broad Idea International Ltd v Convoy Collateral Ltd; Convoy Collateral Ltd v Cho Kwai Chee (aka Cho Kwai Chee Roy)** [2022] 2 WLR 703 applied; **National Bank Trust v Yurov and others** [2016] EWHC 1913 applied.

5. As to the issue of judicial comity, it is clear that the learned judge took into account the desirability for judicial comity and gave it at least moderate weight. However, she was careful to indicate that this had to be weighed against other relevant circumstances arising from the evidence which she also took into account such as the status of the pleadings. The learned judge cannot be condemned for having regard to the absence of the respondents' case in opposition in view of the considerable additions made by the appellant in its amended statement of claim, after the *ex parte* freezing injunction was granted and to the other material elements which were not before the Trinidad and Tobago High Court when that order was made. Accordingly, the appellant's criticisms of this aspect of the learned judge's evaluation of the case are unjustified. The learned judge was entitled to find as she did and the Court would not reverse her determination by reason of the weight she attached to the judicial comity factor.
6. It is an established principle of law that an applicant seeking an *ex parte* injunction has a heavy duty of candour to the court regarding all relevant matters which may impact the grant or refusal of relief. Having regard to the appellant's claim of fraudulent misrepresentation by the respondents, the concerns highlighted by the learned judge were material. They pointed to evidentiary details which were not particularised in the original claim form filed in the Trinidad and Tobago court or in the *ex parte* application in either the Trinidad court or the BVI court. The learned judge had an abundance of material from which she was entitled to find that the appellant had failed to discharge its duty of candour to the court. Furthermore, on the authority of **Brink's Mat Ltd.**, it was open to her to discharge the freezing injunction on account of this breach. For the foregoing reasons, the Court finds that the judge made a well-reasoned, balanced and justifiable determination on each of

the relevant factors and did not consider irrelevant matters. Her decision does not disclose any error in principle and is not blatantly wrong.

Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350 applied.

JUDGMENT

Introduction

- [1] **HENRY JA [AG.]**: This is an interlocutory appeal by Tobago House of Assembly ("the appellant") against the order of the learned judge dated 20th December 2022 by which she discharged an interim freezing injunction ("the Discharge Order") made against Messrs. Richard Graham and Darren Hreniuk ("the respondents") said to be trading jointly as Original Canopy Tours Enterprises Ltd. ("Original Canopy") and awarded costs to be paid by the appellant. The interim freezing injunction was made *ex parte* by another judge on 16th November 2022. It restrained the respondents from dealing with their assets in the British Virgin Islands ("BVI") up to a value of US\$500,000.00.
- [2] The interlocutory freezing injunction was obtained on the basis that the appellant had filed a claim in the High Court of Trinidad and Tobago against Original Canopy on 24th November 2021. In those proceedings, the appellant claimed that it had entered into a services agreement with Original Canopy doing business as Original Canopy Tours, for the design, development and construction of a high range canopy tour course ("zipline tour") and that the respondents were its principals.
- [3] As it turned out, the appellant made the services agreement not with Original Canopy as claimed but with OCT Enterprises Limited¹ ("OCT") (a company incorporated in the BVI) acting through its directors Messrs. Graham and Hreniuk. At the *inter partes* hearing, the appellant for the first time acknowledged in its affidavit that Original Canopy was named as a party to the litigation in Trinidad and Tobago and in the BVI based on a soft search of the companies' registry and that a

¹ The name is entered in the BVI Companies register at the FSC in all capital letters.

subsequent fuller search disclosed OCT's existence. It explained that when an initial search was conducted online at the Financial Services Commission ("FSC") for the details of the company's incorporation documentation, misleading information was unearthed which led it to believe that the entity with whom it had contracted was not duly registered.

- [4] Based on this incorrect information, the appellant contended before the Trinidad and Tobago High Court and at the *ex parte* hearing for the injunction in the BVI and in Trinidad and Tobago, that it was induced by the respondents to enter into a contract with a sham company - Original Canopy - and now feared that the respondents would take steps to dissipate assets held in the BVI, to frustrate the appellant's ability to enforce a future judgment of the Trinidad and Tobago High Court.
- [5] The appellant claimed that pursuant to the services agreement, it advanced to the respondents just over US\$400,000.00 in four instalments and that in breach of the contract they failed to deliver the agreed services and have not delivered the materials or equipment for which payment was made. The appellant claimed damages for breach of contract and for continuing loss suffered as a result of breach of contract, interest and costs. No parallel claim was filed in the BVI.
- [6] By the time the *inter partes* hearing was conducted, the appellant had added OCT as a party to the proceedings in Trinidad and Tobago and had made an application to add it to the BVI proceedings. An application was also made in the BVI court to extend the interim freezing injunction to OCT. After hearing the parties, the learned judge refused those applications and made the Discharge Order. Before the learned judge and during the hearing of this appeal, the appellant conceded that their assertion that the respondents induced them to contract with a non-existing entity was no longer viable.
- [7] The appellant contended that in discharging the freezing injunction, the learned judge erred in the exercise of her discretion by, among other things, failing to

consider important facts relative to the risk of dissipation of assets; failing to apply the correct test as to the availability of relief in support of foreign proceedings; failing to have adequate regard to judicial comity; and making errors of fact. It submitted that consequently the decision was unsafe and plainly wrong and should be reversed.

[8] The respondents represented themselves in the court below and before this Court. They resisted the appeal. They submitted that the appellant pursued this matter against an incorrect entity which created a cascading effect of misleading information being presented to the court. They submitted further that the appellant misled the court as to the actual state of affairs in general and regarding the nature of the contractual relationship between the appellant and their company OCT.

[9] I am satisfied that by discharging the interim freezing injunction the learned judge neither committed an error in principle nor made a determination that was blatantly wrong. For the reasons outlined in this judgment I would dismiss the appeal in its entirety and affirm the learned judge's orders.

Factual Background

[10] It is not in dispute between the parties that on 12th June 2015, the appellant entered into an agreement with OCT, under which OCT agreed to design, develop and construct a zipline tour in the Main Ridge Forest Reserve in the island of Tobago, in the Republic of Trinidad and Tobago. The agreement is exhibited² to the first affidavit of Lesley Gray, the appellant's senior counsel, that was filed on 15th November 2022.

[11] The introductory clause identifies the parties as 'OCT Enterprises Ltd, DBA The Original Canopy Tour (OCT)' and the Tobago House of Assembly. The signature page reflects that the signatories were Raye Sandy, Chief Administrator of Tobago House of Assembly and Richard Graham for OCT.

² As one of several documents labelled 'LG1'. See Record of Appeal Vol. 2 – Part 1, pgs. 117 – 123.

- [12] On 24th November 2021, the appellant filed a claim form and statement of claim in the High Court of Trinidad and Tobago against Original Canopy alleging certain performance issues with the contract. It pleaded that between 15th June 2015 and 10th June 2016, it had transmitted four payments totaling US\$416,000.00 by wire transfer to Original Canopy to an account at First Caribbean International Bank (“FCIB”), Road Town, Tortola. Further, that in breach of the agreement, Original Canopy failed or refused to perform its obligations under the contract. It claimed damages for breach of contract.
- [13] Leave was granted by the Trinidad and Tobago High Court to serve the claim on Original Canopy in the BVI. The appellant retained the law firm Harneys to effect service. However, service was not achieved because searches³ conducted on the Virtual Integrated Registry Regulatory General Information Network revealed that Original Canopy was not registered under BVI laws. It was discovered that the entity, ‘Original Virgin Canopy Ltd.’ was registered as a BVI company but other than the similarity in part of the name, there was no connection between it and Original Canopy.
- [14] Relying on that information, the appellant filed another claim in the Trinidad and Tobago High Court on 4th November 2022 against the respondents alleging fraud, in that the respondents fraudulently misrepresented to the appellant that Original Canopy was duly registered as a company in the BVI; fraudulently represented that they were its founders and directors; and further they thereby deceived the appellant into entering into the services agreement. It pleaded that the pre-contractual discussions were untrue and fraudulent and that those misrepresentations were made with the intention to induce it to execute the services agreement and make payments to them to its detriment. Essentially, by the new claim, the appellant contended that the respondents had deceived it into paying over US\$400,000.00 in reliance on a contract with a sham company that failed to perform its contractual obligations.

³ Between 6th and 11th May 2022.

- [15] Based on those assertions, the Trinidad and Tobago High Court granted the appellant an *ex parte* injunction restraining the respondents from dealing with their assets in Trinidad and Tobago, the BVI and the United States of America (“USA”) and expressly freezing until 16th November 2022, account number 2000192005393 held by the respondents with FCIB in Road Town, Tortola and their account at First Citizens Bank in Scarborough, Tobago. The court also granted permission to serve the respondents outside of Trinidad and Tobago. The injunction was initially extended until 5th December and subsequently until the determination of the Trinidad and Tobago proceedings or further order.
- [16] On 15th November 2022, the appellant applied *ex parte* to the BVI court for an interim freezing injunction to, among other things, restrain the respondents until further order, from disposing of, dealing with or diminishing the value of the assets owned by the respondents within the BVI up to the value of the substantive claim in Trinidad and Tobago, whether in their own name or not and whether owned jointly, beneficially, legally or otherwise up to the same value and further to restrain them from removing monies held in account number 2000192005393 with FCIB, Road Town, Tortola, BVI until further order of the court.
- [17] The appellant also sought leave to serve the respondents with any such interim freezing order out of the jurisdiction pursuant to rule 7.3(2)(b) of the **Civil Procedure Rules, 2000** (“CPR”).⁴ CPR 7.3(2) (b) expressly permits service out of a claim seeking a permanent injunction to restrain a defendant from doing something in the jurisdiction.
- [18] In the application, the appellant denied knowledge of the respondents’ whereabouts but nonetheless gave their ‘last believed country and general area of residence’ as Arawak Chambers, Sea Meadow House, Blackburne Highway, P.O Box 116, Road Town, Tortola, BVI and 5201 Blue Lagoon Drive Miami, Florida, USA, 33126. It

⁴ Which were operational when this matter was heard in the lower court have since been replaced by the Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023.

sought permission to serve them outside of the jurisdiction. Ms. Gray averred that those were the addresses last provided by the respondents as their place of residence and it is believed that 'service at that address, or at such other address as ascertained at the time of service in that jurisdiction would suffice for effecting service of these proceedings'.⁵ In reality, the address in Tortola is OCT's registered address.

[19] By order dated 16th November 2022 and entered on 18th November 2022, a judge in the BVI court granted the interim freezing injunction and leave to the appellant to serve the order on the respondents out of the jurisdiction at their last known residential addresses or to their last known email addresses. Alternatively, service was permitted to be substituted through publication in local newspapers circulating in the BVI, Trinidad and Tobago and the USA.

[20] By Notice of Application filed on 5th December 2022, the appellant applied for OCT to be added as a respondent in the proceedings; for the freezing injunction to be extended to OCT in the same terms as against the original respondents and for the interlocutory freezing injunction to be continued against the respondents. In the application, the appellant asserted that during a further search of the companies register on 21st November 2022, legal counsel discovered that OCT is an active BVI Company bearing registration number 430213 with a registered address at 'Sea Meadow House, P.O. Box 116, Road Town, Tortola, Virgin Islands, British'. The appellant further asserted that it had made an application to the Trinidad and Tobago High Court to add OCT as a defendant to those proceedings and it is necessary to add it as a party in the BVI application because it was the corporate vehicle used to defraud the appellant.

[21] The appellant added that it has a good arguable case in the Trinidad and Tobago proceedings that OCT is a co-conspirator in an unlawful means conspiracy to defraud the appellant; that it concealed the fraud from the appellant which resulted

⁵ At paras. 30-32 of her affidavit in support filed on 15th November 2022.

in substantial loss and damage; further that OCT deceived it into entering into contractual relations to provide developer services for the design, development and construction of the zipline tour which was a sham; that there are compelling reasons to believe that OCT cannot be trusted and there is a real and serious risk of dissipation of assets given the false representations by the founders of OCT.

[22] In her affidavit in support,⁶ Ms. Lesley Gray, stated that following the service of the freezing order on FCIB it was discovered that there is an active BVI company registered as OCT ENTERPRISES LTD. She averred further that information on directors and officers was not publicly available and therefore the appellant had no evidence that the respondents were connected to OCT. She asserted that the appellant maintains nonetheless that there is a strong nexus between OCT and the respondents.

[23] Ms. Gray stated that under the services agreement the appellant made payments to OCT by wire transfer to its account number 2000192005393 at FCIB in Road Town, Tortola. She asserted that it is therefore necessary to grant an interlocutory freezing order against the respondents and OCT because of the risk of dissipation of assets by them, because 'the respondents are fraudsters who will likely attempt to frustrate any judgment against them'. She maintained that due to the respondents' dishonest reputation, their and OCT's assets should be preserved to avoid frustrating any relief that may be obtained against them.

[24] In relation to the proceedings in the Trinidad and Tobago High Court, Ms. Gray stated that the respondents did not attend court on the return date – 16th November 2022 – and therefore the freezing order was continued against them by that court.

[25] On 6th December 2022, the appellant filed an amended claim form and statement of case in which substantial revisions were added including details of the services agreement such as the payment schedule and information corrected regarding

⁶ Filed on 6th December 2022.

certain steps taken by the respondents to meet some of their obligations under the services agreement.⁷ The appellant further supplemented its pleadings with email correspondence between its agents including its project manager and the respondents in the years after the execution of the services agreement.

- [26] On 12th December 2022, the second respondent, Mr. Hreniuk filed an affidavit in opposition to the application for continuation of the freezing order and the addition of OCT. He indicated that the affidavit was also being filed on the first respondent's behalf and with his consent. In it, he asserted that OCT was not served at its registered address with the proceedings filed in the Trinidad and Tobago court and that Mr. Graham and he were likewise not served.
- [27] Mr. Hreniuk traced the history of OCT's 21-year existence, its structure, reputation and its successes in the zipline industry and spoke to its ongoing operations globally including in Costa Rica. He supplied details of its banking relationship with FCIB in the BVI and its financial strength. He added that OCT has a long-standing account with FCIB in the BVI for over 15 years.
- [28] He indicated that the incorporation documents for OCT Enterprises were given to the appellant since May 2015. Therefore, it was or should have been aware of OCT's existence. He averred that OCT's registration information has not changed and the BVI company number has remained the same. He added that neither he nor Mr. Graham has either individually or in concert represented to the appellant that they trade singly or jointly in their personal capacities as 'Original Canopy Tours Enterprises Limited' and he is a stranger to any such entity. He concluded that the appellant clearly failed to conduct a full and proper search on OCT.

⁷ See for example the new paragraph 27 which states that the respondents brought 'insignificant amount of materials' to Trinidad and Tobago in or around September 2015, seemingly replacing the old paragraph 28 where it was stated that up to that point the claimant had received no materials under the service agreement.

- [29] Mr. Hreniuk denied that any misrepresentations were made to the appellant as alleged and insisted that the appellant's claim is based on factual inaccuracies. He refuted the claim that OCT is in breach of the services agreement with the appellant and countered that it is the appellant who is in breach by failing to pay invoices in accordance with the agreed terms and conditions. He explained that in September 2015, OCT sent a team to Tobago to begin setting up the site for full installation of equipment even without payment of outstanding invoices by the appellant. He pointed out that an email was sent from OCT on 25th September 2015 to advise that the second payment was three weeks late and this would lead to a delay in the delivery of materials and the subsequent installation. The second payment arrived in due course but the third payment was also delayed and has never been made.
- [30] He maintained that the interim freezing injunction was obtained through misrepresentations to the BVI court. He claimed that OCT has been unable to settle its ordinary trading debts and that he and Mr. Hreniuk have likewise been unable to meet their ordinary living expenses and ordinary debts.
- [31] The learned judge heard the application on 15th and 16th December 2022 and delivered an oral decision on 20th December 2022. She provided written reasons on 9th January 2023. She ruled that the court had no personal jurisdiction over the respondents and could not grant a free-standing freezing injunction in aid of foreign proceedings against them. Although not expressly stated, the implication (based on her express commentary on the evidence) is that this was not possible in the absence of evidence as to the respondents' residency or domicile in the BVI. The learned judge held that the appellant's claim as to misrepresentation about the identity of the contracting entity had little to no chance of success because the appellant was aware from 2015 of the relationship between the respondents and OCT by virtue of the corporate documentation (including its Certificate of Incorporation and of Good Standing) supplied to them by OCT.

- [32] The judge held that while there was a bona fide dispute between the appellant and the respondents based on competing allegations of breach of contract which disclosed an arguable case as to non-performance of the contract, she was not inclined to conclude that fraud was involved as alleged. She concluded that the evidence advanced by the appellant of there being a real risk of dissipation of assets was thin and had not met the threshold of establishing solid evidence of such real risk of dissipation. She noted that this was reinforced by the appellant's delay in initiating these proceedings. She therefore discharged the freezing injunction made *ex parte* against Messrs. Graham and Hreniuk; refused to make an interim freezing injunction against OCT; and awarded costs to the respondents to be assessed if not agreed.
- [33] By its Amended Interlocutory Notice of Appeal⁸ the appellant appealed the Discharge Order and the costs award. It seeks an order reinstating the interim freezing injunction against Messrs. Graham and Hreniuk and costs.

Grounds of Appeal

- [34] The appellant advanced five grounds of appeal, namely:
- (1) the learned judge erred in law or alternatively mixed fact and law and was plainly wrong in failing to consider important facts in relation to the risk of dissipation;
 - (2) the learned judge erred in law, or alternatively mixed fact and law and was plainly wrong in failing to apply the correct test to the question of [availability of] injunctive relief in support of foreign proceedings including (but not limited to) the fact that the learned judge accepted and treated the proceedings as being amended to include OCT ENTERPRISES LTD a company registered in the BVI as a respondent, yet questioned the court's personal jurisdiction over the respondents;

⁸ Filed on 4th April 2023.

- (3) the learned judge erred in law and was plainly wrong in failing to give any or sufficient regard to judicial comity in injunctive relief in support of foreign proceedings;
- (4) the learned judge erred in fact and was plainly wrong in concluding that the correspondence raised in the BVI proceedings was not before the Trinidad and Tobago court, as justification for departing from the position of the Trinidad and Tobago court; and
- (5) in the circumstances, the learned judge's decision to discharge the injunction was unsafe and ought not to be upheld.

Issues

- [35] The grounds of appeal raise two main issues, i.e., whether an incorrect test was applied to the availability of injunctive relief in support of foreign proceedings and whether the learned judge's evaluation of the application was defective by reason of errors of law or mixed law and fact. I propose to address them accordingly.

Role of appellate court in reviewing a judge's exercise of discretion

- [36] This appeal in essence invites this Court to reverse the learned judge's order to discharge the interim freezing injunction, which emanated from the exercise of a discretionary power. Before delving into the heart of the appeal, it is instructive to outline at this juncture the Court's remit when it is invited to review the exercise of discretion by a lower court.
- [37] It is now settled that an appellate court will not lightly interfere with the exercise of discretion by a lower court. It will do so only if satisfied that the learned judge was blatantly wrong in her determination because she either erred in principle by taking irrelevant factors into consideration or by disregarding pertinent matters or by according relevant factors too little or too much weight and by reason of such error exceeded the generous ambit within which reasonable disagreement is possible.

Dufour and Others v Helenair Corporation Limited and others⁹ is one of the leading authorities in which this principle was articulated. I remain mindful of it as I consider the appellant's criticisms of the learned judge's exercise of her discretionary power.

Ground of appeal 2 - Whether the learned judge applied the incorrect test for the grant of interlocutory injunction relative to foreign proceedings

- [38] An interim freezing injunction is also referred to as a *mareva* injunction, so called after the case **Mareva Cia Naviera SA v International Bulkcarriers SA** ('**The Mareva**')¹⁰ in which such an order was first made. It is an order restraining a respondent from disposing of, dissipating or removing assets from the jurisdiction where there are grounds for believing that the respondent would take steps to do so and thereby frustrate the enforcement of a later judgment against him. Essentially, the freezing injunction is deployed to facilitate the execution of a future judgment for the payment of a sum of money by ensuring that assets are preserved and not depleted.
- [39] An interim freezing injunction may be granted by the court in support of foreign proceedings. The appellant contends that the learned judge erred in the instant case by not applying the correct test for such grant.
- [40] On this issue, the learned judge noted that in **Broad Idea International Ltd v Convoy Collateral Ltd; Convoy Collateral Ltd v Cho Kwai Chee (aka Cho Kwai Chee Roy)**¹¹ the Board recently restated and endorsed the principles governing the grant of freezing orders. She opined that as long as the court has personal jurisdiction over a respondent, it may grant a freezing order in respect of his assets if the applicant has a good arguable case against him for being granted a judgment for the payment of a sum of money that is enforceable in a court of law. Additionally, it must be established that the respondent was liable to take steps to reduce the

⁹ (1996) 52 WIR 188.

¹⁰ [1975] 2 Lloyd's Rep 509, 510.

¹¹ [2022] 2 WLR 703.

value of those assets; that there was a real risk of him doing so; and that he would thereby frustrate the applicant's recovery of the judgment sum.

- [41] In relation to Messrs. Graham and Hreniuk, the learned judge opined at paragraph 31 of the judgment:

“In the present case, even though the Applicant gave the Respondents’ address as Arawak Chambers, Sea Meadow House, Blackburne Highway, Road Town, Tortola, this is the registered address of OCT ENTERPRISES LTD and there being no evidence of any personal jurisdiction over the Respondents, the Court has no jurisdiction to grant a free standing freezing injunction in aid of enforcement of foreign proceedings against the Respondents.”

- [42] The appellant argued that the court's holding that it had no personal jurisdiction over the 'respondents' is at odds with the fact that it 'treated them [OCT ENTERPRISES LTD] as added for the purpose.' It submitted further that it is trite law that the BVI court has personal jurisdiction over companies like OCT that are registered in and have registered offices within the BVI. Therefore, the court erred by concluding that it had no personal jurisdiction over the 'respondents' collectively although it treated OCT as having been added as a party. It contended that the court does have personal jurisdiction over OCT as it falls squarely within section 24A of the **Eastern Caribbean Supreme Court (Virgin Islands) Act** ("**Supreme Court Act**")¹². It reasoned that even if the court concluded that it had no personal jurisdiction over the respondents, Richard Graham and Darren Hreniuk, the injunction should have been made against OCT who the court treated as one of the respondents and as being within the court's personal jurisdiction.

- [43] The appellant submitted that contrary to the judge's ruling, the BVI court has jurisdiction to entertain a claim in personam over the respondents because they had voluntarily submitted to the court's jurisdiction by their conduct. It contended that the evidence before the court confirmed that the respondents accepted service and gave no indication that jurisdiction was being contested. It argued that the court may

¹² Cap. 80 of the Laws of the Virgin Islands.

infer voluntary submission from the circumstances, such as by using the objective test referred to in **Sage v Double A Hydraulics Limited**¹³ as ‘a well-informed but disinterested bystander test’.

[44] In support, the appellant cited **The Conflict of Laws (the commentary for Rule 33)**,¹⁴ Article 24 of The Brussels I Regulation and of the Lugano Convention and the English High Court decision in **Dennis v Tag Group Ltd and others**.¹⁵ In **Dennis v Tag** the court concluded that the respondents who were resident outside the jurisdiction had submitted to the court's jurisdiction by participating in and resisting an injunction application. I make the observation that the decision is neither binding nor of persuasive authority in this Court.

[45] The appellant relied further on **Advent Capital Plc v GN Ellinas Imports-Exports Limited**¹⁶ in which Colman J stated:

“The relevant test is whether the party has by his conduct in the proceedings acted in such a way which is only necessary or only useful if objection to the jurisdiction of the court in question has been waived or has never been entertained at all... The essence of the test is that - reflected in the word “only” - there has to be an unequivocal representation by word or conduct that objection is not taken to the relevant jurisdiction.”

[46] Regarding the court's jurisdiction to grant interim relief in support of foreign proceedings, the appellant submitted that this takes a different and specific form from worldwide freezing injunctions. Citing **Republic of Haiti and others v Duvalier and others**¹⁷ the appellant argued that the former is “to ensure that a judicial determination on the merits is not frustrated and that the assets of which a judgment may be satisfied are not dissipated, where the defendant's assets may well be found in a country other than in which the substantive proceedings are taking place.”¹⁸

Discussion

¹³ [1992] The Times Law Reports 165.

¹⁴ Dicey, Morris & Collins, (16th Ed).

¹⁵ [2017] EWHC 919 (Ch).

¹⁶ [2005] EWHC 1242 (Comm).

¹⁷ [1989] 1 All ER 456.

¹⁸ Appellant's Amended Skeleton Argument filed 4th April 2023, para. 105.

- [47] This ground of appeal attacks the learned judge's ruling that the court lacked personal jurisdiction over the respondents and therefore could not grant a free-standing freezing injunction in aid of enforcement of foreign proceedings against them. The criticism is two-fold. Firstly, it is that the term 'respondents' includes OCT a BVI incorporated company that is subject to the court's jurisdiction, therefore the impugned ruling is plainly wrong and demonstrates a misapplication by the judge of the test for the grant of interim injunctive relief in aid of foreign proceedings. Secondly, it is contended that the respondents Messrs. Graham and Hreniuk, having not taken issue with the court's jurisdiction over them, have thereby voluntarily submitted to the court's jurisdiction, are therefore subject to its jurisdiction and are liable to and should have had an interim freezing order made against their assets. Therefore, the learned judge erred in principle by failing to apply the correct test and by discharging the freezing order.
- [48] It is worth noting that while the judge held that the court could not grant a free-standing interim injunction against 'the respondents' because of lack of jurisdiction, she nonetheless went on to consider the application on its merits, on the premise that the court did have personal jurisdiction over them. A pertinent question is, who was the judge describing as 'respondents' in paragraph 31 of the judgment?
- [49] The term 'respondents' is used three times in that paragraph. In the first instance, the respondents are distinguished from OCT in relation to the address supplied in the application. The learned judge makes the point that the address is OCT's and not the 'respondents'. Clearly 'respondents' in that context could mean only Messrs. Graham or Hreniuk. The rest of the paragraph completed the judge's reasoning that in the absence of an address for the 'respondents' there is no evidence that the court has personal jurisdiction over them to grant a free-standing injunction to aid in foreign proceedings. Obviously, by syntax and rules of grammar, the second and third uses of the word 'respondents' in the paragraph refer to Messrs. Graham and Hreniuk and not to OCT.

[50] Indeed, the learned judge was here making a connection to an earlier observation made by her regarding the lack of evidence about Mr. Graham's and Mr. Hreniuk's addresses. She noted at paragraph 10:

"In the Notice of Application, the Applicant stated that the true whereabouts of the Respondents was unknown but that their "last general area of residence was at Arawak Chambers, Sea Meadow House, Blackburne Highway, Road Town, Tortola and Blue Lagoon Drive, Miami Florida, USA". There was no evidence in support of this allegation that this was the Residents' last known residential address. The evidence shows that Road Town address is the registered address of OCT Enterprises Ltd."

It seems quite clear therefore that the term 'respondents' when used in paragraph 31 of the judgment refers exclusively to Messrs. Graham and Hreniuk and did not extend to OCT.

[51] I am fortified in this view because of earlier statements in the judgment that signaled the court's recognition and acceptance that it had personal jurisdiction over OCT and could grant the interim freezing order against it if it was just and convenient so to do. In this regard, at paragraph 23 of the judgment the learned judge remarked:

"I pause here to note that the Applicant did not need leave to add OCT ENTERPRISES LTD as a party and given its status as a BVI company, the court has personal jurisdiction and it falls squarely within section 24A of the Supreme Court Act."

[52] Clearly, 'respondents' in paragraph 31 of the judgment refers only to Messrs. Graham and Hreniuk and not to OCT. It follows that the learned judge was not in that statement applying to OCT the test for grant of interim injunctive relief in support of foreign proceedings. Therefore, to the extent that the appellant contends otherwise or argues that the learned judge thereby misapplied the test to OCT as a respondent, it is misguided and incorrect.

Test for grant of interim injunctive relief in aid of foreign proceedings

[53] I turn now to the appellant's contention that the learned judge erred by finding that the court did not have personal jurisdiction over the respondents and did so because she did not apply the correct test. In **Convoy Collateral**, the Board traced the

historical development of the equitable remedy of interim freezing orders as a feature of the common law up to codification of the applicable principles in statute in some jurisdictions such as the United Kingdom and the BVI.

[54] As a matter of law, the BVI court has been vested with legislative power to grant free standing interim injunctions in aid of foreign proceedings against a respondent, provided that the respondent is subject to the court's jurisdiction and he has been served with the relevant court process. This development was achieved by the enactment of section 24A of the **Supreme Court Act**. It effectively codifies the legal principles that have emerged with the progression of this area of law, as described in **Convoy Collateral**.

[55] Section 24A provides:

“(1) **The High Court or a judge thereof may grant interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction.**

(2) On an application for any interim relief under subsection (1) the High Court or a judge thereof may refuse to grant such relief if, in the opinion of the High Court or a judge thereof,

(a) It has no jurisdiction, apart from this section, in relation to the subject-matter of the proceedings in a foreign jurisdiction; and

(b) It is inexpedient in the circumstances for the High Court or a judge thereof to grant such relief.

(3) **Subsection (1) applies notwithstanding that**

(a) the subject matter of the proceedings in a foreign jurisdiction would not, apart from

this section, give rise to a cause of action over which the High Court or a judge thereof would have jurisdiction; or

(b) the appointment of a receiver or **the grant of interim relief sought is not ancillary or incidental to any proceedings in the Territory.**” (Emphasis added)

[56] This legislative provision empowers the court to grant a free standing interlocutory injunction in aid of foreign proceedings regardless of whether ancillary proceedings have begun in the BVI or elsewhere or are under contemplation. However, the

exercise of such power 'must be ... in accordance with principle and any restrictions established by judicial precedent and rules of court'.¹⁹

- [57] In delivering the majority opinion in **Convoy Collateral**, Lord Leggatt explained that the legal position now captured in the BVI by this amendment²⁰ is that the court may grant interlocutory injunctive relief that is ancillary to a final order, if it is based on a recognised cause of action against a duly served defendant, irrespective of whether the final order is being sought from a domestic or a foreign court. Further, he made the point that prior to that amendment, the common law position was to similar effect, as stated in **Siskina (Owners of cargo lately laden on board) and others v Distos Compania Naviera SA** ("the **Siskina**").²¹ In this regard, he quoted from Lord Browne-Wilkinson's speech in the House of Lords case of **Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd**.²² where he said:

"Even applying the test laid down by the **Siskina** the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court or arbitral body."²³

- [58] The test laid down in the **Siskina** to which Lord Browne-Wilkinson referred is relevant to a proper consideration of this issue. In the **Siskina**, the House of Lords held that 'injunction' in the UK RSC Order 11, rule 1(1)(i)) referred only to a final, permanent injunction which was claimed in 'the action' by the claimant as a substantive remedy from the defendant for his infringement of the claimant's legal or equitable right irrespective of whether he also sought damages. The court ruled that the term 'injunction' in that sub-rule did not include any interlocutory injunction such as a freezing injunction.

¹⁹ *Convoy Collateral*, n.10, per Lord Leggatt at para. 39.

²⁰ As previously achieved in the UK by similar legislative amendment.

²¹ [1979] AC 210.

²² [1993] AC 334.

²³ At pg. 343.

[59] Among other things, the **Siskina** illustrates the trite legal principle that service of process assumes significance and is indispensable in relation to the grant of an interim freezing injunction, as indeed with all legal proceedings. This point was made repeatedly by Lord Leggatt in **Convoy Collateral** as he explained that the *ratio decidendi* in the **Siskina** is defensible because the operable rule of court (UK RSC Order 11, rule 1(1)(i)) did not permit service out of a claim for an interlocutory injunction unless it was ancillary to a final order or combined with a claim for other substantive relief.

[60] In the BVI, the applicable rule is **CPR 7.3(2)(b)** which is in similar terms to the UK RSC Order 11, rule 1(1)(i). RSC Order 11, rule 1(1)(i) permitted service of a writ out of the jurisdiction with leave of the court:

“[I]f in the action begun by the writ an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing)”

[61] **CPR 7.3(2)(b)** provides:

“7.3 (1) The court may permit a form to be served out of the jurisdiction if the proceedings are listed in this Rule.

(2) A **claim form** may be served out of the jurisdiction if a claim is made –

(a) ...

(b) **for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction;**” (Emphasis added)

As was held in the **Siskina**, it is now well-established in the BVI that ‘an injunction’ in CPR 7.3(2)(b) refers exclusively to a final, permanent injunction claimed in the claim form as a substantive remedy. Lord Leggatt reiterated this in **Convoy Collateral**.

[62] During her evaluation of the application, the learned judge addressed this issue. She examined the evidence of service of the BVI *ex parte* freezing injunction on the respondents Messrs. Graham and Hreniuk. At paragraph 10 of the judgment, she remarked:

[10] The Applicant sought and obtained leave to serve the Respondents outside of the jurisdiction pursuant the gateway set out in CPR 7.3(2)(b), i.e., where a claim is made for an injunction ordering the defendant not to do some act within the jurisdiction. It is pertinent to note that no claim form has been filed in the BVI... It is to be noted that this issue, specifically the interpretation of “injunction” in the sub rule as referring only to an injunction sought in the action as final substantive relief and did not include a freezing injunction or other interlocutory injunction was determined by the Privy Council in **Convoy Collateral Ltd v Broad Idea International Ltd, Convoy Collateral Ltd v Cho Kwai Chee (aka Cho Kwai Chee Roy)**. The lacuna in the CPR can only be filled by amendment to the rules and unlike the amendment to the Supreme Court Act, there has as yet been no legislation introducing a gateway for interim or freezing injunctions. There was however no application before me seeking to set aside service on the Respondents outside the jurisdiction.”

[63] The learned judge’s determination on this issue is set out at paragraph 31. Implicit in her ruling at paragraph 31 is the conclusion that she was not satisfied that the respondents’ addresses were supplied to the court at the *ex parte* hearing; or that the respondents were resident or domiciled in the BVI, nor that proper service had been effected on them in accordance with CPR 7.3(2)(b) or any other applicable rule. Consequently, she held that the court did not have personal jurisdiction over them and in the circumstances; it had no jurisdiction to grant an interim freezing injunction against them.

[64] The legal principles governing the grant of interlocutory injunctive relief relative to domestic and foreign proceedings were outlined by Lord Leggatt in **Convoy Collateral**. He stated:

“In summary, a court with equitable and/or statutory jurisdiction to grant injunctions where it is just and convenient to do so has power - and it accords with principle and good practice - to grant a freezing injunction against a party (the respondent) over whom the court has personal jurisdiction provided that:

- (i) the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;
- (ii) the respondent holds assets (or, as discussed below, is liable to take steps other

than in the ordinary course of business which will reduce the value of assets) against which such a judgment could be enforced; and (iii) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied.”²⁴

The learned judge was seized of these principles and quoted this passage at paragraph 29 of her judgment.

[65] Essentially, the learning is that the court has very wide and sweeping powers to grant interlocutory injunctive relief in aid of foreign and domestic proceedings once it is satisfied that it is just and convenient to do so, in view of the prevailing circumstances. The court cannot grant such relief unless it is satisfied that the respondent has been served with process in accordance with the applicable rules of court and that the court has personal jurisdiction over the respondent. This is the gateway or threshold to obtaining the relief. In addition, an applicant has to demonstrate that it has a good arguable case for being granted a money judgment that is enforceable in a court of law and that the respondent has assets within the jurisdiction, against which the judgment may be enforced. Further, the court has to be satisfied that there is a real risk that the respondent will deal with those assets in such a way as to deplete or impair them and thereby frustrate the recovery of the judgment sum.

[66] With respect to the gateway point, the conjoint effect of paragraphs 10 and 31 of the judgment is that the learned judge concluded implicitly that proper service was not effected on the respondents because no address for service within the BVI was supplied and the respondents were not served within the BVI. Furthermore, CPR 7.3(2)(b) under which the appellant was granted leave to serve the respondents out of the jurisdiction, did not permit service out of a claim or process seeking a free-standing interim injunction in aid of foreign proceedings.

²⁴ Convoy Collateral, n.10 at para. 101.

[67] The learned judge cannot be faulted for finding that there was no evidence that the respondents maintained a residence or address in the BVI. It was quite clear that the appellant had used OCT's registered address as the respondents'. It simply did not supply any other address for the respondents. This is contrary to the express language of the rules of court. It was therefore quite in order for the learned judge to find that the evidence disclosed no address for the respondents in the BVI and therefore no basis existed on which to find that they resided or were domiciled in Tortola, BVI. By extension, service on them at OCT's registered office in the BVI would have been ineffective. Moreover, because the *ex parte* application sought a free-standing interim injunction, service of the *ex parte* order could not properly be permitted pursuant to CPR 7.3(2)(b) because that sub-rule applies only in relation to proceedings that include a substantive claim for final injunctive relief.

[68] It is important to note that although sub-rule 7.3(2)(b) speaks to a claim form, service of other process is governed by the same rules of court. CPR 7.14 makes this clear. It provides:

- "7.14 (1) An application, order or notice issued, made or given in any proceedings may be served out of the jurisdiction without the court's permission if it is served in proceedings in which permission has been given to serve the claim form out of the jurisdiction.
- (2) The procedure by which a document specified in paragraph (1) is to be served is the same as that applicable to the service of a claim form and accordingly rules 7.8 to 7.13 apply."

[69] Accordingly, the learned judge's determination that the BVI court does not have personal jurisdiction over the respondents, demonstrates that she appropriately considered and correctly applied the test for grant of interim injunctive relief in support of foreign proceedings and that her ruling accords with the learning enunciated in **Convoy Collateral** and section 24A of the **Supreme Court Act**. It matters not that the respondents did not take the jurisdiction point at the hearing. The court is bound to exercise its discretionary power in accordance with the rules of court. It simply could not maintain a free-standing interlocutory injunction against either respondent which was obtained contrary to the service stipulation in CPR

7.3(2)(b). In my opinion, the learned judge was correct to so find even though neither Mr. Graham nor Mr. Hreniuk raised the jurisdiction point.

- [70] When viewed in light of the stated legal principles, the appellant's criticism of the learned judge's ruling is found wanting. The judge was entitled to find as she did (albeit by implication) that the evidence does not disclose that Messrs. Graham and/or Hreniuk maintains an address for service in, resides or is domiciled in the BVI or has some other relevant connection to enable service on either of them within the jurisdiction or to otherwise confer on the court personal jurisdiction over them. Furthermore, as noted before, the learned judge did not include OCT in this part of her determination. For these reasons, I would dismiss ground 2 of the appeal.

Grounds of appeal 1, 3, 4 and 5 - Discharge of Injunction

Appellant's submissions

- [71] Grounds of appeal 1, 3, 4 and 5 outline complaints that among other things the judge failed to have regard to relevant factors; in some instances, failed to attach adequate weight to pertinent matters and in others ascribed too much weight. Those grounds are best dealt with together since they deal with the singular issue of whether the learned judge erred in the exercise of her discretion by making the discharge order.
- [72] The appellant accepted that the learned judge correctly cited the relevant legal principle governing the grant or discharge of a freezing injunction. In this regard, it submitted that a fundamental requirement for obtaining a freezing order is to demonstrate that there is a real risk that the respondents will dissipate their assets outside of the ordinary course of business if the order is not made. The converse applies in relation to the discharge of such an order.
- [73] The appellant submitted further that the case of **Re Van Laun ex parte Chatterton**²⁵ established that a party is required to provide satisfactory evidence that the debt on which the proof is founded, is a real debt and does so by presenting a good arguable

²⁵ [1907] 2 KB 23, 29.

case. In this regard, learned counsel reasoned that even if the learned judge accepted the respondents' evidence that the appellant was indebted to them, she failed and was plainly wrong not to have regard to the fact that there was a genuine and substantial dispute as to whether a debt was owed.

- [74] Citing **Hualon Corporation v Marty Limited**²⁶ the appellant noted that the test for a good arguable case was said to be:

“One which is more than barely capable of serious argument, but not necessarily one that I consider would have more than a 50 percent chance of success at trial. *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft GmbH* (“The Niedersachsen”) [1984] 1 AER 398 at 404.”

- [75] The appellant contended that the only question to be determined by the learned judge was whether the respondents made representations which were more than barely capable i.e., with more than a 50% chance of success, of being fraudulent. It argued further that instead, the learned judge conducted an analysis of the evidence and the applicable law and concluded that the appellant had only a good and arguable case in breach of contract but not fraud, and had no regard to the respondents' history and their admissions.

- [76] In its estimation, the learned judge failed and was plainly wrong not to consider the respondents' history of evasive conduct in relation to the use of their funds, and their failure and/or refusal to substantiate their contractual representations on how materials were actually acquired, stored, auctioned or destroyed, among other things. The appellant highlighted the respondents' failure to attend the *inter partes* hearing for the Trinidad and Tobago freezing order despite what it described as 'expressed notice' through email delivery of notice of the return date on 16th November 2022; the fact that the emails were recorded as delivered (although the appellant received no response to them); that the respondents did not contact the appellant until the BVI FCIB account was frozen; that service of the freezing order

²⁶ BVIHCOM2014/0090 (delivered 20th November 2015, unreported).

was acknowledged on 23rd November 2022, the same day it was served; and that the Trinidad and Tobago, and BVI freezing orders were served at Mr. Graham's email address. Placing reliance on **Les Ambassadeurs Club Ltd v Yu (CA)**,²⁷ the appellant contended that there is nothing to indicate that the respondents' email accounts were inactive.

[77] Learned counsel submitted further that the learned judge failed to and was plainly wrong not to consider the weight of the evidence from the respondents that they did not purchase or auction materials and equipment and the absence of evidence that any materials had been purchased or were intended to be shipped, in face of the appellant's amended pleaded case that 100% of payment for the same had been advanced. She stated that the learned judge further erred by failing to consider that due to the respondents' false representations, it was under no contractual duty to advance further sums to them. Learned counsel reasoned that it is clear from the respondents' actions that they had no intention to comply with the services agreement, as their representations were untruthful. She stated that the evidence reveals that the appellant complied with its contractual obligations by making two tranches of payment, but later declined to make further payments since the respondents failed to ship or provide proof of the materials and equipment purchased.

[78] Learned counsel argued further that the learned judge was plainly wrong not to address the fact that the respondents' evidence was unsubstantiated and constantly changing. She submitted that the respondents' evidence is that the appellant abandoned the project; failed to provide necessary information to progress the construction and installation of the canopy tour; failed to pay the cost of shipping the equipment and material from Miami, Florida; failed to pay storage fees that were incurred; and that the warehouse owner refused to release the materials to the respondents without payment and instead sold them by auction.

²⁷ [2022] 4 WLR 1.

- [79] Counsel pointed out that contrary to this evidence, the respondents submitted at the hearing that the initial stages of performing the services agreement did not require the purchase of materials or equipment and admitted that the materials were never auctioned. She contended that this undoubtedly shows that a debt is due and owing and that there is a danger that the debtors may dispose of their assets so as to defeat it before judgment. A further contention was that the learned judge failed and was plainly wrong not to have regard to the fact that due to the unique circumstances of the case and the fraudulent representations, the appellant was under no obligation to continue to make payments to the respondents.
- [80] Noting that the learned judge recognised that there is no dissipation where the use of assets is to pay 'genuine indebtedness'²⁸ the appellant argued that she nonetheless failed and was plainly wrong not to take into consideration other relevant facts including its evidence disputing the respondents' contention that there was a genuine debt and fraud.
- [81] Further, learned counsel took issue with the amount of weight that the learned judge attached to certain factors in her evaluation. She submitted that too much weight was placed on the development of the substantive claim in Trinidad and Tobago and the issues to be determined at trial, such as whether the representations were sufficient for sustaining a cause of action of fraudulent representation and fraud committed in performance of contract. Learned counsel stated that in **Les Ambassadeurs Club Ltd v Yu (CA)**, the Court noted that a distinction must be made between a defendant who refuses to pay until forced to do so and one who is intent on not paying and seeks to frustrate recovery of funds by dissipating his assets. It argued that the respondents fall into the latter category.
- [82] On the subject of alleged wrongdoing by the respondents, the appellant argued that insufficient regard was had to this as the basis of its substantive claim in Trinidad and Tobago. It submitted that on the other hand, the learned judge placed heavy

²⁸ At paragraph 46 of the judgment.

reliance on its delay; the respondents' reputation; and their contention of non-payment. It also highlighted its evidence of wire payments to the respondents which contradicted the respondents' claim in the letter from Gavin White of Wilson Elser Moskowitz Edelman & Dicker LLP which erroneously stated that it had made only one payment of US\$277,000.00 pursuant to the services agreement.

[83] Noting that the learned judge set out a considerable number of instances of delay and remarked that 'the level of dilatoriness has reinforced my view that the Applicant does not hold a genuine concern that there is a real risk of dissipation',²⁹ the appellant conceded that it was dilatory in bringing these proceedings. However, it argued that the issue of delay in the context of the **Black Swan**³⁰ jurisdiction is of minor significance, particularly where similar relief is already in place in the foreign court. It submitted that the High Court decision in **Natali Osetinskaya v Golante Management Ltd and Usilett Properties Inc.**³¹ is authority for this principle and submitted that the issue of delay though considerable is not determinative as to whether or not the freezing order should be continued.

[84] The appellant submitted further that the respondents' longevity in business and their reputation with other contractual parties provide no basis for discharging the freezing order since reputable companies and businesses are not immune from fraudulent claims. Accordingly, the court should be careful not to assume without more, that a person who has been honest to some is unlikely to be dishonest with others. Further, it reasoned that given that the respondents have held out themselves to be a reputable company, at minimum they should be in a position to provide the appellant with a detailed account and inventory of the monies spent.

²⁹ At paragraph 53 of the judgment.

³⁰ See BVIHCV2009/399 *Black Swan Investment I.S.A v Harvest View Limited et al* (delivered 23rd March 2010, unreported).

³¹ BVI Claim No. 37 of 2013 (delivered 25th July 2013, unreported).

Material non-disclosure

- [85] The appellant took issue with the learned judge's conclusions that there is a considerable amount of evidence in the BVI proceedings that was not before the Trinidad & Tobago High Court;³² that there was a great deal of new evidence; and that the appellant exhibited a substantially revised Amended Statement of Case ("ASOC") which raises the question about the adequacy of the disclosure made at the *ex parte* hearings and the duty to disclose the respondents' possible defences.³³ It accepted that the duty to make full and frank disclosure of all facts remains a heavy one and argued that the court has a discretion to continue the order where the non-disclosure is minor and it would be right to do so. It referred to **Kazakhstan Kagazy plc v Arip**³⁴ and **Brink's Mat Ltd v Elcombe and others**³⁵ in support. The appellant argued that it is settled law that the court may interfere with the findings of fact of a lower judge and re-evaluate those facts provided that they are inconsistent with the evidence.
- [86] Counsel argued further that the ASOC became necessary after searches confirmed that OCT ENTERPRISES LTD³⁶ was a registered BVI entity. She stated that the ASOC was filed on 6th December 2022 and contains further amendments to those set out in the draft ASOC filed on 24th November 2022. Most of those amendments should not be considered new since it is largely an expansion of the earlier statement of claim filed on 14th November 2022, such as an extract of the contractual terms in the services agreement; the steps taken by the appellant to receive the anticipated shipment of materials and equipment; the respondents' position regarding the status of the materials and equipment and the steps taken by the appellant to demand performance of the services agreement, all of which were before the Trinidad and Tobago High Court in affidavit evidence.

³² At paragraph 55 of the judgment.

³³ At para. 20 of the judgment.

³⁴ [2014] EWCA Civ 381.

³⁵ [1988] 1 WLR 1350.

³⁶ Emphasising that the registered name is expressed in all capital letters.

[87] The appellant submitted that other amendments³⁷ outline events that could not reasonably have been included earlier because they took place after the application was filed for leave to amend the statement of claim. It argued that it was entirely reasonable for it to further particularise its case in this manner and the learned judge's criticism that it presented a 'substantially revised Amended Statement of Case' is plainly wrong. Accordingly, the learned judge failed and was plainly wrong not to take into account several relevant matters and had wrongly exercised her discretion. It pointed out that the particulars of the respondents' demand for further payment and their counter contention that the appellant was in default were already in the Statement of Claim and was put before the Trinidad and Tobago High Court twice before the injunction was continued and extended to include OCT ENTERPRISES LTD.³⁸

[88] Learned counsel submitted further that it is necessary to consider the injustice which may occur if an order is discharged leaving a defendant free to dissipate assets. Placing reliance on **National Bank Trust v Yurov and others**,³⁹ she stated that in cases where it appears that the claimant is a 'victim of a massive fraud from which the defendant has benefited to the tune of tens of millions of dollars' and 'the defendant's conduct even on his own account has been dishonest', the court will continue the freezing injunction.

Respondents' submissions

[89] The respondents argued that the unchallenged evidence before the judge was that OCT was an established company with existing contractual commitments and with a long-standing banking history in the BVI. Further, they had never been sued for failure to complete a project. They indicated that they have attended court proceedings in Trinidad and Tobago as well as within the BVI and made

³⁷ At paras. 76-80 of the ASOC.

³⁸ At para.19 of the Statement of Claim filed on 14th November 2022 and in the draft ASOC exhibited to the affidavit in support of the application to amend filed on 24th November 2022.

³⁹ [2016] EWHC 1913.

representations before the courts in the BVI and have retained legal counsel to make representations on their behalf before the courts in Trinidad and Tobago.

[90] They contended that throughout these proceedings the appellant has consistently misrepresented OCT's standing and that of its principals and filed proceedings against an incorrect entity. They argued that the evidence in the court below indicates that at all material times they represented to the appellant that they were OCT's principals. Further, that the pre-contractual documents disclosed to the appellant confirmed that the respondents were its directors and the services agreement dated 12th June 2015 which forms the basis of the contractual arrangement between the parties was entered into between the appellant and OCT. In addition, there was no evidence before the judge to suggest that the respondents represented themselves as Original Canopy Tours Enterprises Ltd. They stressed that the Trinidad and Tobago and BVI courts were led into error as to the actual state of affairs and as to the contractual relationship between the appellant and OCT.

[91] They stated that from an examination of the chronology of the facts of this case, it is clear that all the matters which were relevant to the weighing of facts were not presented to the Trinidad and Tobago court or the BVI court in November 2022. It was only through their affidavit in response that the court was able to get a full picture of the history of the contractual relations between the appellant and OCT. They added that the appellant was in breach of its duty to the court in this regard. They asked that the appeal be dismissed with costs.

Discussion

[92] The High Court is empowered by section 24(1) of the **Supreme Court Act** to grant an interim injunction including a freezing injunction. It provides expressly for such an order to be made "in all cases in which it appears to the High Court or to a Judge thereof to be just or convenient that the order should be made, and any such order

may be made either unconditionally or upon such terms and conditions as the High Court or the Judge thinks just". As explained by Lord Leggatt in **Convoy Collateral**:

"That provision gives the High Court power to grant an injunction by "an interlocutory order ... in all cases in which it appears to the court or judge to be just or convenient that the order should be made ...". It would be hard to cast the power in wider terms than that."⁴⁰

[93] The **CPR** makes express provision authorising the court to grant an interim freezing injunction. Rule 17.1 states:

"17.1 (1) The court may grant interim remedies including –

...

(j) an order (referred to as a "**freezing order**") restraining a party from –

(i) dealing with any asset whether located within the jurisdiction or not;

(ii) removing from the jurisdiction assets located there;"

[94] In exercising the discretion to grant or discharge a freezing injunction, the court is required to act judicially and must seek to give effect to the overriding objective of the **CPR** to act justly.⁴¹ It is now settled in law that in order to satisfy the court that it is just and convenient to grant the freezing injunction, an applicant need not present a winning argument but must make out a good arguable case to be granted 'substantive relief in a judgment that will be enforceable by the court granting the injunction.' In other words, it must be one that is more than barely capable of serious argument. In assessing the merits of the case, the court does not conduct a mini-trial or determine legal questions which are more appropriately reserved for the trial. Instead, the judge considers the affidavit testimony and evaluates the strengths and weaknesses of the case to assess whether a tenable evidentiary narrative is laid out.⁴²

⁴⁰ [2022] 2 WLR 703 at para. 76.

⁴¹ CPR 1.2.

⁴² See *Ninemias Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H. & Company K.G. (The Niedersachsen)* [1986] 1 Lloyd's Rep 397; see also *Hualon Corporation (M) SDN BHD (In Receivership) Acting by its Receiver and Manager Mr. Duar Tuan Kiat v Marty Limited BVI HC (COM) 2014/0090* (delivered 20th November 2015, unreported).

Good arguable case

[95] In the court below, the learned judge cited **The Niedersachsen** and identified the good arguable test articulated by Mustill J, that it is not necessarily one which the judge believes to have a better than 50% chance of success. She determined among other things that the appellant had not supplied solid evidence that there is a real risk of dissipation of assets and had therefore not satisfied the threshold test for the grant of an interim freezing injunction against OCT. It was on this basis that she discharged the interim freezing injunction granted against Messrs. Graham and Hreniuk trading as Original Canopy.

[96] In arriving at this conclusion, the learned judge had regard to several factors. Among them were the appellant's allegations of fraudulent misrepresentation and fraud and the respective parties' opposing testimony regarding breach of the services agreement. She was not satisfied that a good arguable case was made out in respect of the fraud claims as to OCT's existence or the alleged fraudulent performance of the services agreement.

[97] Regarding the alleged breach of contract, the judge ruled that a genuine dispute existed as to whether any of the parties was in breach of the services agreement. She noted:

"There is a bonafide dispute between the parties; each side alleges breach of contract. While I am not prepared to say that there is fraud involved, there is clearly an arguable case raised as to the non-performance of the contract by the Respondents."⁴³

It is noteworthy that the appellant conceded the non-viability of its assertion that the respondents induced it to contract with a non-existent entity. This concession has effectively whittled their substantive case in the Trinidad and Tobago court down to one of breach of contract as found by the learned judge. In my estimation, the learned judge cannot be faulted for so concluding in light of the appellant's

⁴³ At para. 42 of the judgment.

concession that it can no longer maintain that it was induced to contract with a non-existent entity.

Risk of dissipation

[98] The learning as to what constitutes a risk of dissipation is well settled. Borrowing from Gloster LJ in **Holyoake and another v Candy and others**,⁴⁴ this Court in **Mitsuji Konoshita and A.P.F. Group Co. Ltd v JTrust Asia PTE Ltd**.⁴⁵ and in **Broad Idea International Limited v Convoy Collateral Limited**⁴⁶ adopted his formulation of the test as follows:

“... the threshold in relation to conventional freezing orders is well established. There must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. But it is not every risk of a judgment being unsatisfied which can justify freezing order relief. Solid evidence will be required to support a conclusion that relief is justified, although precisely what that entails in any given case will necessarily vary according to the individual circumstances.”

[99] Useful guidance on the application of this principle has also been extracted from the dicta of Males J in **National Bank Trust v Yurov**. He approved certain propositions advanced by the defendants in that case as being relevant in assessing the risk of dissipation, but are by no means exhaustive. He accepted that:

- “(a) The claimant must demonstrate a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant's assets.
- (b) That risk can only be demonstrated with solid evidence; mere inference or generalised assertion is not sufficient.
- (c) It is not enough to rely solely on allegations that a defendant has been dishonest; rather it is necessary to scrutinise the evidence to see whether the dishonesty in question does justify a conclusion that assets are likely to be dissipated.
- (d) The relevant inquiry is whether there is a current risk of dissipation; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held.
- (e) The nature, location and liquidity of the defendant's assets are important considerations.

⁴⁴ [2016] EWHC 970 (Ch).

⁴⁵ BVIHCMAP2018/0047 and BVIHCMAP2018/0020 (delivered 18th December 2018, unreported).

⁴⁶ BVIHCMAP2019/0026 (delivered 29th May 2020, unreported).

(f) Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant.

(g) So too is the defendant's behaviour in response to the claim or anticipated claim."⁴⁷

[100] In the case at bar, the learned judge itemised the foregoing indicia as being relevant. She succinctly captured her conclusion as to the risk of dissipation by stating simply:

"The Applicant has not met the threshold of establishing with solid evidence that there is a real risk of dissipation of assets."⁴⁸

She held ultimately:

"I am satisfied that it is not expedient to grant the relief sought, which remains within my discretion notwithstanding the orders that have been made in the Trinidad proceedings and

I have no obligation to merely rubberstamp their order. The result is that the Applicant's application for continuation of the interim freezing injunction granted ex parte on 16 November 2022 and for interim freezing injunction against OCT ENTERPRISES LTD is refused. The Applicant is to pay the Respondents' costs of the application, such costs to be assessed if not agreed within 21 days."⁴⁹

[101] In her evaluation of the evidence, the learned judge highlighted the appellant's case and found that with respect to the risk of dissipation, it was thin. She stated:

"[48] ... It is said that the Respondents are fraudsters who will likely attempt to frustrate any judgment. The matter is under investigation by the Trinidad and Tobago police (no details were provided). The Respondents have a dishonest reputation, they are of questionable integrity and the risk of dissipation is high. It was submitted that based in (sic) underlying facts and conduct of the Respondents there are compelling reasons to believe that the Respondents cannot be trusted and there is a real and serious risk of dissipation of assets "given their false representation"...

[49] In response, Mr Hreniuk submitted that there is no evidence or sufficient evidence of a real risk of dissipation of assets. He points to the Respondents' compliance with the companion disclosure order as well as evidence of one of the company's ongoing joint venture contracts which has

⁴⁷ [2016] EWHC 1913 at para. 70.

⁴⁸ At para. 51 of the judgment.

⁴⁹ At paras. 56 and 57 of the judgment.

been in place since 2010. In response to the submission that they have been evasive and have failed to provide information as requested, Mr Hreniuk said that the Respondents responded to all their emails they needed to relating to the Applicant's non payment and that they considered that the Applicant had forfeited the right to ask any questions on the disposition of product that they had abandoned six years before. ...

[50] I would add that there is no evidence that the Applicant was making any enquiries or chasing on performance of the contract between December 2017 and August 2020.

[51] The Applicant has not met the threshold of establishing with solid evidence that there is a real risk of dissipation of assets."

- [102] Her assessment of the evidence presented by the appellant compelled the judge to find that in essence no cogent evidence of risk of dissipation was set out in the appellant's case. I consider that the learned judge conducted a fair and balanced evaluation of the respective parties' cases, without attempting to conduct a mini-trial. In my opinion, there was more than sufficient evidence and in some instances a glaring paucity to justify the conclusion to which she arrived. In doing so she had regard to the applicable legal principles and did not commit an error in principle either in fact or in law. I am satisfied that she was entitled to find as she did and I would not disturb her decision that the risk of dissipation was not made out.

Delay

- [103] Additionally, the appellant's contentions that the respondents are intent on taking steps to dissipate their assets did not find favour with the learned judge for a number of other reasons not least of which was the protracted length of time after which the appellant first took legal action to pursue the respondents. The learned judge's remark that 'there is no evidence that the Applicant was making any enquiries or chasing on performance of the contract between December 2017 and August 2020' is a fair characterisation of the appellant's conduct during that period and belies its claim about serious concerns regarding the respondents' business integrity and more fundamentally any genuine fear that there exists a risk of dissipation of funds.

[104] On the matter of the appellant's dilatoriness, the learned judge remarked:

"[52] There is also the issue of the delay in making the application, which is a relevant factor in deciding whether relief should be granted. It seems to me that in this case, the delay tends to support a view that the Applicant did not have a bonafide concern that the Respondents would dissipate their assets. ... I have taken the following matters into account when considering the effect of the delay:

- (a) In the original claim filed in Trinidad in November 2021, no interim freezing injunction was sought. The change in the nature of the claim occurred after the advice received on the soft search in May 2022 and the new claim was then filed in November 2022. This suggests that the risk of dissipation is linked to the claim of fraudulent misrepresentation as to identity of the company. On that count, the claim of fraudulent misrepresentation is misconceived;
- (b) The Applicant was granted permission to serve the Respondents outside of the jurisdiction in January 2022 in the Trinidad proceedings. The letter of instructions from the Applicant's lawyers to Harneys was dated 4 May 2022, four months later. There was no sense of urgency;
- (c) The Statement of Case pleads receipt of the invoice dated TOB11 29 October 2016 US\$108,332.00 for storage fees for equipment and material for 67 weeks as one particular of the Respondents' fraud. This was a point at which the Applicant asserts that Respondents were in fraudulent breach of contract, yet no steps were taken to promptly seek to enforce the contract. In fact, nothing was done until the letter dated 3 August 2020;
- (d) There was no response to the Respondents US lawyers' demand letter dated 4 December 2017 even though that letter mentioned the storage fees and that the Respondents would take action in Florida to recover the sums due from the Applicant;
- (d) There was no action between December 2017 until 3 August 2020 when the Applicant's legal counsel wrote to the Respondents;
- (e) The Applicant was informed by Respondents in November 2020 that the items had been in storage had been auctioned off [para. 52 of the Amended Statement of Claim];
- (g) No claim filed until November 2021 for a breach of contract that is said to have occurred from circa October 2015 [para. 32 of the Amended Statement of Claim].⁵⁰

⁵⁰ At para. 52.

[105] She concluded at paragraph 53:

“[53] For all the concerns expressed about the honesty and reputation of the Respondents, the Applicant has been remarkably dilatory in dealing with its claim. The level of dilatoriness has reinforced my view that the Applicant does not hold a genuine concern that there is a real risk of dissipation.”

[106] The learning is that delay is a relevant factor in applications for interim injunctive relief but delay would not necessarily deprive an applicant of relief especially where there is cogent evidence of a risk of dissipation of assets. It was accurately captured by the learned judge. In all the circumstances of this case, the learned judge was entitled to ascribe significant weight to the appellant’s delay and to find on the evidence before her that it reflected on the appellant’s part a remarkable level of indifference to the respondents’ conduct on which it now belatedly relies to ground an assertion that there is a risk of dissipation of assets, when presumably no such concern existed for the several years which preceded the filing of the claim. The judge had ample evidence on which to make such a finding. I do not consider her assessment to be blatantly wrong or to be tainted by irrelevant considerations. I would therefore not interfere with her assessment on this score.

Judicial comity

[107] In addressing the issue of judicial comity, the judge factored in what she referred to as non-disclosure by the appellant and the absence of the respondents’ evidence in opposition. She stated:

“[54] I gave **serious consideration** to the fact that this application was pursued as ancillary to the Trinidad proceedings. Mrs Hannaway Boreland stressed the fact that the Trinidad court has been satisfied that there is a good and arguable case against the Respondents and OCT ENTERPRISES LTD and that there is a real risk of dissipation of assets and granted the interim freezing order to remain in place pending the determination of the claim. As such, being a court who is asked to grant the relief essentially as security for the enforcement of a prospective foreign judgment, and that main court having granted similar interim injunctive relief, **I am mindful of the desirability of judicial comity.**

[55] However, it is clear to me that there is a considerable volume of evidence that was before me, that had not been presented to the court in Trinidad and Tobago. The ASOC which completely overhauled the claim against the Respondents and to which were annexed significant documents providing a fuller picture of the breakdown in the contractual relationship between the parties was filed the day after the order continuing the freezing order until determination of the claim. Further, the court has not had the benefit of the Respondents' evidence in opposition and there has not been an inter partes hearing of the applications there. Service of the Trinidad proceedings on the Respondents was only effected on 7 December 2022."⁵¹ (Emphasis added)

[108] From the foregoing, it is clear that the learned judge took into account the desirability for judicial comity in this case and gave it at least moderate weight. However, she was careful to indicate that this had to be weighed against other relevant circumstances arising from the evidence. She cannot in my opinion be condemned for having regard to the absence of the respondents' case in opposition in view of the considerable additions made by the appellant to the ASOC after the *ex parte* freezing injunction was granted and the other material elements which were not before the Trinidad and Tobago court when that order was made. The appellant's criticisms of this aspect of the learned judge's evaluation of the case are in my view unjustified. The learned judge was entitled to find as she did. I am satisfied that she did not go wrong by attaching considerable weight to the fact of the Trinidad and Tobago court's decision and I would not reverse her determination by reason of the weight she attached to the judicial comity factor.

Material non-disclosure

[109] It is an established principle of law that an applicant seeking an *ex parte* injunction has a heavy duty of candour to the court regarding all relevant matters which may impact the grant or refusal of relief. This includes matters within the applicant's knowledge or others that he may have discovered on making appropriate inquiries. He is required to make full and frank disclosure of all material facts that the court

⁵¹ At paras. 54 and 55 of the judgment.

might reasonably take into account in its deliberations. It is for the court and not the applicant or his counsel to determine what is material.⁵² As held in **Brink's Mat Ltd.**, although failure to comply with this duty of candour does not automatically lead to a discharge of the *ex parte* injunction, the court is entitled to take it into account in deciding whether to discharge the injunction, continue it or make another order on new terms. In deciding whether to discharge an injunction for non-disclosure, the court will consider the importance of the undisclosed material to the issues to be decided and whether it was sufficiently relevant to justify the making of a discharge order.

[110] In the case at the appeal bar, the learned judge considered several matters as evidencing material non-disclosure by the appellant. These included the disparity between the appellant's narrative of the respondents 'disappearing into thin air' and the respondents' account that between 2015 and 2017 they had been trying to get their invoices paid and had even had their lawyers Wilson Elser Moskowitz Edelman & Dicker make a formal demand by letter dated 4th December 2017. She also noted that contrary to the appellant's assertions that the respondents had fraudulently misrepresented their and OCT's identity and that their business entity was a sham, the appellant was at all material times in possession of the incorporation details and other documentation. Further, the ASOC included additional details (including correction of the narrative in some places⁵³) that were not earlier foreshadowed in the original filings in the Trinidad and Tobago and BVI courts.

[111] The learned judge noted:

"[18] The effect of the Respondents' evidence is that it debunks the Applicant's case that the Respondents made false representations regarding their identity and that OCT Enterprises Ltd and the Respondent's business is all a sham. Mr. Hreniuk criticized the Applicant's conduct of the search for the company which led to the allegations made against the Respondents' character and formed the basis for the fraud claim. Mr.

⁵² Kazakhstan Kagazy plc and others v Arip [2014] EWCA Civ 381.

⁵³ See footnote 7 above.

Hreniuk expressed surprise at the claim being filed against Original Canopy Tours Enterprises Limited, when the Services Agreement, the invoices and all correspondence correctly identified the company.

[19] The Respondents' evidence also put a different light on the breakdown of the contractual relationship between the parties. Quite opposite to the Applicant's narrative of the Respondents disappearing into thin air, the documentary evidence reflected that the Respondents had been trying to have their invoices paid and the materials shipped to Tobago, even to the extent of retaining lawyers who made a formal demand on the Applicant by letter dated 4 December 2017 from Messrs. Wilson Elser Moskowitz Edelman & Dicker LP in which the Respondents alleged that the Applicant was in breach of contract.

[20] Ms. Gray's Third Affidavit filed on 14 December 2022 in response to Mr. Hreniuk's affidavit provided a great deal of new evidence detailing the issues with performance of the contract, which itself painted a different picture from what had been put in evidence before. The Affidavit exhibited the substantially revised ASOC filed in Trinidad proceedings on 6 December 2022. This raises questions about the adequacy of the disclosure made in the *ex parte* hearing of the application, including the Applicant's duty to bring to the court's attention likely defences to be raised by the Respondents."⁵⁴

[112] Regarding those concerns, she opined:

"... it is clear to me that there is a considerable volume of evidence that was before me, that had not been presented to the court in Trinidad and Tobago. The ASOC which completely overhauled the claim against the Respondents and to which were annexed significant documents providing a fuller picture of the breakdown in the contractual relationship between the parties was filed the day after the order continuing the freezing order until determination of the claim. Further, the court has not had the benefit of the Respondents' evidence in opposition and there has not been an *inter partes* hearing of the applications there. Service of the Trinidad proceedings on the Respondents was only effected on 7 December 2022."⁵⁵

[113] Having regard to the appellant's claim of fraudulent misrepresentation by the respondents, the concerns highlighted by the learned judge were material. They pointed to evidentiary details which were not particularised in the original claim form filed in the Trinidad and Tobago court or in the *ex parte* application in either

⁵⁴ At paras.18-20 of the judgment.

⁵⁵ At para. 55 of the judgment.

the Trinidad court or the BVI court and in the case of the name of the corporate entity, this was a matter that could have been discovered on full and proper inquiry either at the companies' registry or by a thorough or even cursory review of the services agreement.

- [114] The learned judge had an abundance of material from which she was entitled to find that the appellant had failed to discharge its duty of candour to the court. Furthermore, on the authority of **Brink's Mat Ltd.**, it was open to her to discharge the freezing injunction on account of this breach. As a matter of law and on the evidence, her ruling on this point is unassailable and I would not interfere with it.

Relevant and irrelevant factors

- [115] The appellant made heavy weather of the learned judge's evaluation of the respondents' claim that the materials were auctioned. Its submissions appear to be an invitation to the court to conduct a mini-trial on the untested affidavit testimony. This is not permissible. While admittedly there appears to be some evidentiary uncertainty as to whether the materials were bought and auctioned, even if the learned judge had doubted the veracity of the respondents' averments on this aspect of the case, there remained an abundance of material from which she could still have concluded as she did without her determination being contradictory or plainly wrong. In my opinion, whether materials were bought and auctioned or not is a factual issue that can be resolved categorically only at the trial. The learned judge's handling of that aspect of the case does not amount to a misdirection or misapplication by her of the applicable legal principles and I would not disturb her ruling.
- [116] Likewise, the weight ascribed by the learned judge to the Trinidad and Tobago proceedings was well within reasonable parameters in all of the circumstances. I consider that her overall evaluation of the appellant's and the respondents' cases was balanced, well-reasoned and thorough. I remind myself that this Court is

limited in its capacity to reverse a lower court's decision in relation to evidentiary issues and evaluative exercises of the type undertaken in the case at bar.

[117] For all of the foregoing reasons, I am satisfied that the learned judge stayed well within the permissible boundaries of reasoning in evaluating the materials in this case. She made a well-reasoned, balanced and justifiable determination on each of the relevant factors and did not consider irrelevant matters. I am of the considered opinion that her decision does not disclose any error in principle and is not blatantly wrong. I would not reverse it. I would accordingly dismiss grounds of appeal 1, 3, 4 and 5.

Disposition

[118] Accordingly, I would make the following orders:

- (1) The appeal is dismissed, and the order of the learned judge is wholly affirmed.
- (2) The appellant shall pay to the respondents their costs on the appeal to be assessed by a judge of the Commercial Court if not agreed within 21 days.

[119] I am grateful to the parties for their submissions.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Robert Levy
Justice of Appeal [Ag.]

By the Court

Chief Registrar