

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVI HC (COM) 2014/0090

BETWEEN:

**HUALON CORPORATION (M) SDN BHD (In Receivership)
Acting by its Receiver and Manager Mr. Duar Tuan Kiat**

Claimant/Applicant

AND

MARTY LIMITED

Defendant/Respondent

Appearances:

Mr. Paul Dennis, QC with him Ms. Nadine Whyte and Dr. Alecia Johns for the
Claimant

Mr. John Carrington, QC for the Defendant

2015: November 3; 20.

JUDGMENT

*Application to discharge Injunction obtained without notice – Injunction order not having
return date – Rule 17.4(4) and (5) of the Civil Procedure Rules 2000 – Whether injunction
ought to be set aside without more – Whether application for injunction properly made ex
parte – Whether serious issue to be tried – Delay – and risk of dissipation of assets.*

The Applications

- [1] **FARARA J [Ag.]**: On 3rd November 2015 I heard submissions by counsel for the parties on an application filed 6th March 2015 by the Defendant, Marty Limited, (“the Discharge Application”) to discharge the injunction order made some 13 plus months ago on 16th September 2014 (“the Injunction”). The Order was made by Bannister J on a without notice application by the Claimant filed 22nd July 2014 (“the Ex Parte Application”). The Defendant relies in support of the Discharge Application on the Second Affidavit of Akilah Anderson filed 6th March 2015¹. At the time of the Ex Parte Application, there were two other defendants who were also restrained by the Injunction. However, as matters unfolded, these proceedings (and hence the Injunction) were discontinued against those defendants, as detailed below.
- [2] There is also on the court’s file an application filed 26th March 2015 by the Defendant, Marty Limited, for summary judgment and for striking out the Claim in its entirety (“the Summary Judgment and Strike-Out Application”). At the beginning of his submissions, Mr. Dennis QC, counsel for the Defendant, indicated that the Defendant would not be pursuing that application before me on this occasion, but would, in the Discharge Application, be also relying on all the grounds and arguments in its skeleton argument relating to the Summary Judgment and Strike-Out Application.
- [3] There is also a third application. This one by the Claimant, for a stay of the claim in these proceedings (“the Stay Application”), pending the outcome of arbitration

¹ See Tab2

proceedings which are said to have been commenced elsewhere. This latter application was heard by Leon J on 18th May 2015, and his reserved decision thereon is pending. Before me, both counsel seem to be in agreement (Mr. Dennis QC stating expressly and Mr. Carrington QC not demurring), that the pending decision on the Stay Application presented no impediment to my proceeding with and rendering my decision on the Discharge Application.

- [4] The record in this matter also reveals, that a prior application by the Defendant (then the Third Defendant) for an order that the court ought not to exercise jurisdiction over it (“the Defendant’s Jurisdictional Application”), and for the consequential discharge of the Injunction (see Amended Third Defendant’s Notice of Application filed 26th January 2015), was dismissed by Bannister J on 10th February 2015. On that occasion, the learned judge also made an order, on a separate application by the Claimant, discontinuing the claim in this action against the then named First and Second Defendants, Oung Da-Ming and Dato’ Oung Yu-Ming (referred to as “the Oung Brothers”), who are said by the Claimant to have been the moving spirits in the acts of dishonesty alleged in the Amended Statement of Claim filed herein. I will return to the matter of the dismissal of the Defendant’s Jurisdictional Application, and the submissions by Mr. Carrington QC and Mr. Dennis QC on the effect, if any, of that decision, on my determination of the Defendant’s Discharge Application.

The ex parte application for injunction and permission to serve out

- [5] On 22nd July 2014, the Claimant, a Malaysian registered company in receivership, acting by its Receiver Mr. Duar Yuan Kiat, who was appointed Receiver and Manager of the company under the terms of a debenture, filed two notices of application, both to be heard without notice. They sought an order for service out of the jurisdiction of the Claim Form, Statement of Claim and ancillary documents

on the then named Defendants². This application was granted by Bannister J on 16th September 2014.

[6] The second application by the Claimant sought an interim injunction, pursuant to Part 17 of CPR, against Marty Limited (then the Third-named Defendant) *“pending the determination of the Claimant’s claim inter alia for a permanent injunction”*, restraining it from (i) registering any transfer of the shareholding of the First and Second Defendants in the Third Defendant, and (ii) dealing in any manner with its interest or any part of its interest in Hualon Corporation Vietnam.³ This second application, also filed 22nd July 2014, was supported by both the First Affidavit of Ms. Corrine George filed 22nd July 2014⁴ and the Second Affidavit of Corine George filed 11th August 2014⁵, to which certain documents were exhibited as “CG2”. Mr Carrington QC, who appeared for the Claimant at the *ex parte* hearing on 16th September 2014, filed (or lodged) written submissions on 15th September 2014⁶. At the hearing on 16th September 2014, the judge also granted the Injunction sought in the second application.

[7] In the matter before me, we are only concerned with the Injunction and the Defendant’s Discharge Application. The judge’s oral ruling on the *ex parte* injunction application⁷ was given in these terms: *“I will give permission to serve out as agreed; usual time limits and the injunctions will be in the terms I’ve mentioned over what period.”* To which Mr. Carrington responded: *“Maximum of 28 days”*. And the judge states: *“Maximum of 28 days.”*

² See Tab 14

³ See Tab 17

⁴ See Tab 15

⁵ See Tab 18

⁶ See Tab 20

⁷ See Tab 21

[8] It is pellucidly clear from the ruling of the learned judge that he was mindful of the provisions of CPR 17.4(4) which limits the court, on a without notice application, to granting an interim injunction for a maximum period of 28 days (unless any provision of the rules permit a longer period, which does not apply here). This very point is made clear from paragraph [4] of the Note of the judge's oral judgment delivered 10th February 2015 on the Defendant's Jurisdictional Application⁸. However, the learned judge did not fix a specific return date for the injunction at that time, as is required by CPR 17.4(5). He relied on the Court Office to fix the return date within the 28 day period which, unfortunately, did not happen. The formal order of the court, as drafted and entered up on 29th September 2009, does not stipulate a return date, makes no reference to the injunction order being in effect for a maximum of 28 days (as the judge had stipulated), nor does it state that a return date would be fixed by the Court Office. As worded, the Injunction Order reads as an interim injunction "pending the hearing and determination of the claim" or further order.

[9] I will consider below what, if any, is the effect of this failure on the Injunction or its continuation.

Grounds for Discharge of the Injunction

[10] In the Discharge Application, the Defendant relies on a number of grounds. These were divided by Mr. Dennis QC, in his oral submissions, into technical and substantive grounds. The grounds in the Discharge Application did not include an allegation of material non-disclosure, but Mr. Dennis QC did seek to rely on such allegations before me. I do not base my decision on any such ground as a defendant/applicant is generally confined to the grounds stated in its discharge

⁸ See Tab 22

application and no notice of this additional ground or any particulars were to the Claimant.

- [11] I will consider first the ‘technical’ grounds relied on by the Defendant, but before doing so, I must record that the parties were in agreement at the hearing that paragraph 1(b) of the Injunction, which prohibits the Defendant from “making any alteration to its register of members”, ought to be discharged. Accordingly, I so ordered during the course of the hearing on 3rd November 2015. In these circumstances, the matter proceeded before me only in relation to paragraph 1(a) on the Injunction.

The Injunction is irregular having been granted for more than 28 days

- [12] Mr. Dennis QC submitted that the Injunction, having not been limited to a maximum period of 28 days, or given a return date within the 28 day period, is irregular. Accordingly, he contends that the Defendant is entitled to have the Injunction discharged, and the court ought, without more, to discharge it. In this regard, he relied on CPR 17.4(4) which stipulates that, on an application made without notice, the court may grant an interim order “for a period of not more than 28 days”. As his argument goes, the Injunction, having been granted for a period in excess of 28 days in breach of rule 17.4(4), is irregular and must be discharged. In support of his submissions, he relied on two unreported decision of Justice d’Auvergne.
- [13] In the first decision, ***Fursey Management Limited v Gefio General Finance Corporation Inc et al*** Civil Suit No. 87 of 2003, the learned judge, in a judgment delivered 7th October 2003 where an interim injunction had been granted on a without notice application for a period in excess of 28 days, discharged the

injunction. The judge, having cited Rule 17.4(4), dealt with this issue in an abbreviated way. It is stated at paragraph [42]:-

“The above noted rule is pellucid –“not more than 28 days.” The period given in the order of injunction on 27th June 2003 extends over the period set by the rules and therefore the injunction should be discharged.”

[14] The second decision is ***Zhu Jaing Finance Ltd v American dream In Guangzhou Ltd et al*** Civil Claim No. BVIHCV 2003/0121. In a judgment delivered 13th February 2004, Justice d’Auvergne followed her decision in ***Furse***. In doing so, she remarked at paragraph 33 of the judgment, that this “is not an issue to be case managed, not an issue for the consideration of Rule 26.1(2)(k) which empowers the court to extend or shorten the time for compliance with any rule.”

[15] Mr. Dennis submits further that this is not a matter of mere irregularity, but one of the fundamental right of a party who is entitled to be heard on an application in relation to an order made in it’s absence. He contends that CPR 26.9, dealing with the power of the court to put things right where there has been an inadvertent failure to comply with an order, rule or direction, has no application in the instance matter, since that power is intended for situations where a party, and not the court, has not followed the rules. It is to be observed that Mr. Dennis does not go so far as to contend that the Injunction is void. He takes the view that the court had the power to make the order, but it ought not, in compliance with the applicable rule, to have made the order for a period in excess of 28 days. Instead, the order is for an indefinite period.

[16] On this issue, Mr. Carrington QC, while not disputing that the Injunction does not comply with Rule 17.4(4), a matter not open to any doubt, made three initial points. First, he submitted that the Defendant, having not relied on this as a ground in its

first discharge application (as amended) dated 26th January 2015, is estopped from relying on it as a ground in this second discharge application. His second point is that, in any event, the defect is one that can be put right pursuant to the court's powers under CPR 26.9(4). As his third point, Mr. Carrington submits that the order, having been made within the jurisdiction and powers of the court, even if made not in compliance with the applicable rule, stands and remains valid and enforceable, unless and until it is set aside. To this latter principle there can be no demur.

- [17] As regards Mr. Carrington's first point, the Defendant (then the Third Defendant), on 17th December 2014 filed an application seeking a declaration that the court ought not to exercise jurisdiction over it to try the claim, and for a consequential costs order (the Defendant's Jurisdictional Application). The application was amended by the Defendant, and the amended notice of application filed 26th January 2015. By its amendments, the Defendant also sought an order discharging the Injunction and added a fifth ground which states-

"If the Court grants the declaration which the applicant seeks-that it will not exercise jurisdiction over the third defendant to try the claim- the injunction should properly be discharged as (i) the claim on which it is predicated will have fallen away, and (ii) the main relief which the claimant seeks is not capable of direct enforcement by this Honourable Court."

- [18] From this it will be seen that the sole basis upon which the Defendant sought, in its amended notice of application, to have the Injunction discharged, rested solely on its original contention that the court ought not to exercise jurisdiction over the Defendant to try the claim. Accordingly, this first salvo was rooted in its assertion that the court ought not to exercise jurisdiction based on principles of *forum non convenience*. It did not rest on, nor was it then asserted by the Defendant, that the Injunction was irregular and ought not to have been granted. This jurisdictional

challenge was not successful, and the application dismissed by Bannister J on 10th February 2015. Having found that the jurisdictional challenge fails, the judge at paragraph [13] of the Note of his oral judgment states-

“The proceedings thus remain on foot. [T]he grounds upon which discharge of the injunction is sought are not met. Marty’s application is accordingly dismissed.”⁹

[19] Mr. Carrington submits, in the round, that this first application, being an application to discharge the injunction, having failed, the Defendant is estopped from making a second application on the ground that the Injunction was irregular and ought to be discharged. He submitted that the principles of *res judicata* also apply in relation to interlocutory applications. In support of these submissions, Mr. Carrington relies on a passage from the judgment in ***Henderson v Henderson* (1893) 3 Hare 100, at 114-115, 67 ER 313, [1843-60] All ER Rep 378** which states:-

“the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.”

[20] Specifically in relation to interlocutory applications, I was referred by Mr. Carrington to a passage from the judgment of Lord Diplock in ***Fidelitas Shipping Co. Ltd. v V/O Exportchleb* [1965] 2 AER 4 at 10** where he states:-

⁹ See Tab 22, para [13]

“In the case of litigation the fact that a suit may involve a number of different issues is recognised by the Rules of the Supreme Court which contain provisions enabling one or more questions (whether of fact or law) in an action to be tried before others. Where the issue separately determined is not decisive of the suit, the judgment on that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to show that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence...

This is but an example of a specific application of the general rule of public policy *nemo debet bis vexari pro una et eadem causa*. The determination of the issue between the parties gives rise to ...an “issue estoppel”. It operates in subsequent suits between the same parties in which the same issue arises. A fortiori it operates in any subsequent proceedings in the same suit in which the issue was determined.”

- [21] While, at first blush, there may appear to be some force in this submission by Mr. Carrington, in my opinion, the principle of *res judicata*, giving rise to an issue estoppel, does not apply in the instant matter. Here the nub of the Defendant’s amended application was a challenge to jurisdiction made pursuant to CPR 9.7(1) By Rule 9.7(6) an order made declaring that the court will not exercise jurisdiction may also “discharge an order made before the claim was commenced or the claim form served.” This would obviously include, as a consequence of the court not exercising jurisdiction, the interim injunction obtained ex parte on 16th September 2014 before the claim was served on the Defendant, Marty Limited. In short, the rule dealing with how to challenge jurisdiction provides, as a possible consequence of a finding that the court will not to exercise jurisdiction in a matter,

the very relief which the Defendant sought by way of amendment to its notice of application.

[22] The issue canvassed by the amended application was that the court ought to decline to exercise jurisdiction over the Defendant in respect of the claim, and this is the issue upon which the court gave its ruling on 10th February 2015. There has never been an *inter partes* hearing on the merits of the continuation of the Injunction, and none had been previously fixed by the court. The hearing before me is the first such hearing. Furthermore, a party against whom an injunction has been obtained, even after a full *inter partes* hearing, may subsequently apply to the court for the discharge of that injunction, where circumstance have arisen which may render the continuation of the injunction wrong in principle or unjust. A first application to discharge does not ipso facto debar a second application, albeit on a different ground or issue.

[23] As far as I am aware, the court was not called upon and did not rule on the alleged irregularity of the injunction order itself. Accordingly, in my view, this is not a situation where “an issue” was previously determined by the court, and a party is now relying, in a new or subsequent application, on some other ground to that which they pleaded or relied on before, and which they could have asserted when the original application was made, to say that the decision on that issue was wrong.

[24] As regards Mr. Carrington second point (the court can put it right), the simple answer is that, even if rule 26.9 applies to permit the court to correct a situation where the order of the court, as entered up, does not conform in a material way with the order as pronounced by the court, in any event, once the 28 day period elapsed without a return date, it became impossible for the court to put it right.

That having been said, I am also not convinced as to the applicability of Rule 26.9 to the situation at hand. Sub-paragraph (1) limits the applicability of rule 26.9 in these terms: “*This rule applies only where the consequences of failure to comply with a rule, practice direction, court order or direction has not been specified by any rule, practice direction or court order.*”(emphasis added). I am of the opinion that this rule does not apply to situations other than non-compliance by a party. I therefore reject this point.

[25] In the instant matter, we are dealing with an Injunction Order which is not void, but which is in effect as an order of the court, unless and until it is set aside. This is so because the court has ample jurisdiction pursuant to section 24 (1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act Cap 80 to grant injunctive relief. The rules of court are meant to define and to circumscribe the manner in which that jurisdiction should be exercised. They are not meant to limit or to reduce the court’s jurisdiction.

[26] The question remaining is whether the Defendant is entitled, without more, as Mr Dennis contends, to have the Injunction set aside on the basis of irregularity. On this aspect Mr. Carrington has provided, post hearing, the decision of the Court of Appeal in ***Palm Island Resorts Limited v Arts Friends Limited*** Civil Appeal No. 5 of 2002 in which Georges JA(Ag) observed at paragraph [22], that CPR 17.4 “was not followed as it ought to have been.” This was a matter where an injunction granted on a without notice application, was stated to be until trial or further order. An inter partes hearing was eventually held some 38 days after the injunction was granted. At that hearing, the defendant’s application to discharge the injunction was dismissed and the injunction continued. Alleyne JA, who delivered the main judgment of the Court of Appeal, did not allude to or comment on the injunction

being irregular or on the effect of CPR 17.4(4). And Georges JA, did not address any implications flowing from the non-compliance with that rule.

[27] In his supplemental written submissions on this point, Mr. Carrington urged that **Fusey** is no good law and ought not to be followed, since rule 17.4 does not specify a sanction, it being addressed to the court and not a party. Accordingly, he submits, in reliance on the decision of the Privy Council in **Attorney General of Trinidad and Tobago v Keron Mathew** [2011] UKPC 38, that the failure to follow the rule does not vitiate the order. However, I do not understand Mr. Dennis to be saying that the order is void or vitiated, but that the court ought to discharge it because of the failure to specify a return date.

[28] Clearly, applying rule 17.4 (4) and (5), the Injunction ought only to have been in effect, in the first instance, for a maximum period of 28 days. It is therefore irregular on its face. I have considered the decisions rendered on this issue by Justice d'Auvergne (as she then was) who felt compelled to set aside such an order. I have also considered the submissions of Mr. Carrington on this issue, and the decision in **Keron Mathews**. I am of the opinion, notwithstanding the irregularity, the order stands, unless and until it is set aside or discharged. The Injunction has finally been the subject of an inter partes hearing. Accordingly, I must go on to consider whether the Injunction ought to be discharged for any of the other reasons advanced by the Defendant in its application. In doing so, I am mindful that the Claimant has had the unintended benefit from the irregular order, for a period well in excess of that permitted by the rules, and in circumstances where the order does not accurately reflect what the judge in fact ordered and intended.

[29] As an important matter of principle, the clear intent and purpose of rule 17.4(4) and (5) is to protect defendants against the consequences of an intrusive order, obtained before trial and without notice to them, and without the court having the opportunity to hear their side. In my view, the court ought not to simply brush over a situation where this important protection has been swept away by an order, which on its face, does not reflect the full terms of the order made by the court.

The Application ought not to have been made Ex Parte

[30] This is the second of the technical points relied on by the Defendant. Again CPR 17.4(4) is in play. This rule permits the court to only grant an interim remedy *ex parte* where it is satisfied, either that a genuine case of urgency has been made out by the applicant and notice cannot be given to the respondent, or that to give notice would defeat the purpose of the application.

[31] Mr. Dennis argued that there was clearly no urgency justifying the hearing of the application and the granting of the Injunction on a without notice basis. With respect to the second limb at Rule 17.4 (4) (b), he contends that no case was made out before Justice Bannister that to give notice would defeat the purpose of the application. Accordingly, he submits, that this is yet another basis upon which the court ought, at the *inter partes* hearing, without more, to discharge the injunction. Undergirding his submissions on this aspect, is the further submission that no real risk of dissipation of assets by the Defendant was made out before the learned judge. In this regard, Mr. Dennis referred to what he termed a 'bald assertion' by Ms Corine George at paragraph 42 of her first affidavit filed on 22nd July 2014.¹⁰

[32] Paragraph 42 of Ms. George's First Affidavit, dealing with the pivotal issue of 'risk of dissipation of assets', states:

¹⁰ See Tab 15, page 139

“There is also a real risk, based on the history of this matter, that the Oung Brothers, upon their or Marty Limited being served with the claim herein, may seek to dissipate or further conceal their interests in HVN and thereby defeat the purpose of the proceedings or the Applicant’s recovery.”

- [33] Ms. George then goes on at paragraph 43, to state that the Oung Brothers have shown themselves to be “prepared to act in their own interest and contrary to the interest of the Claimant and its creditors”, concerning the Claimant’s valuable assets, and to disregard the powers of the Receiver and Manager of the Claimant company, “and to transfer a significant shareholding of the Claimant in HVN after his [the Receiver’s] appointment.”
- [34] Further, at paragraph 44, Ms. George avers that damages will not be an adequate remedy, and ends by stating: “there is, based on their conduct, a serious risk of wrongdoing against which the Claimant needs to be protected pending the determination of the claim.”
- [35] At paragraph 49, Ms. George simply states that “the defendants have not been given notice of this application because the Claimant has reasonable fears that to do so would defeat the whole purpose of this application as the Oung Brothers may take immediate steps to layer further their ownership of HVN by either transferring shares in Marty Limited or having Marty Limited transfer its shares in HVN.” These are bare statements aimed at satisfying the requirements of CPR 17.4(4)(b). They need to be buttressed by cogent evidence if they are to be properly considered.
- [36] That being said, where the fraudulent or dishonest conduct is so grave as to lead to the conclusion that a defendant is likely to deliberately dissipate or transfer or

dispose of its assets, or where there is cogent evidence of prior acts or attempts by a defendant or those controlling the defendant, to conceal the fraud or their dishonest actions, so as to make them difficult to detect, it is open to a court to conclude that there is a real and continuing risk of dissipation of assets on the part of the defendant, necessitating an application for interim relief being made without notice.

- [37] The claim in this matter is for knowing receipt giving rise to a constructive trust. In the Claimant's skeleton argument¹¹ for the ex parte application hearing on 16th September 2014, the claim is summarised as follows:

"The nub of the Claimant's claim is that the Oung Brothers, in breach of the fiduciary duties that they owe to the Claimant under Malaysian law, wrongfully caused to be transferred to Marty Limited in a series of transactions the Claimant's substantial shareholding in Hualon Corporation Vietnam, in which the Claimant had invested US\$470 million, thereby depriving the Claimant's creditors of this valuable asset with the result that the Third Defendant, Marty Limited holds this shareholding subject to equitable duties to the Claimant to account therefor and return same to the Claimant."

- [38] The shares in HVN, to which paragraph 1(a) of the injunction is addressed, were apparently, on the Claimant's case, held by the Defendant since 2008, some 7 years before the application was made in B.V.I. There was no certificate of urgency filed, and no urgency seems to have been asserted in the application or in the skeleton argument. The transcript¹² of the ex parte hearing on 16th September 2014 reveals that neither of the threshold questions concerning whether the Claimant was justified in bringing the application without notice to Marty, were

¹¹ See Tab 20

¹² See Tab 21

canvassed. The judge's concern, in relation to the application for injunction, focused on two issues, namely, delay and fortification, on both of which the judge seems to eventually be satisfied.

[39] The ex parte application, though filed on 22nd July 2014, was not heard until 16th September 2014. No explanation for this delay has been given in the various affidavits. Mr. Dennis argues that this is indicative of a lack of urgency on the part of the Claimant as applicant in pursuing its application, to which Mr. Carrington responds that there was the intervening long vacation of the court. I cannot be certain as to what the proper explanation is for this delay in having the application heard, and I will refrain from making any definitive statement thereon, save to say that this strikes me as being unusual.

[40] What is, however, most significant and very unusual, is that once the Injunction was obtained on 16th September 2014, it took until 13th October 2014, almost a month later, for the Injunction to be served by the Claimant on Marty Limited at its registered office in BVI. In my view, this is certainly not indicative of an urgency in obtaining the order or of any genuine concern about the risk of dissipation of the Defendant's assets. More critically, it completely undermines the assertions at paragraphs 42 and 44 of Ms. George's Second Affidavit regarding the risk of dissipation of assets, namely the shares in the Vietnamese company HVN. Again, it must also be borne in mind that the shares in HVN were said to have been transferred to Marty by the Oung Brothers since 2008, some about 7 years prior to the application for the Injunction, and the Receiver discovered these transfers in 2009 (5 years prior to the application), when a Due Diligence Report from lawyers in Vietnam, brought this to his attention.¹³

¹³ See page 10, transcript 16/09/14 Tab 21.

[41] Mr. Carrington deals briefly with the reason for proceeding ex parte in his oral submissions before me. I understand the Claimant to be relying on the second limb at CPR 17.4(4)(b) – notice to the defendant would defeat the purpose of the application- and on the assertions at paragraph 42 of Ms. George’s First Affidavit. As stated above, these assertions of risk of dissipation of assets are not sustained by the Claimant’s own conduct post the granting of the Injunction.

[42] Accordingly, I am in agreement with Mr. Dennis QC that, taking all the circumstances into account, neither factor at CPR 17.4(4)(a) or (b) had been made out by the Claimant. Accordingly, the Injunction Order ought to be discharged.

Serious Issue to be Tried

[43] Before considering the matters of delay and risk of dissipation of assets, I must consider whether there is a serious issue to be tried in these proceedings. In other words, the Claimant must make out a good arguable case, that is, 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 Gmbtt (“The Niedersachsen”)** [1984] 1 AER 398 at 404. I remind myself that in dealing with this issue, I am not to condescend to an in-depth analysis of the evidence or likely evidence, or to try to resolve apparent differences in the competing evidence. These are all matters properly for the trial with the benefit of cross examination of the witnesses. Nor is it the role of the judge at this stage to try to resolve difficult questions of law **American Cyanamid v Ethicon Ltd** [1975] 1 AER 504 at 510

[44] Mr. Dennis submits that the claim is bound to fail. This is quite apart from any consideration of the claim being statute barred, which, as I indicate below, is a matter that looms large in these proceedings.

[45] The Claimant's case, as pleaded, is contained in its Amended Statement of Claim filed 14th April 2015¹⁴. At paragraph 4 it is pleaded that the Defendant is a BVI registered company, whose directors and shareholders are the Oung Brothers. It is also pleaded at paragraph 5, that at all material times, Mr. Oung Da Ming (one of the Oung Brothers) was the controlling shareholder of three Taiwanese companies, namely, Hualon Corporation Taiwan ("Hualon Taiwan"), Hualon Dyeing Corporation ("Hualon Dyeing") and E-Hsin International Corporation ("E-Hsin").

[46] Hualon Corporation Vietnam ("Hualon Vietnam" or "HVN") was incorporated by the Claimant as its wholly owned subsidiary on 30th December 1993 with a registered legal capital of 80,000,000.¹⁵ The Claimant, which was granted financing facilities by a syndicate of banks in Malaysia, fell into financial difficulties, and on 30th November 2006 its creditors, under powers in a debenture, appointed Mr, Dyar Tuan Kiat Stephen as Receiver and Manager of the Claimant. Thereupon the authority of the Oung Brothers, as directors of the Claimant, ceased. The Receiver sold the operating business and assets of the Claimant in its factory in Malaysia to a third party investor on 25th June 2008.¹⁶

[47] On 1st July 2009, having received a Due Diligence report from Indochine lawyers in Vietnam, the Receiver discovered that Hualon Vietnam's ("HVN") charter had

¹⁴ See Tab 24

¹⁵ See para 9

¹⁶ See paras. 10, 14 and 16.

been changed from that of a subsidiary of the Claimant by the transfer of majority ownership, through series of Taiwanese companies controlled by the Oung Brothers, particularly Oung Da Ming¹⁷

[48] Paragraph 19 of the Amended Statement of Claim states:-

Prior to the re-registration of Hualon Vietnam, Oung Brothers acting in the name of the Claimant had, on 25 June 1999, purported to increase the Registered Legal Capital in Hualon Vietnam such as to issue 9.3% thereof to Hualon Deying and 42.04% thereof to E-Hsin. While these issues were recorded as having been made for cash, the Claimant avers that no such injections took place as alleged or at all.

[49] Most importantly, the Claimant pleads, at paragraph 20 that, on or about 26 March 2007, E-Hsin transferred its interest in Hualon Vietnam to the Defendant”. Further, it is the pleaded case that also on 26th March 2007, Hualon Deying increased its stake in Hualon Vietnam to 11.1% by purporting to subscribe for further shares in that company at no consideration, thereby further reducing the Claimant’s stake to 47.69%.

[50] Paragraph 22 of its Amended Statement of Claim states:-

“On or about 7 August 2008 the Oung Brothers, purporting to act in the name of the Claimant, purported to transfer 47.5% of the Registered Legal Capital [in Hualon Vietnam] from the Claimant to the Defendant, thereby reducing the Claimant’s stake in Hualon Vietnam to 0.10%. The Oung Brothers had no authority to act in the name of or on behalf of the Claimant in this transaction and the Claimant received no consideration therefor. On the same date, Hualong Dyeing transferred its purported stake in Hualon Vietnam to the Defendant. By reason of the purported subscriptions and transfers pleaded above, the Defendant has acquired 99.7% of the ownership of Registered Legal Capital of Hualon Vietnam

¹⁷ See para. 17.

which includes all but 0.19% of the 67.81% interest held by the Claimant prior to the matters pleaded above..”

[51] The Claimant goes on at paragraph 23 to plead that these transfers were for the personal benefit of the Oung Brothers and, at paragraph 24, that the Defendant “was a mere façade used by the Oung Brothers in their attempt to conceal their breaches of fiduciary duty to the Claimant and their wrongful receipt of the Claimant’s shareholding in Hualon Vietnam.”

[52] The Amended Statement of Claim concludes at paragraph 30, by alleging that the Claimant has suffered loss and damage “by being wrongfully deprived of its shareholding in Hualon Vietnam and all rights accruing thereunder...” The specific causes of action pleaded against the Defendant is that it is liable to (i) account to the Claimant for the wrongful receipt of the Claimant’s shareholding on Hualon Vietnam; (ii) account for all income received from such shareholding; and (iii) to compensate the Claimant in equity for “dishonest assistance in the breaches of trust by the Oung Brothers.”

[53] Thus, in the round, the Claimant’s pleaded case is that its majority shareholding in Hualon Vietnam was dishonestly, through a series of subscriptions and transfers of shares in 1999 and 2007 effected by the Oung Brothers, transferred from its ownership, without its authority or agreement and for no consideration, to two Taiwanese companies and then on to the Defendant, (which is owned and controlled by the Oung Brothers); and by final transfer in 2008 directly to the Defendant. Accordingly, the Defendant knowingly received the Claimant’s shares in Hualon Vietnam, and must be called upon to account for them and any benefits derived from them, and an injunction is necessary to prevent the Defendant from disposing of its assets (including the shares in Hualon Vietnam), pending trial and determination of its claim.

- [54] By contrast, Mr. Dennis submitted that the materials before the court do not support any transfer of shares owned by the Claimant in Hualon Vietnam (“HVN”) to the two Taiwanese companies owned by the Oung Brothers. Instead what happened, as disclosed by the documents before the court, was an increase in the Registered Legal Capital in Hualon Vietnam, which new share capital was then allocated to the Taiwanese companies for valuable consideration, they having made investments in Hualon Vietnam. It is through these transactions, that these companies acquired a controlling interest in Hualon Vietnam, which they subsequently transferred to the Defendant.
- [55] Mr. Dennis submits further, that the consideration which had to be paid for the shares was not payable to the Claimant, but to Hualon Vietnam in exchange for giving these companies a stake in its Registered Legal Capital. Furthermore, in so far as there is a complaint in the Amended Statement of Claim of a transfer of the Claimant’s shares in Hualon Vietnam to the Defendant, this came about as a result of a restructuring of Hualon Vietnam, by which Marty took on certain obligations of Hualon Vietnam which exposed it (Marty) to liability. Accordingly, the Defendant did not acquire any shareholding that actually belonged to the Claimant, contrary to what is asserted in its pleading.
- [56] Three sets of transfers, said to have taken place in 1999, 2007 and 2008, are relied on by the Claimant. The first transfer was prior to the appointment of the Receiver and Manager of the Claimant in 2006, and the other two thereafter.
- [57] As regards the transfer on 25th June 1999, Mr. Dennis, referred to paragraph 19 of the Amended Statement of Claim, where it is pleaded that the Oung Brothers, acting in the name of the Claimant, purported to increase in the Registered Legal

Capital of Hualon Vietnam by “[issuing] 9.3% thereof to Hualon Dyeing and 42.04% thereof to E-Hsin.” Here the Claimant’s pleaded case is an increase in the Registered Share Capital of Hualon Vietnam, and the issuance of those shares to the two Taiwanese companies, and not a transfer of shares held in Hualon Vietnam by the Claimant to these companies for no consideration. As Mr. Dennis rightly submits, the consideration for the issuance of these shares to the Taiwanese companies would have to be paid to Hualon Vietnam and not to the Claimant. Mr. Dennis submits further, that this was not brought to the attention of the judge by the Claimant or its counsel during the ex parte hearing.

- [58] In this regard, he also referred to a Board Resolution dated 30th December 1998 (Tab 4 page 31), some 6 months approximately before the 25th June 1999 issuance of these shares to the two Taiwanese companies, whereby the directors of Hualon Vietnam resolved as follows:-

That the Board of Management be and is hereby agreed to accept Hualon Dyeing Corporation’s investment of United States Dollar Eleven Million Nine Hundred and Fifty Thousand (USD\$11, 950,000.00) and The E-Hain International Corporation’s investment of United States Dollar Fifty Four Million (USD\$54,000,000.00) as authorised legal capital of the Company.”

Further Resolved that the Company’s legal capital will be changed as follows:”(This if followed by a chart which shows the Claimant’s shareholding at 48.66%, Hualon Dyeing at 9.30% and E-Hain at 42.04%.)

- [59] Mr Dennis also referred me to two agreements at Tab 4 pages 32 and 33, one between Hualon Vietnam and Hualon Dyeing, and the other between Hualon Vietnam and E-Hsin. They are essentially in the same wording, documenting separate agreements whereby Hualon Dyeing and E-Hsing, for a cash investment

of respectively USD\$11,9590,000 and USD\$54,000,000, would receive, respectively, 9,3% and 42.04% of the total legal capital of Hualon Vietnam.

[60] From these documents and the documents at pages 34 and 35 of the Hearing Bundle, it would seem clear that the 1999 alleged transfer of shares for no consideration, was indeed not a transfer of shares, but an issuance of share capital in Hualon Vietnam for cash consideration given by each of the two Taiwanese companies Hualon Dyeing and E-Hsin. It is by these transactions that they became shareholders in Hualon Vietnam. The subsequent transfer of those shares from each of these companies to the Defendant, was a transfer of shares for which they had apparently given valuable consideration. If this version of the facts remains unchallenged, then it would be very difficult for the Claimant to make-out a case of knowing receipt of the 1999 shares by the Defendant.

[61] Next I turn to the 2007 transfer dated 26th March 2007. The Claimant pleads at paragraph 21 of the Amended Statement of Claim that on that date Hualon Dyeing purported “to subscribe for further shares in Hualon Vietnam thereby increasing its stake in that company by 11.1% and reducing the Claimant’s stake further to 47.69%. No consideration was paid for this additional interest.” At paragraph 32.3 of her first affidavit, Ms. George avers that on 26 March 2007 Hualon Dyeing increased “the Registered Legal Capital by US\$2,600,000 and this meant that the Claimant held 47.69% of the Registered Legal Capital”, with the Defendant holding 2.21% and Hualon Dyeing 11.1%. Again, these are references, not to share transfers, but to an increase in the Registered Legal Capital of Hualon Vietnam, and the issuance of new shares to Hualon Dyeing.

[62] Mr. Dennis referred to the 2009 Due Diligence Report, and in particular page 14 of the Report,¹⁸ which sets out a table showing a breakdown of the 'paid-up capital' in Hualon Vietnam. This table shows Hualon Dyeing as having fully contributed, and the Defendant as only partially contributed for their respective shares. The table is followed by this statement:-

'As mentioned in the table at item 1.1 of Part B above, it is stated in the amended investment Certificate dated 7 August 2008 of Hualon VN that Hualon Malaysia transferred major of its capital in Hualon VN to Marty Ltd (i.e. USD62,3236,188, accounting for 99.60% of its contribution capital to the Charter in Hualon VN).

[63] Mr. Dennis also made reference to page 10 (page 158 Hearing Bundle) of the Due Diligence report, and to the Investment Certificate at page 188, to buttress his submissions regarding the alleged 2007 transfer.

[64] The 2008 transfer was said to be direct from Hualon Vietnam to the Defendant. Paragraph 22 of the Amended Statement of Claim states-

'On or about 7 August 2008, the Oung Brothers, purporting to act in the name of the Claimant, purported to transfer 47.5% of the Registered Legal Capital from the Claimant to the Defendant, thereby reducing the Claimant's stake in Hualon Vietnam to 0.1%. The Oung Brothers had no authority to act in the name of or on behalf of the Claimant in this transaction and the Claimant received no consideration therefor. On the same date, Hualon Dyeing transferred its purported stake in Hualon Vietnam to the Defendant'.

[65] Mr Dennis criticised the accuracy of the summary at page 10 of the Due Diligence Report¹⁹ of what is stated in the Investment Certificate at page 189 of the Hearing

¹⁸ See Tab 16 page 162

¹⁹ See page 158 Hearing Bundle

Bundle. His short point is that the summary speaks to the transfer by the Claimant of 'contribution capital,' when the Investment Certificate speaks of the Defendant having made a capital contribution to Hualon Vietnam in the sum of USD\$130,640,688. The later description is supported by Mr. Chan Yi-Chiang who was the General Director and legal representative of the Claimant. At paragraph 14 of his affidavit²⁰ he states: "It will be clear from the afore-mentioned documentary evidence that Marty did not acquire its equity ownership in HVN through a share transfer from Hualon Malaysia, In addition to its initial investment of US\$20,000,000.00 in 2007, Marty has made several subsequent investments in HVN, bringing its total contributed capital to US\$130,640,688.00." Accordingly, Mr. Dennis submitted, the allegation in the pleading that the Oung Brothers in 2008 made a transfer of the Claimant's shares in Hualon Vietnam to the Defendant is unsustainable.

[66] Finally, Mr. Dennis submitted that, in fact, the Defendant's contributed capital in Hualon Vietnam was later reduced. In support of this, he referred to the chart at page 56 of the Hearing Bundle which shows an initial contributed capital of USD\$20 million, accumulated losses of USD\$5,388,226, for a resulting contributed capital after write-off of USD\$14,611,774. Accordingly, he submits, there is no serious issue to be tried as between the Claimant and the Defendant.

[67] Mr. Carrington, on the other hand, contended in his oral submissions, that the situation regarding these transfers is not as clear on the documentary evidence before the court as Mr. Dennis sought to make out. It is Mr. Carrington's primary submission, that this court is faced with a conflict between the Due Diligence Report prepared by Vietnamese lawyers on matters of Vietnamese law, and the interpretation of that report by BVI lawyers (presumably a reference to Mr. Dennis'

²⁰ See Tab 3

submissions on this aspect). To make good this submission, Mr. Carrington referred the court to pages 150 and 153 to 159 of the Due Diligence Report and to paragraphs 8 to 10 of the Affidavit of Chan Yi-Chiang (the General Director and legal representative of Hualon Vietnam) filed 26th March 2015 where he addresses, specifically, the 1999 transfer.

- [68] In paragraph 8, after stating that in Vietnam capital is divided into 'legal capital' which refers to the amount committed to be paid, and 'contributed capital', which is the amount actually paid, Ms. Chan avers: -

“Since the transactions in 1999 related to legal capital only, no monies were paid and no shares issued, just the agreements between the parties to jointly and severally assume the rights and obligations of Hualon Malaysia’s original commitment to the Vietnam government alone.”

- [69] At paragraph 9 of Chan’s affidavit, he states that “these transactions were neither gratuitous nor secret.” He then goes on to state that as a 100% foreign invested company, HVN is closely monitored by the Vietnam Ministry of Planning and Investment for full compliance and, accordingly, a Certificate of Investment was issued on 25th June 1999 by this Ministry ‘as the official approval of HVN’s amendment to its original legal capital structure.” He therefore reiterates, at paragraph 10, that “there was no transfer of Hualon Malaysia’s shares in HVN to E-Hsin and HDC.”

- [70] The references to pages 7 to 11 of the report (pages 155 to 159 of the Hearing Bundle), relates to matters which fall within Part B of the Report, which is stated at page 5, as providing “information covering the latest information” about Hualon Vietnam. Whereas, Part C is described as providing “our advice on legal aspects in relation to rights and benefits as well as rights of control of the Hualon Malaysia

for Hualon [Vietnam], and on legal aspects and consequences and legal redress in respect of the transaction of transfer of the capital from Hualon Malaysia to Marty Ltd in the view that the authorized representative of Hualon Malaysia is not authorized to act or has acted ultra vires. The analysis in part C is based on the applicable laws and regulations of Vietnam in force at the date of this Report.”

[71] At Part C paragraph 4.1 of the Report, it is stated that under the laws of Vietnam, a change in members of an LLC or an assignment of contribution capital of a member, shall be registered with the licensing authority by submitting to it an application dossier. At paragraph 4.2 it is clearly stated that the investor is responsible for the ‘accuracy, truthfulness and lawfulness’ of the contents and documents of the investment application dossier, and the licensing authority will not be responsible for such accuracy or, the truthfulness of the contents or the documents.

[72] The Report goes, on at paragraph 6, to allude to (without forming a conclusive view) to a situation where the representative of Hualon Malaysia is not authorized to act or has acted ultra vires in relation to the transfer of capital from Hualon Malaysia to the Defendant. At paragraph 6.1 onward, there is an assessment of what are the legal consequences if this were the case. Nowhere does the Report conclude that any of the information in the Investment Certificate filed with the Ministry is incorrect, or that the transfer of shares to Hualon Dyeing and E-Hsin were as a result of some person being unauthorised or exceeding their authority to do so.

[73] Finally, on this aspect, Mr. Carrington, in his oral argument, submitted that the Claimant had the exclusive right to all the capital in Hualon Vietnam (issued and unissued), and the two Taiwanese companies wrongfully took over some of its

commitment. As he put it, they could not ‘muscle in on someone’s exclusive right.’ As such the diminution of the Claimant’s rights took place without it being compensated. He also submitted, that the Investment Certificate is not conclusive, as the issuing authority is not bound by the contents of the certificate, and it does not give rise to a presumption of truthfulness. Accordingly, he concludes that there is a serious issue to be tried as to whether the Oung Brothers transferred the Claimant’s right to contribute to the capital of Hualon Vietnam without compensation.

[74] This formulation by Mr. Carrington of the Claimant’s case is new, and does not accord with its pleading. Nowhere in the Amended Statement of Claim is it asserted that the Claimant had an exclusive right to the unissued capital in Hualon Vietnam. Furthermore, it is apparent that the Oung Brothers did not control the board of Hualon Vietnam (“HVN”).

[75] Having reviewed the Amended Statement of Claim and the arguments and submissions of both counsel on this issue, I am of the opinion that the Claimants case, albeit seemingly a weak one, has met the test of a ‘good arguable case’ in the sense described in **Ninemia**. It is not for me at this stage to resolve on the documents and affidavits before me, the key issues of fact raised regarding the exact nature and legal effect under Vietnamese law of the 1999, 2007 and 2008 transactions, whereby shares in HVN were acquired by Hualon Dyeing and E-Hsin and, ultimately, the Defendant Marty Limited. There are some important factual issues, such as whether these companies acquired the shares for valuable consideration as investors in Hualon Vietnam or were they acquiring shares or rights to shares to which the Claimant was entitled. The resolution of these issues will involve questions of Vietnamese law.

Delay and Risk of Dissipation of Assets

[76] The next ground relied on by the Defendant in discharge the injunction is inordinate delay by the Claimant in bringing the application. This factor is not *per se* a ‘technical’ point. It is substantive factor to be taken into account by the court in determining the important question of whether there is a real risk of dissipation of assets **A,B,C,D E, A v A. Civil Appeal No.1 of 2011 per Webster, JA at paras [24] to [25]**. Where the delay is inordinate and not properly explained, the court may conclude that there is no real risk of dissipation, and the interim relief ought not be granted or, where previously granted, ought to be discharged. However, there is no general rule that delay in applying for an injunction or freezing order is a bar simpliciter to obtaining such interim relief. **Mezhdunarodniy Promyshlenniy Bank & Anor v (1) Sergei Vikforovich Pugachev (2) Kea Trust Company Limited and others [2008] EWCA Civil 906**, per Lord Justice Bean at para [34].

[77] At paragraphs 76 and 77 of his skeleton argument, Mr. Dennis relies on two decisions of our courts. The first in time is **First Montana Services LLC and others v Best Concrete Corporation and others** Civil Claim No. 53 of 2007, a decision of George-Creque J (as she then was) from the High Court in Anguilla. There the learned judge reviewed a number of prior decisions in our sub-region dealing with delay. In **Alfa Telecom Turkey Limited v Teliasonera OYJ Civil Appeal No. 12 of 2008** George-Creque JA, as she then was, delivering the judgment of the court, opined on the issue of delay thus-

“The maxim of equity that ‘delay defeats equities’ is well known and is sometimes stated in the expression – ‘a person who sleeps on his rights losses them’. Delay in seeking interim relief is that much more critical. This is because the grant of interim relief is predicated on a state or urgency.”

[78] This passage is a sobering reminder to those who come before the court for interim relief, an equitable remedy that they ought not to sit on their rights or claims, before moving the court for protective orders in advance of the trial.

[79] As stated above, the facts demonstrate that the Receiver of the Claimant company, appointed under the powers in the debenture, was made aware, through the 2009 Due Diligence Report, of the transfer of the shares into the name of the Defendant company. This is some 5 years before the application for interim injunction was filed in July 2014. That delay has not been explained by the Claimant to my satisfaction.

[80] At paragraph 46 of her First Affidavit, Ms. George pointedly states that “the Claimant first discovered the transfers upon receipt of a Due Diligence Report dated 1st July 2009”. She attempts to explain this by saying that the documents were ‘in complete disarray’, and “there was no order in which the various original documents and orders had been stored, if at all.” In this vein, she states further that: “verifying the fact that no consideration had been received for the transfers was a painstaking process as was discovering who owned” the Defendant. She ends of by saying that none of the former staff was available to the Receiver to assist him ‘in bringing order to chaos.’²¹ I have my doubts as to the competence of Ms. George to give this kind of evidence of matters of which she must have absolutely no personal knowledge.

[81] Further explanation is given by Ms. George at paragraph 47 of her said affidavit, which does not bear repeating here, all of which I have taken into account in reaching my conclusion on this issue. Ms. George, at paragraph 48, asserts that the risk of dissipation or concealment is on-going; a bald and unsubstantiated statement.

²¹ See paragraph 66

[82] If one is to begin a consideration of the period of the delay from when the Receiver was appointed in 2006, what is glaringly missing from the explanation of the delay, as proffered by the Claimant via the Second Affidavit of Ms. George, is the complete absence of any particularity. There is no evidence given as to how long it took the Receiver to analyse the information and documents when he became aware of the alleged transfers. When was this task completed to a point where the Receiver was sufficiently informed as to not only the transfer of the shares in NVN to Marty, but that this transfer was for no apparent consideration, as the Claimant asserts. This is the kind of evidence which is critical to any proper consideration and evaluation of the explanation given for such a long delay in commencing proceedings in BVI against the Defendant, and seeking interim relief. Also, as mentioned earlier, the conduct of the Claimant, once it obtained the injunction, was dilatory to say the least, and does not speak to any urgency or any genuine concern about the risk of dissipation of assets by the Defendant being a real one.

[83] Accordingly, having found that the inordinate delay in applying for the interim injunction was not satisfactorily explained, I am not convinced that there is a real risk of dissipation of assets, and the injunction ought to be discharged. This is separate and distinct from any consideration of the limitation point in relation to the claim, a matter which, on the pleadings looms large for the Claimant, and also speaks to whether there is a serious issue to be tried. This is so because the Receiver was appointed since 2006, and the Claimant's interest in HVN is listed as one of the charged assets in the schedule to the very debenture under which the Receiver was appointed. Considerations of whether the claim is statute barred, will rest on whether the pleaded causes of action were concealed by fraud of the Defendant or the Oung Brothers, so that the limitation period does not begin to run until the Claimant discovered the fraud or could with reasonable diligence have

done so.²² A determination of this issue will turn on the evidence adduced, and accordingly, I will refrain from saying anything more at this stage.

Adequacy of Damages

[84] I go on to consider this issue out of an abundance of caution, in case I am shown not to be correct in my conclusions on the other issues dealt with above. I propose to deal with this issue quite briefly. Mr. Dennis submits that damages would be an adequate remedy for the Claimant because the company is in receivership, the Receiver has sold-off all the known business and assets of the company, and to the extent that the Defendant may be said to hold shares in Hualon Vietnam belonging to the Claimant, the Receiver will no doubt have to sell those shares to pay the creditors. Therefore, if the Claimant was successful, damages would be an adequate remedy. On the other hand Mr. Carrington, submits that the timing for the sale of such a unique asset as the Claimant's shares in Hualon Vietnam, must be left to the Receiver to decide in order, as I understand his argument, to be able to fetch the best price, as there is no evidence before me of a market for the sale of shares in a Vietnamese company. Furthermore, it is for the Defendant to satisfy the court that they would be good for the money, of which no evidence has been produced.

[85] I am of the opinion that damages would have been an adequate remedy in this matter. Obviously, the intention of the Receiver must be to sell the shares to pay creditors of the Claimant, indeed this would be his duty under the debenture as the appointed Receiver of the Claimant Company, and must also be the reason why he has brought this claim. However, the matter does not end there. The Defendant must also demonstrate that it would be able to make good an award of damages against it. The value of the shares, at least 'book' value, is said to be over

²² (s. 25 Limitation Act)

US\$14.6 million. The Defendant has produced no evidence as to its assets. Accordingly, the court cannot in those circumstances accept or assume that the Defendant may be able to make good any judgment in damages, if the Claimant was successful in its claim, but not successful in retrieving the shares. **Evans Marshall & Co Ltd v Bertola [1973] 1WLR 349 at 380H**. I am therefore constrained to conclude, in the round, that damages would not be an adequate remedy for the Claimant.

Conclusion

- [86] For the reasons set out above it is just and convenient that the Injunction be discharged forthwith. I would accordingly discharge the injunction obtained by the Claimant without notice on 16th September 2014 (of which paragraph 1(b) was already discharged by me on the consent of the parties on 3rd November 2015). Having done so I make no order entering a new injunction.
- [87] The Defendant has succeeded in its application and is entitled to an award of costs. The Claimant is to pay the Defendant's costs of this application.
- [88] There shall be an inquiry as to any damages which may have been suffered by the Defendant flowing from the injunction being obtained on 16th September 2014.

Gerard St.C Farara QC
Commercial Court Judge (Ag)