

ST VINCENT AND THE GRENADINES

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)



CLAIM NO 277 OF 2013

BETWEEN:

KEVIN JESSAMY

First Respondent/First Claimant

And

DE-AON SAYERS

Second Respondent/Second Claimant

acting on their own behalf as well as on
behalf of seventy-two former employees
of Discovery Works Legal (SVG) Inc.

Third Respondents/Third Claimants

And

DISCOVERY WORKS LEGAL (SVG) INC

Fourth Respondent/Defendant

HARRY DEBARI

Fifth Respondent

And

GLAXO SMITHKLINE LLC

Applicant/Intervenor

Appearances

Mr Malcolm Arthurs and Mr Samuel Coffey for the Applicant/Intervenor
Mr Carl Joseph for the First, Second and Third Respondents/Claimants
Mr Parnell Campbell QC, and with him Ms Mandela Campbell for the Fourth
Respondent/Defendant and Fifth Respondent



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2014: October 3; December 17
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DECISION

INTRODUCTION

- [1] **LANNS, J [Ag]:** On the 5th of December 2013, on a "Without Notice Application" by the First, Second and Third named Respondents/Claimants Mr Justice Wesley James [Ag] granted a freezing injunction (the Freezing Order) against the Fourth and Fifth Respondents herein in respect of certain assets which the said Fourth and Fifth Respondents may own or control or responsible for, and stored at a named facility in St Vincent and the Grenadines. The Freezing Order has since been varied by the consent of the parties who were named therein. Importantly, the Freezing Order entitled anyone served with, or notified of the injunction to apply to the Court at any time to vary or discharge it. GlaxoSmithKline LLC (GSK) was notified of the Freezing Order. GSK asserts that some of the assets frozen belong to it; that the assets comprise confidential and sensitive information and thus, swift action is required to protect its information from disclosure to third parties and/or competitors. To that end, GSK invoked paragraph 10 of the Freezing Order and moved to intervene for the purpose of obtaining an Order varying the Freezing Order to exempt from its effect, GSK's Information.
- [2] By "Urgent Notice of Application" filed on the 10th January 2014, GSK sought an Order from the Court that it be permitted to intervene in the proceedings. GSK also sought an Order varying the Freezing Order granted by the Court on 5th December 2013, as well as certain consequential directions from the Court. I shall revert to the reliefs sought by GSK below.

RELEVANT BACKGROUND FACTS

- [3] There is considerable history to GSK's application in both the USA and St Vincent and the Grenadines. This history will be helpful in understanding how the application has come before the court. I have drawn upon the background factual information gleaned from the documents filed in this matter, including the pleadings, the applications, the affidavits and documents exhibited thereto, court orders.

The Parties

- [4] GSK is a Delaware limited liability company that carries on business in the USA. It engages in the research and development of drugs and other health care products, and is a wholly owned subsidiary of GlaxoSmithKline plc, a global health care company organised under the laws of England and Wales.

- [5] The First and Second named Respondents/Claimants, Kevin Jessamy (Mr Jessamy) and De Aon Sayers (Ms Sayers) were, up until 31st August 2013, employees of Discovery Works Legal (SVG) Inc (OWL (SVG)). Mr Jessamy was employed as the General Manager of OWL (SVG) and Ms Sayers was employed as the Financial Controller thereof.
- [6] The Third named Respondents/Claimants are referred to as "seventy-two former employees of OWL (SVG)". Mr Jessamy and Ms Sayers are said to be acting on their own behalf, and on behalf of the seventy-two former employees of OWL (SVG). These 72 employees are said to have provided technical, clerical and other services for DWL(SVG) from the year 2004, and up to 31st August 2012.
- [7] The Fourth named Respondent, DWL(SVG) was at all times material, a limited liability company incorporated in the State of St Vincent and the Grenadines. At all times material, DWL(SVG) carried on the business of provider of data processing and related services for profit, conducting business from premises known as Alternative Hardware & Building Supplies, situate at Lower Middle Street, Kingstown, St Vincent and the Grenadines (the Processing Facility). During the course of hearing of GSK's Application, Counsel for GSK (Mr Arthurs) revealed that on the 9th of August 2014, OWL (SVG) was struck off the Register for non-payment of fees.
- [8] Discovery Works Legal, Inc (OWL (USA)) is described as a Delaware corporation which provides litigation support services to its clients, and has its principal place of business in Philadelphia, USA. OWL (USA) is not a party to, or an intervener in these proceedings. However, it features in GSK's Application by virtue of its ownership, its affiliation with OWL (SVG), and by virtue of it being a party to an Agreement entered into between GSK and OWL (USA).
- [9] The Fifth named Respondent, Mr DeBari is represented as the founder, Chief Executive Officer and sole shareholder of DWL(SVG). He is also the founder, Chief Executive Officer, and majority shareholder of OWL (USA).¹

The General Service Agreement

- [10] On 7th April 2007, GSK and OWL (USA) entered into an Agreement known as a General Services Agreement (GSA). By that Agreement, GSK would send to OWL (USA)² large quantities of unprocessed documents, including copies of employee hard drives and server repositories. OWL (USA) agreed to

¹ See Second Affidavit of Harry DeBari filed 18th September 2014

² DWL (USA) is referred to as. "the Supplier" in the GSA.

process portions of the information sent to it by GSK for review and production in litigation proceedings and investigations. OWL (USA) agreed to store all GSK documents in a way so as to maintain proper chain of custody in order to comply with the Rules of Evidence that govern whether, when, where, how and for what purpose, proof of a legal case may be placed before a Trier of fact for consideration. The GSA sets out the circumstances under which the Agreement may be terminated.

[11J] By clause 11, the GSA makes all the information which GSK gives to DWL(USA) confidential:

"The Supplier agrees that any and all data, reports, specifications, computer programs or models and related documentation, business or research plans of GSK or its Affiliates or third parties and any other documents or information furnished to the Supplier, or to which the Supplier is given access, by GSK in connection with the performance of this Agreement, shall be deemed confidential property of GSK."

[12] By Clause 11.4 it was agreed that "At any time upon the request of GSK, the confidential information, including any copies shall be returned to GSK, and all other embodiments of the Confidential Information in the possession of the Supplier, including all copies, and/or other form or reproduction, shall, at GSK's option be returned or destroyed."

[13] Clause 20.1 prohibited the Supplier from subcontracting any of its rights or obligations under the GSA without prior written consent. The Supplier was not to allow any services to be performed other than on its own premises.

[14] Clause 27 stipulated that 'The validity and interpretation of the GSA and the legal relations of the parties shall be governed by the internal laws of the Commonwealth of Philadelphia, without regard to its rules governing conflicts of law. GSK and the Supplier consented to the personal jurisdiction and venue of the state and federal courts of Philadelphia County, Pennsylvania.

GSK Data sent to St Vincent and the Grenadines

[15] OWL (USA) sent massive quantities of GSK's information to its affiliate DWL(SVG) in St Vincent and the Grenadines for processing. There seems to be a dispute as to whether GSK knew that the documents were being sent to a separate legal entity, namely OWL (SVG), but that issue is beyond the scope of the Application before the Court, and in any event seems to be a matter which falls to be decided outside the jurisdiction of the Eastern Caribbean Supreme Court. In fact, it is a question for the laws of Philadelphia because by virtue of Clause 27 of the GSA sub-headed "Governing Law": "The validity and interpretation of this Agreement and the legal relations of the Parties hereto shall be governed by the

internal laws of the Commonwealth of Pennsylvania without regard to its rules governing conflicts of law. GSK and Supplier hereby consent to the personal jurisdiction and venue of the state and federal courts of Philadelphia County, Pennsylvania."

Termination of Employment

- [16] OWL (SVG) had over 300 employees at its Processing Facility in St Vincent and the Grenadines. In or about the year 2008, OWL (SVG) began to terminate the employment contracts of several of its employees without paying them salaries owed to them for the last three months of their employment. The explanation given for the terminations was that OWL (SVG) was facing financial difficulties mainly brought about by the general global economic downturn affecting the USA, which in turn affected OWL (SVG)'s ability to meet its financial commitments to the employees. The employees who were affected decided to take a certain course of action to recover the money owed to them as unpaid salaries.

Commencement of Claim against OWL (SVG)

- [17] On 21st November 2013, Mr Jessamy, Ms Sayers and the seventy two employees for whom they act, (whom, for simplicity and convenience, I shall refer to interchangeably as "the Claimants") instituted legal action against OWL (SVG) alleging that they have been dismissed since the 31st August 2012, but have not yet been paid their salaries. They pray for payment of the sum of \$US 231,305.23 or \$EC 617,000.00 for unpaid salaries and US\$401,000.00 or \$EC1,072,000.00 in respect of severance pay.
- [18] On the 22nd of November 2013, OWL (SVG) filed an Acknowledgement of Service in which it admitted the claim in its entirety. On the basis of the admission, the Claimants filed a Request for Judgment on Admission. The Judgment was entered on the 11th day of December 2013. It is reproduced for convenience:

"JUDGMENT is hereby entered on the Defendant's Admission of Liability for the following:

Amount claimed	\$1,690,087.52
Court fees on claim	\$ 600.00
Legal practitioner's fixed costs on issue	\$ 2,500.00
Together with interest from date of issue to today	\$ NIL

Court fees on entering judgment	\$	NIL
Legal practitioner's cost on entering judgment		<u>NIL</u>
TOTAL		\$1,693,157.52
Less paid since issue of claim		<u>NIL</u>
Amount for which judgment is to enter		<u>\$1,693,157.52</u>

Dated the 11th day of December 2013.

BY THE COURT

.....
REGISTRAR

Application for Freezing Injunction

[19] Concurrently with the filing of the Request for Judgment on Admission, the Claimants filed an "Application Without Notice" seeking the following reliefs against both OWL (SVG) and Mr DeBari³:

- "(1) An Order for the freezing by Mareva Injunction
- a. all assets and real or personal property which the Respondent s, by themselves might have, or own or control or be responsible for as trustee or otherwise, located in St Vincent and the Grenadines, so as to effectively restra· in the Respondents, by themselves or agents, directors, operatives, employees or howsoever otherwise from removing from the Respondents premises at Alternative Hardware & Building Supplies, ... or at any other location in' St Vincent and the Grenadines,
 - b. any data howsoever stored whether electronically or otherwise, or effects or equipment owned or controlled by the Respondents, or over which the Respondents have or exercised custodial rights whether gratuitous or for profit, and whether held by way of lien arising from any contract or agreement or.

³ Mr DeBari has not been named as a Defendant in, th e Claim Form, but he was named as a Respondent in the Application for the Freezing Order.

arrangement temporary or permanent between the Respondents and any other person, entity, partnership, corporation whether operating within or outside St Vincent and the Grenadines, and whether domiciled or resident within or outside St Vincent and the Grenadines, for such period as to the Court might seem just and in any event all periods of time from the granting hereof until the full satisfaction of the admitted judgment debt ... in respect of the services rendered to the First Respondent ... for the period up to 31st August 2012 without the specific authorisation of the Court...

- [20] As previously stated, on the 5th of December 2013, His Lordship, Mr Justice Wesley James acceded to the Claimants' Application, and granted a Freezing Order against OWL (SVG) and Mr DeBari in respect of assets which they might own or control in St Vincent and the Grenadines or elsewhere.
- [21] By paragraph 5 of the Freezing Order, OWL (SVG) and Mr DeBari were restrained from removing from Saint Vincent and the Grenadines, or in any way dispose of, or deal with or diminish the value of any of their assets which are in St Vincent and the Grenadines up to the value of One Million, Six Hundred and Ninety-three Thousand, One Hundred and Fifty-even Dollars and Fifty-two Cents (\$EC1,693,157.52).
- [22] Paragraph 6 of the Freezing Order specifies what assets and real or personal property are included. They are the same assets referred to and sought after in the Application for the Freezing Order. I need not repeat them.
- [23] Paragraph 7 of the Freezing Order makes exceptions for the Respondents to spend a stated sum of money for living expenses and legal advice *on* be any of them should physically come to St Vincent and the Grenadines, provided that they must infer the Applicants of the source of those monies. Provision is made in paragraph 7 of the Freezing Order for the spending money to be increased by agreement, for variation of the Freezing Order, but the agreement must be in writing and approved by the Court.
- [24] Paragraph 9 of the Freezing Order stipulates that the Freezing Order will cease to have effect if the Respondents (a) provide security *by* paying the sum of \$EC1,693,157.52 into Court to be held to the Order of the Court or (b) make provision for security in that sum by another method agreed with the Applicants' Legal Practitioners.
- [25] Paragraph 10, as stated before, gives anyone served with or notified of the Order permission to apply to the Court at any time to vary or discharge the order (or so much of it as affects that person).

[26] Paragraphs 11, 12, 13, 14, and 15, address the following subheads "service", "costs", "effect of this order", "seff by banks" and "withdrawals by respondents".

[27] The Freezing Order contains two schedules. Schedule A refers to the Affidavit of Uklyn Abbot dated 3rd December 2013, and the documents exhibited thereto. And Schedule B speaks to the several undertakings given by the Applicants/Claimants as to service on the Respondents, compensation for any loss that may be caused to OWL (SVG) and Mr DeBari and costs to any person other than OWL (SVG) and Mr DeBari as a result of the Freezing Order.

Variation of Freezing Order

[28] On the 18th of December 2013, on a joint application on behalf of the Claimants, OWL (SVG) and Mr DeBari before Thomas J, the Freezing Order was varied by, and with the consent of the parties, pursuant to paragraph 10 of the Freezing Order. The Consent Order was granted in the terms prayed for in the draft order lodged with the application. It reflects the parties' consent that they will attempt to collect any outstanding monies due to OWL (SVG) in order to pay the Claimants, and defray other debts/expenses: "The parties commit jointly and severally to collaborate with the Applicants/Claimants and the United States clients of the Respondents, to endeavor to collect monies in respect of all outstanding debts owed to the Respondents, to the intent that such monies shall be used by the Respondents foremost in the liquidation of the judgment debt, and any remaining balance shall be applied towards reducing the indebtedness of the Respondents in respect of their obligation towards their rent and utility bills."

The consent order focused heavily on ways and means of liquidating the judgment debt owed by OWL (SVG), reducing indebtedness in respect of rent and utility bills. It also focused on issues of security; for example, it dictates who shall have authorised access to the Processing Facility where the frozen data is stored, for what purpose, and under what terms and conditions data may be removed from the Processing Facility. When GSK got wind of what was taking place in St Vincent and the Grenadines, it decided to seek leave to intervene.

Leave to intervene

[29] On the 17th of July 2014, upon application by GSK, filed on 10th January 2014, under a certificate of urgency, the High Court [Henry J (Ag)] gave GSK leave to intervene in the proceedings for the purpose of varying the Freezing Order as varied by the Consent Order so that it can recover its data at the Processing Facility in St Vincent and the Grenadines. Aside from granting leave to intervene, Justice Henry ordered

the "Claimants/Respondents, and Respondents" to file and serve any evidence and submissions on or before 15th September 2014; and GSK as to file and serve any response and further submissions on or before 26th September 2014, and the matter was adjourned for hearing of the second limb of GSK's Application (i.e. for variation of the Freezing Order) on the 2nd of October 2014.

[30] In seeking to comply with the Court's Order, the parties filed the following documents:

- (a) The second Affidavit of Mr Debari filed on 18th September 2014 with two bundles of documents exhibited thereto marked "HAD-2" and "HAD-3".
- (b) The Affidavit of Mr Jessamy filed 19th September 2014;
- (c) The third Affidavit of Mr DeBarifiled 22nd September 2014
- (d) The Second Affidavit of Martin Kenny filed on 26th September 2014 with a bundle of documents exhibited thereto marked "MK-2"

[31] On the date of hearing, GSK presented the Court with the following documents for its assistance: (a) Hearing Bundle; (b) Key Evidential Points and issues; (c) Legal points; (d) Chronology of events in support of oral submissions. GSK had already filed written submissions, and these were augmented by oral submissions and the documents listed at (a) to (d). Although given the opportunity to do so, neither the Claimants nor OWL (SVG) and Mr Oebari filed any written submissions. However, Counsel for the Claimants made oral submissions and Counsel for OWL and Mr Oebari addressed the Court.

Related Proceedings in the USA

[32] In around the year 2012 and up to January 2013, there were related proceedings taking place in the Supreme Court of New York between GSK and OWL (USA) and Mr Oebari resulting in several orders against Mr Oebari requiring him to return GSK's data to it. The orders included a Stipulation Order whereby Mr Oebari agreed to turn over GSK data to it, and GSK was required to pay OWL (USA) the sum of \$US 55,000 in two instalments for the return of the data that had been delivered to it. One instalment of \$25,000.00 was paid, and OWL (USA) and Mr DeBari delivered the raw unsourced data in the United States. But they have not delivered the raw unsourced data from OWL (SVG) in St Vincent and the Grenadines. In relation to the second instalment that was payable by GSK, GSK was prevented, by the

terms of a Garnishee Writ issued by a litigation Firm in the United States against Mr OeBari and OWL (USA), from making any further payments to OWL (USA) or Mr DeBari.

[33] Significantly, the Court in New York - Hon: Madam Justice Kornreich, has ruled that GSK does not owe Mr OeBari anything: "Nothing is owed to Mr OeBari. So whatever has to be done in St Vincent, it does not include any payments to Mr OeBari. I want that clear.... No money is owed to Mr OeBari and I am saying that on the record now ... I thought I held it prior to that, but I will say it again."⁴

[34] The record shows that in the course of an exchange between Mr Hirsh, Counsel for DWL (USA) and Mr OeBari, and Justice Kornreich on the issue as to whether any monies are owed to Mr DeBari, the Judge stated: "I have read the agreement ... and there was nothing in this agreement, I will say for the record now, which gives Mr DeBari the right to ariy further monies."⁵

[35] I now turn to consider GSK's application for a variation of the Freezing Order

CONSIDERING GSK's APPLICATION TO VARY THE FREEZING INJUNCTION

[36] By the second limb of its application filed on the 10th January 2014, GSK seeks the following reliefs as summarised:

- (1) That the Freezing Injunction granted in these proceedings on 5th December 2013, as varied by order of this court on 18th December 2013, be varied so as to exclude from its remit all property (including confidential information, electronic data and other intangible property) shown to belong to GSK.
- (2) That GSK and its agents, including GSK's lawyers and their IT experts Berkley Research Group LLC, be permitted to enter the premises of OWL (SVG) at the processing Facility at Alternative Hardware & Building Supplies Ltd, Lower Middle Street, Kingstown, St Vincent and the Grenadines, in order to catalogue or destroy the GSK Information (the Work).
- (3) That GSK and its agents may, as far as is necessary to carry out the Work, access computers, servers, electronic devices and all other media which may contain other data

⁴ See paragraph 61 of the Second Affidavit of Martin Kenny.

⁵ See paragraph 62 of the Second Affidavit of Martin Kenny.

not belonging to GSK and which is subject to the Freezing Injunction. That except without prior written consent of Mr DeBari and or OWL or by order of the Court, the GSK, and the IT Experts shall not furnish, show, or disclose non GSK information to any person or entity except to:

- (a) personnel of the GSK or OWL actually engaged in assisting in carrying out the Work, or as permitted or required under this order as is required by *1a1*, who each shall similarly be bound by confidentiality.
 - (b) counsel for GSK and OWL and their associate attorneys, paralegals and other professional personnel (including support staff) who are directly assisting counsel in implementing the terms of this order, are under the supervision and control of such counsel, and who have been advised by such counsel of their obligation hereunder;
 - (c) consultants retained by GSK and OWL, or their counsel to furnish technical or expert services in connection with this order, provided that such non-GSK information is furnished, shown or disclosed in accordance with the terms hereof.
 - (d) the court and court personnel; and
 - (e) any other person agreed by GSK Mr DeBari and OWL
- (4) GSK and its IT Experts shall:
- (a) use any reasonable, administrative, physical and technical safeguards, including but not limited to, the adoption of reasonable policies and procedures as necessary to prevent a breach of non-GSK Information and to reasonably and appropriately protect the integrity and availability of non-GSK Information;
 - (b) require any subcontractors, or other third parties with which GSK or the IT Experts does business that are provided with non-GSK Information, to agree, in writing, to implement reasonable and appropriate safeguards and to adhere to the same restrictions, conditions, and obligations with respect to the use, disclosure, and protection of non-GSK Information that apply to GSK and the IT Experts under this Order. Such written agreements shall identify OWL and any of its clients whose information was revealed as a third party beneficiary with

rights of enforcement and indemnification from such subcontractors in the event of any violation of the written agreement; and

- (c) disclose to its subordinates or other third parties, and request from Mr OeBari or OWL only the reasonably minimum non-GSK Information necessary to identify all GSK Information and to complete the Work.

(5) At all times GSK and the IT Experts shall

- (a) use the same standard of care to protect non-GSK Information as they use to protect their own confidential information of a similar nature, but no less than a commercially reasonable standard of care;
- (b) not use the non-GSK Information other than is necessary to effectuate GSK's rights under this Order; and
- (c) disclose non-GSK Information to GSK's agents and or affiliates on a need to know basis only; provided that each affiliate and agent is bound by obligation of confidentiality and restrictions against disclosure at least as restrictive as those contained herein.

(6) GSK is to pay reasonable costs of the Claimants in these proceedings, up to a maximum of \$US5,000.00.

(7) That there be no order as to costs. This Order shall not prejudice whatsoever right which GSK may have to seek compensation for its costs incurred in these proceedings, and in certain related proceedings pending before the Supreme Court of the State of New York (Index No 650210/13).

Grounds of the Application

[37] Sixteen grounds of application are put forward. They can be summarised as follows:

- (1) On or about 2nd April 2007, OWL (USA) contracted with GSK to receive process and store information belonging to GSK. This information is highly confidential and sensitive and is legally owned by GSK.

- (2) GSK believed that the Information would be stored in the US. Under the terms of the GSA OWL (USA) cannot gain any legal or propriety rights to any GSK Information, and is required to keep such information strictly confidential and may not disclose it to any third party.
- (4) Under the terms of the Agreement, OWL (USA) was not permitted to assign the GSA or subcontract any portion of the work without the prior written consent of GSK, which was not given. In September 2011, GSK issued a request to OWL (USA) and Mr DeBari for GSK's information to be returned. DWL (USA) and Mr DeBari refused to return the information unless OWL (USA) received payment beforehand.
- (5) GSK has obtained a number of orders from the Supreme Court of New York designed to facilitate and compel the cataloguing and ultimate transfer of the GSK Information to GSK. Most notably, on 19th November 2013, the Supreme Court of New York ordered Mr DeBari and OWL (USA) to fully cooperate with GSK and its experts, all of whom will sign confidentiality agreements, and have complete unfettered access to all servers which have plaintiffs data on them so that they can retrieve all GSK information or destroy it. This was to occur within 3 weeks.
- (6) During the course of the US Proceedings, it has become apparent that the GSK Information is the subject of a freezing injunction ordered by this Court on 5th December 2013, which was subsequently varied on 18th December 2013. The rationale of the freezing injunction, as varied, is to, among other things ensure that OWL (SVG) can collect monies owed to it for the ultimate benefit of OWL (SVG) employees and other creditors. This does not apply to GSK or the GSK Information. GSK has no contractual relationship with OWL (SVG) and it owes no money to OWL (SVG). GSK has no actual or potential liability to OWL (SVG); and all invoices under the GSA from OWL (USA) have been paid.
- (7) At the time the Freezing Injunction was made, neither OWL (USA) nor any of its affiliate had the right to be in possession of the GSK Information because the GSA had on 28th February 2013, terminated on its own terms.
- (8) The relief requested by GSK in its application is reasonable and will do nothing to harm the interests of the Claimants/Employees in this action. As OWL (SVG) has no legal right

to possess or to hold the GSK Information, it cannot sell or dispose of it in an effort to satisfy any obligation owed to the Claimants in this action.

(9)

The potential for disclosure of the GSK Information to third parties raises a substantial risk of irreparable harm. The GSK information includes data that is highly confidential, including privileged information, trade secrets, patent files, sales and purchase information, executive discussions and personal information of GSK employees. GSK would suffer irreparable harm should the GSK Information fall into the hands of competitors or otherwise disclosed. The information is of no legal, legitimate use to third parties and must be protected from disclosure. Moreover, GSK runs a substantial risk of litigation should the GSK Information be disclosed to third parties.

Supporting Affidavits

- [38] The application is supported by the First Affidavit of Mr Martin Kenny, Managing Partner of Martin Kenny & Co, (MKS) who acts on behalf of GSK in this matter. A bundle of documents marked "MSK1" is exhibited to the Affidavit.

Answering Affidavits

- [39] Mr DeBari swore to an Affidavit filed 18th September 2014 in response to GSK's Application (Mr DeBari's Second Affidavit). In that Affidavit Mr DeBari acknowledged that he is under an obligation imposed by the Supreme Court of New York to fully cooperate with GSK and its IT experts in the retrieval of GSK data located in storage facilities in his offices in St Vincent and the Grenadines. He went on to give a brief background covering the years 2004 to 2012, and thereafter he responded to the supporting Affidavit of Mr Kenny filed on 9th January 2014.
- [40] On 19th September 2014, Mr Jessamy swore to and filed an Affidavit in which he referred to the Freezing Order and the variation of the Freezing Order that is in place. He expressed, among other things his fear that if OWL (SVG) and Mr DeBari are permitted to remove from St Vincent and the Grenadine the data which it has in storage for sundry clients, the Claimants will not have any effectiveness of redress against OWL (SVG) or Mr DeBari,
- [41] Mr DeBari on 22nd September 2014, swore to and filed Affidavit No 3 as a supplement to Affidavit No 2 which he says contains errors and omissions. Exhibited to Affidavit No.3 is a bundle of documents marked "HAD-4" which is said to have been omitted from Exhibit "HAD -2"

Replying Affidavit

- [42] On 29th September 2014, Mr Kenny swore to, and filed a Second Affidavit which he says was specifically intended to respond to the First, Second and Third Affidavits of Mr DeBari, as well as the Affidavit of Mr Jessamy filed on 19th September 2014. After recounting some preliminary facts, Mr Kenny went on to address the Affidavits of Mr DeBari and Mr Jessamy. He next discussed the US Proceedings in Suit Index NO. 650210/13, setting out extracts from the Transcript from a hearing on 12th August 2014 in that Suit.
- [43] None of the affiants was subject to cross-examination. It is to be noted however, that on 22nd September 2014, the Claimants, - Mr Jessamy, Ms Syers and the 72 employees for whom they act, filed an Application for an Order for Mr DeBari and Mr Kenfly to attend the hearing to be cross-examined on their Affidavits. However, according to Mr Carl Joseph, Counsel for Mr Jessamy, Ms Sayers and the 72 employees, no date was given for the hearing of the Application, and it is too late now to obtain an order to have the affiants here. Accordingly, Mr Joseph made an oral application for leave to withdraw the Application, to cross-examine, to which application I acceded. Mr Parnell Campbell, QC at that juncture apologised for Mr DeBari's absence, indicating that Mr DeBari had informed him that he was unable to come to St Vincent for the hearing, and in any event, he was not aware of a formal order from the Court to secure his attendance.

THE ISSUES

- [44] Mr Arthurs has identified the issues for consideration as
- (1) What are the terms that govern the grant of an injunction against a Defendant's property
 - (2) What are the terms that govern the grant of an injunction against a third party's property.

Ultimately, the main issue for determination is whether, given the circumstances of the case, the Freezing Order should be varied in the terms suggested by GSK. **This question must of necessity be looked at by reference to the question of whether the property of a third party can be subject to an injunction and if so under what circumstances can this occur?**

REPRESENTATIONS OF MR PARNELL CAMPBELL QC ON BEHALF OF DWL (SVG) AND MR DEBARI

- [45] Neither OWL (SVG) nor Mr DeBari oppose GSK's Application. Indeed, from the onset, Mr Campbell QC stated to the Court that "before we embark on a protracted hearing", he would wish to indicate to the Court that he had been instructed by Mr DeBari to state to the Court that neither he (Mr DeBari) nor OWL (SVG) are opposing the Application by GSK because Mr DeBari is under compulsion of an order of Justice

Kornreich in New York to cooperate with psK in so far as the retrieval of their data is concerned; and he wishes to indicate to the Court that he is cooperating by not opposing GSK's Application. That being said, Mr Campbell QC went on to state that MDeBari had filed three Affidavits which were meant to present a different factual matrix from that presented by GSK, but these Affidavits are not to be regarded as filed in opposition to the claim by GSK. As regards the allegation that OWL (SVG) had been struck off for non-payment of fees, Mr Campbell QC confirmed that OWL (SVG) had been struck off the Register in St Vincent and the Grenadines on 9th August, 2014. That being the case, Mr Campbell was of the view that the concession that he was instructed to offer on behalf of OWL (SVG) is somewhat in limbo.

SUBMISSIONS OF MR MALCOLM ARTHURS ON BEHALF OF GSK

[46] Mr Arthurs prefaced his submissions by saying that GSK's Application becomes much shorter having regard to Mr. Campbell QC's submission to the Court. Counsel then went on to identify the issue for determination positing that the primary issue for consideration has to do with the circumstances in which a third party's property can be subject to an injunction. Counsel was of the view that that issue can be disposed of by reference to two simple cases which he listed and discussed during the course of his submissions. I will revert to the cases below.

In summary, Counsel grounded his submissions on the following points:

- (1) All parties are satisfied that some of the data currently stored on OWL (SVG) electronic media storage devices belong to GSK.
- (2) The contract by which the data was turned over to OWL (USA) and eventually to OWL (SVG) is governed by US law;
- (3) AUS Court has found that GSK does not owe any money for the return of its data held at the St Vincent Processing Facility
- (4) GSK has not been sued by OWL (SVG) for anything;
- (5) The invoices that Mr DeBari purport to be owed have not even been submitted to GSK according to the contract
- (6) GSK is not an asset flight risk. Evidence of this is contained in Mr Kenny's Second Affidavit. GSK's positive equity; its assets exceed its liabilities by a figure in the billions, capable of paying any debt which OWL (SVG) may sue for.
- (7) The Claimants do not claim that GSK owe them any money. Their only claim is against

DWL(SVG).

- (8) The injunction is the Claimants' injunction. It has mistakenly affected a third party's property, but the Claimants have no claim against GSK ; so there is no basis in law to freeze the third party (GSK) property. The Claimants' contention that by freezing GSK's assets, is seeking effectiveness of redress against the judgment debt owed by DWL(SVG), is an improper use of an injunction. That is not a proper use of an injunction.
- (8) Given the nature of the data: 1, it has no value to anyone but GSK. It is data used for specific purposes and other people have a proprietary interest in it as well as GSK. Some of it is patent information, some of it is proprietary information. If the data is released on the open market, GSK could stand substantial losses. It is not a valuable asset in the normal way that you treat assets to be frozen by an injunction.
- (8) The case of **American Cyanide**⁶ confirms the three criteria for the grant of an injunction: (i) There must be a good and arguable case against the Respondent; (ii) There must be a risk of dissipation of assets; and (iii) it must be just and convenient.
- (8) The grant of an injunction over a third party's assets is however different because GSK is not a party to these proceedings for any other purpose but to recover its property. There are only limited circumstances in which the property of a third party will be frozen; if the Court has reason to believe that the property actually belongs to the Defendant and not a third party, then the court may freeze that property. (**SCF Finance Company v Masri and Another**⁷ relied on). The data belong to GSK. It has not been said that it belong to OWL (SVG).
- (9) The second instance in which a third party's property may be frozen is where a Claimant has a substantive right against the Defendant and then the Defendant in turn has a specific substantive right which it can exercise against a third party and its assets; in such situation, the Court may consider implementing a freeze order over the third party's assets (**C Inc v L and Another**⁸ relied on).

⁶ [1975] AC 396.

⁷ [1985] 2 All ER 747

⁸ [2001] 1 (Comm) 446

- (10) Neither of the two limited instances mentioned in the cases apply in this case. All parties accept that some of the data at OWL (SVG) Processing Facility in St Vincent and the Grenadines belong to GSK.

SUBMISSIONS OF MR CARL JOSEPH ON BEHALF OF MR JESSAMY, MS SAYERS AND 72 FORMER EMPLOYEES OF OWL (SVG)

[47] Mr Joseph grounded his submissions on the following points as summarised.

- (i) The Claimants are not arguing that OWL (SVG) has a claim against GSK. GSK was never mentioned in the Suit brought by the Claimants. And there was never an allegation that GSK owe any of the former employees money.
- (ii) The Claimants are not saying that the assets held at OWL (SVG) can, or may be sold. We are saying that the data that we have sought to freeze the movement out of St Vincent was in the possession of DWL (SVG) and Mr DeBari. And the Freezing Order together with the variation thereof was to prevent the removal from St Vincent and the Grenadines of this data by the Judgment Debtors who had it in their possession. This was done to give the Claimants some effectiveness of redress against OWL (SVG) and Mr DeBari. If the data is permitted to be moved, the employees will have no effectiveness of redress.
- (ii) OWL (SVG)'s removal from the list of international companies can readily be cured because these proceedings started before it was removed, and the judgment is against OWL and Mr DeBari. So even though OWL (SVG) has not been restored, Mr DeBari is still liable to the workers. The judgment was for salaries and severance pay owed to the former employees who had used their talent and expertise to process the raw material received from sundry clients abroad into usable data ready to be returned from St Vincent and the Grenadines to the person or companies that sent them. So the employees had actually put something into the transformation of this raw data into usable data. They have added value to the raw data to enable it to be used.
- (iii) Once Mr DeBari was unable or unwilling to pay the judgment debt, anything that he had in his possession, or over which he had control at the time (which happens to be processed data belonging to sundry clients) was frozen. Regardless of who it belonged to, it was in

⁹ The judgment is not against Mr DeBari in his personal capacity. He was not named in the Claim. The Judgment is against OWL (SVG) who was the sole Defendant in the Claim. Mr DeBari entered the proceedings in his personal capacity when the Claimants applied for the Freezing Injunction.

the possession of the employers - DWL (SVG) and Mr OeBari. It was discovered later that seventy-five per cent (75%) of the data belong to GSK. When the employees sought the injunction, they did not look at any particular owner outside of OWL (SVG). There are other clients of OWL (SVG) whose assets are caught by the Freezing Order and they have not sought to have the Freezing Order lifted.

- (iv) It was right and proper for the Freezing Order to be granted.
- (v) Mr OeBari has failed to turn up today. He is a non-national. He is not resident in St Vincent. He is not subject to authority. He has no property in St Vincent. The assets he had in his possession are the only thing the former workers have to hold on to. In order to move the material out of the jurisdiction, who ever pays the judgment would have the data released. That Mr OeBari owes GSK is of no concern to the Claimants. Our main concern is to have the judgment debt satisfied to compensate the workers so that they be not left empty handed. The data is very important to GSK. GSK has no obligation to satisfy the judgment but if it wants the data it can satisfy or pay part of the judgment., and take it out on Mr DeBari
- (vi) Mr Jessamy in his short affidavit sets out how the data is processed. During the process of employment, the raw data is processed and the processed data is returned. By virtue of their input, the workers have added value to the property. This added value is the property of the Claimants.
- (vii) It may well be in the interest of Mr DeBari to have the Freezing Order lifted so that he would be freed from everything. We agree that GSK have 75% of the material but the overriding interest of the former employees is the payment of salaries. and severance and lifting of the Freezing Order will deny them of the main recourse of achieving that objective.

COMMENTS BY MR CAMPBELL QC IN RESPONSE TO MR ARTHURS' AND MR JOSEPH'S SUBMISSIONS

- [48] The court did not anticipate a lengthy response if any, from Mr Campbell QC in light of his opening remarks that he was not opposing GSK's Application. However, learned QC assured the Court that what he had to

say were not remarks in opposition, but in the context of Mr Arthurs reference to Justice Kornreich's pronouncements to the effect that GSK does not owe Mr DeBari anything. He simply wanted to direct the Court's attention to a document exhibited to the Third Affidavit of Mr DeBari. It is Exhibit "HAB_4", page 78 which is a letter dated 13th August 2014. Mr Campbell QC pointed out that this was a letter of protest written by Mr DeBari's, and DWL(USA)'s lawyer Mr Lawrence Hirsh, directly to Justice Kornreich, protesting the statements the judge had made, which statements purport to be findings of fact when, as the letter indicated, those matters have not yet been ventilated before her. Mr Campbell was of the view that this Court would benefit from a perusal of the letter to reinforce the point and to correct the impression this Court may have got that it is a foregone conclusion that nothing was owed to Mr DeBari by GSK. Mr Campbell pointed out that Mr DeBari's First Affidavit consists almost entirely of invoices which he alleges were monies due to him from GSK for storage of the data. Those were the same Affidavits that Mr Campbell QC had said were not intended as opposition to GSK's application.

- [49) At this point, Mr Campbell QC proceeded on a discourse designed to show the difference between raw data and processed data. Mr Campbell QC drew the analogy of "coco beans coming in and chocolate going out". This sparked some intemperance from Mr Arthurs who repeatedly objected, and was at pains to understand the relevance of Mr Campbell QC's submissions when he had indicated that he was not opposing the Application. So far as Mr Arthur's was concerned, Mr Campbell QC was taking advantage of the opportunity afforded him by the Court.
- [50) I have no intention of setting out in detail all of Mr Campbell QC's response. Suffice it to say that as the submissions of Mr Campbell QC unfolded, I got the distinct impression that Learned QC was departing from his position and was now supporting the position taken by Mr Joseph for the Claimants that GSK must pay up the judgment debt, and or the "added value" of the data, (which has not been quantified) if it wanted its data back. So I posed the question: Are you taking a different stance? whereupon Mr Campbell QC answered that he was not. His further response was that while Mr DeBari was not opposing GSK's getting back their processed information, it is not the same thing as him saying that he does not recognize that GSK has an obligation towards the people who created the "chocolate". He made it clear that because he was not opposing the application, it does not mean that he was not opposing the idea that the GSK has no obligation to the workers. Further, Mr Campbell QC stated that Mr DeBari never agreed to undercut the workers to whom he has a responsibility both as a former employer and more importantly as a judgment debtor. Mr DeBari, submitted Mr Campbell QC, does not want the record to show that he, (Mr DeBari) came here through his Counsel and agreed that GSK should get their data, fly away, with it and leave the workers hanging there. To my mind, that is a departure from the position initially taken by Mr Campbell QC, although it purports to put on a different complexion.

[51] Things got a little out of control temperamentally when Mr Campbell QC proceeded far beyond the letter of 13th August exhibited to the Third Affidavit of Mr DeBari, which Mr Campbell QC had already said was not intended to oppose the application. Mr Arthurs objected repeatedly. Tempers flared; and inappropriate comments and accusations were made. Needless to say, the exchange between Counsel led the Court to express its dissatisfaction as to the unhealthy and inappropriate conduct exhibited by Counsel. The court demanded decorum. In the end, apologies were made to Mr Campbell, QC and to the Court, and Mr Arthurs was called upon to reply to the submissions put forward by Mr Joseph on behalf of the Claimants and Mr Campbell QC on behalf of OWL (SVG) and Mr DeBari.

MR ARTHUR'S REPLYING SUBMISSIONS

[52] In commencing his submissions in reply, Mr Arthurs stated "My friends make the fundamental mistake of assuming that the data is production data:" This is raw unprocessed data, submitted Counsel. Even Mr DeBari is saying that this is raw unprocessed data, Counsel further submitted. In developing that point, and to demonstrate that the data is raw data, Counsel referred to an e-mail exhibited to the Second Affidavit of Mr Kenny. It was sent on 18th January 2013 from Marianne Gagliardi¹⁰ to Mr DeBari asking Mr DeBari if he was in a position to transfer the gross data that GSK provided, and informing that the production data had been uploaded, and that they were in a position to receive and archive the gross data.

[53] Reference was also made to the transcript of the proceedings of 19th November 2013,¹¹ before Justice Kornreich, where the lawyers for GSK and OWL (USA) and the Hon Justice Kornreich engaged in an exchange concerning the interpretation of the GSA that governed the overall Work. Mr Hirsh revealed that they had a dispute concerning "what was the obligation to give back work, that the conclusion to give back all the data both the raw and ...". He stops there. Mr Arthurs next drew the court's attention to page 93 of the same transcript, and quoted Mr Hirsh as saying: "The debate now ... concerns what is the scope of what Discovery Works and Mr DeBari were obliged to do in the stipulation. We say that what was always discussed between the parties for this \$500,000 fee for the turnover work was to be returned what's called the source data, i.e. the raw unprocessed data that had been delivered. That's what we say the stipulation meant.."

[54] So far as Mr Arthurs was concerned, when Mr DeBari is being asked for source data, he is being asked for raw unsourced data that was delivered in the United States. Counsel was adamant that OWL (USA) and Mr

¹⁰ Marianne Gagliardi is said to be Mr DeBari's contact at GSK

¹¹ Transcript exhibited to Mr DeBari's Third Affidavit

DeBari have delivered the raw unprocessed data in the USA, but they have not yet delivered the raw unprocessed data which they sent to OWL (SVG). So the point is, submitted Counsel, when in the year 2012 Mr DeBari was being asked for the source data, he was being asked for raw unprocessed data.

- [55] Mr Arthurs was of the view that all of the data should be returned. The data cannot be called confidential if part of it is returned but not the other part. GSK is asking for all of it. The workers did not add any value to the raw data. They have not changed that in my way, argued Mr Arthurs.
- [56] Mr Arthurs in his further reply submissions stated that the Claimants have not addressed the fundamental issue that the data was given to OWL (USA) by GSK and it represents GSK property. Only Mr DeBari would know why the fees and sums that were being paid to OWL (USA) were not ultimately passed on to the employees in St Vincent, and he is not here today, Counsel lamented.
- [57] Counsel concluded his reply submissions by reiterating that GSK does not owe the Claimants anything. It is entitled to get its property back. Furthermore, submitted Counsel, the Claimants have not met the limited test set out in the two cases cited and which govern freezing third party property. GSK cannot allow its data to sit in an unsecured facility. Nobody is even tendering or administering OWL (SVG). The sole director has not shown up here today, repeated Counsel. The balance of convenience test which governs the grant and variation of an injunction operates very much in GSK's favour. GSK has done nothing wrong, Counsel concluded.

DISCUSSION AND DECISION

- [58] In this case, the Court is confronted with a unique situation whereby the Claimants have obtained a Freezing Order freezing assets which do not belong to the Claimants, but to sundry clients of the Claimants' former employer OWL (SVG). There is no dispute that about seventy-five percent of the assets belong to GSK and that those assets comprise sensitive, confidential information stored on servers in a Processing Facility in St Vincent and the Grenadines. Mr Joseph stressed that it is only GSK who is asking for release of its assets. To my mind, it matters not that GSK is the only person asking for its assets. In this world, even one person, matters.
- [59] The situation is also unique because the Claimants are in possession of an unsatisfied judgment -- not against GSK, and not against Mr DeBari in his personal capacity; rather against their former employer OWL (SVG). Counsel for the Claimants in his submissions was bold enough to say that the data is very important to GSK, and that although GSK has no obligation to satisfy the judgment, if it wants the data returned, it can satisfy, or pay part of the judgment debt, and thereafter take it out on Mr DeBari.

[60] Lest it be forgotten, the Judgment is against DWL(SVG) - not Mr DeBari. - at least not against him personally. If the Claimants decided not to join Mr DeBari as a Defendant, then they must accept the consequence of their failure to do so. Can they avoid the vicissitudes of not joining Mr DeBari in the Claim?

[61] The uniqueness of the situation is also reflected in Mr Campbell QC's submission that GSK owes an obligation to the people who created the "chocolate" and that the record must not show that Mr DeBari, through his Counsel has agreed that GSK should get their data, fly away, with it and leave the workers hanging there.

[62] Lest it be forgotten, Mr Campbell QC has told the court that Mr DeBari has instructed him not to oppose GSK's application for the return of its data. Lest it be forgotten, neither DWL (SVG), nor Mr DeBari nor the Claimants have sued GSK for anything. Further, lest it be forgotten, a Court of competent jurisdiction in New York has ruled that GSK does not owe Mr DeBari anything; and has opined that whatever has to be done in St Vincent does not include any payments to Mr DeBari. In the spirit of comity, and in deference to Justice Kornreich, this ruling must be taken into account.

[63] Mr Joseph adverted to the expression "added value" and Mr Campbell QC adverted to "chocolate". So far as Mr Arthurs was concerned, the workers have not added any value to the raw data that Mr DeBari is being asked to return; and the workers have not in any way changed the raw data from "coco beans" to "chocolate". According to Mr Arthurs, this is not a new product, and in any event the question as to whether it is a new product is a question for the St Vincent Courts. In my judgment, this is not an issue that this court should be unduly concerned about in the application before it. This is probably a matter to be dealt with at some later stage, perhaps in separate proceedings.

[64] As Mr Arthurs has quite correctly stated, there is not one set of victims here. There are two sets of victims - the Claimants who have an unsatisfied judgment to be enforced against their former employer DWL (SVG) for unpaid salaries and severance for work they have done; and GSK whose confidential information including: patent and trademark data, healthcare data, data about patients, trials data, trade secrets and other data that GSK has to keep secret, that it needs for its drug company business, have been caged in a Processing Facility in St Vincent and the Grenadines, by virtue of the Freezing Order.

[65] Now, from the submissions advanced, it could appear that a question which comes to the fore, is whether the Claimants and Mr DeBari can use the Claimants' Judgment to obtain a strategic advantage over GSK. I think that I have already said enough to show that if that was what was intended, the question must be answered in the negative. I would agree that the rights of the workers should be recognised, (and I have already expressed my concern about theft, and I will do so again), but I am unable to agree that GSK is

somehow indebted to the Claimants and must liquidate the judgment debt, and then take it out on Mr DeBari who has no judgment against him, personally¹² and who has not sued GSK for anything. It bears stating that a Mareva Injunction operates in personam. In other words it is directed towards the Defendant in person and not to the Defendant's assets, or third parties' assets for that matter. It does not give the Claimants a lien on the Defendant's or third parties' property¹³.

[66] Mr Joseph's submission that GSK must satisfy the judgment debt is, to my mind, inconsistent with paragraph 9 of the Freezing Order which provides:

"9. This Order will cease to have effect if the Respondents:

- (a) provide security by paying the sum of \$EC1,693,157.52 (One Million, Six Hundred and Ninety-Three Thousand, One Hundred and Fifty-Seven Dollars and Fifty-Two Cents); or
- (b) make provision for security in that sum by another method agreed with the Applicants' Legal Practitioners."

[67] That paragraph speaks for itself. The Freezing Order is the Claimants' Order. The Judgment emanates from the pleaded case of the Claimants against OWL (SVG). The Court would have granted the Freezing order on the basis that the Claimants had a good and arguable case against OWL (SVG) in respect of the Claim for the payment of unpaid salaries and severance, and damages for breach of contract of employment, coupled with the risk of dissipation of assets over which OWL (SVG) has no proprietary interest, but over which they had control. The pleadings are merged in the Judgment. It bears repeating that the Judgment is against OWL (SVG). No one has disputed that the Judgment is against OWL (SVG). In this regard, I am of the view that it is no part of the court's function in this application to determine that GSK must satisfy the judgment debt if it wants its data back. And I do not think that it lies in the mouth of Counsel Mr Joseph to suggest that.

[68] I digress here to state that I have made the observation, that despite the assurance given to the US Court, by Mr DeBari's that he will cooperate in relation to the return of GSK's data, despite the Stipulation Order and despite the fact that the US Court has ruled that GSK does not owe Mr DeBari any money, and despite the fact that Mr DeBari has represented to the US Court that the Freezing Order imposed by the High Court in St Vincent and the Grenadines, has prevented him from complying with the orders of the US Court, Mr DeBari and OWL (SVG) have consented to a variation of the Freezing Order which seems to say in

¹² Although he cannot hide behind the Corporate veil; it would be inequitable for him to do so.

¹³ Aetna Financial Services Ltd v Fiegalman

paragraph 9 thereof, that if GSK or any of OWL (SVG) clientele, or any of Mr DeBari's clientele is desirous of accessing the Processing Facility where data is stored, they will not be allowed access unless appropriate and adequate arrangements have been made in advance to OWL (SVG), such money to be used firstly towards the liquidation of the Judgment Debt.¹⁴ This, to my mind serves to demonstrate that Mr DeBari is prepared to do just as he pleases. The consent order seems to be an attempt to circumvent and reject the Stipulation Order of the US Court.. He seems to be attempting to enforce the Claimants Judgment against his company against GSK through the backdoor without bringing suit against GSK and in the face of the ruling of Justice Kornreich. What is more there seems to be no full information in the papers leading to the Original Freezing Order nor the Consent Order, that made the court aware of any of the proceedings taking place in the US Courts. If the court were aware of the US Orders, particularly the Stipulating Order directing Mr DeBari, to return GSK's data at no cost, and ordering full cooperation of Mr DeBari to ensure the return of the data, (which he agreed to do) the Court may not have approved the Consent Order. dated 18th December 2014. A perusal of the Consent Order shows that the documents merely referred to their clients, and showed concern about the clients data. But there is no specific reference to any US court orders.

[691] It is noteworthy that neither Mr Campbell QC nor Mr Joseph produced, or cited any authority governing third party assets. Nor have they offered any submission in respect of the cases cited by Mr Arthurs. They focused heavily on the plight of the workers, and were adamant that if GSK want its data, it must provide the money to pay off the workers; It must not be allowed to take its data and leave the workers hanging - empty handed.

[701] The court has reviewed the evidence as contained in the affidavits and documents exhibited thereto, and has given very deliberate consideration to the very attractive, passionate and lucid submissions of all learned counsel. However, the court prefers and accepts the submissions of counsel for the Applicant GSK, and proposes to accede to GSK's application for an order varying the Freezing Order dated 5th December 2013, as varied by the Consent Order dated 18th December 2013, for the following reasons:

1. Mr Campbell QC who represents OWL (SVG) and Mr DeBari told the court that Mr DeBari does not oppose GSK's application for the variation of the Freezing Order in the terms suggested because he (Mr DeBari) was under compulsion by the New York Court to

¹⁴ See paragraph 9 of the Consent Order dated 18th December 2013.

cooperate with GSK for the return of its data. There were no terms and conditions in terms of payment of monies by GSK attached to Mr DeBari's non-opposition until later on in proceedings after Mr Joseph had made his oral submissions. Even then, Mr Campbell maintained that MR DeBari was not opposing the application.

2. Mr Joseph for the Claimants, has failed to justify the continuation of the Freezing Order against the assets of GSK. There is no merit in the submission by Mr Joseph that if GSK wants its data, it can pay the judgment debt or half of it. and take it out on Mr DeBari. This, to my mind is not a proper factor the court can take into account in determining whether or not to vary the injunction. There is no plausible evidence which leads me to conclude that GSK has any obligation to satisfy the judgment debt. Indeed, a US Court has found that GSK does not owe Mr DeBari any money for the return of its data.
3. The argument that GSK should not be allowed to take its data and fly away leaving the workers hanging there is also devoid of merit, and in any event, is insufficient, to establish that GSK is not entitled to a variation of the Freezing Order as requested. This is not a factor that the court can take into account. A Mareva Injunction operates in personam. In other words it is directed towards the Defendant in person and not to the Defendant's assets. It does not give the Claimant a lien on the Defendant's property. The court takes the view that GSK has not attorned to the jurisdiction of this court on an in personam basis. It has merely been allowed to apply to vary the Freezing Order which affects its property rights.
4. The Respondents have failed to meet the threshold test for variation of the Freezing Order in that they have not shown that there is a serious question to be tried in relation to GSK's application to vary the Freezing Order; they have not addressed the balance of convenience; they have not suggested that GSK is a flight risk; and they have not suggested that GSK has not given any undertaking as to damages
5. The court is of the view that no serious question arises on the application by GSK to vary the Freezing Order. The Claimants have been successful on their claim against OWL (SVG) and have a judgment in their favour, albeit a paper judgment. Moreover, since there had been no contract between the Claimants and GSK, there is no serious issue to be tried.

6. Additionally, the Claimants and OWL (SVG) have conceded that the bulk of the data frozen belong to GSK. further, I am satisfied, based on the evidence proffered in the Second Affidavit of Mr Enny (to which GSK's 2013 financial record is exhibited), that GSK is not an asset flight risk. Furthermore, the application is for a variation to exclude data owned by GSK held in the Processing Facility. in St Vincent and the Grenadines. and GSK has expressed a willingness to give an undertaking to meet the reasonable costs of the Claimants respecting the application to vary, up to a maximum of \$US5,000.00. Additionally, GSK has also in Mr Martin's Affidavit given an undertaking that in the event OWL (SVG) brings an action against GSK and obtains a judgment against it, GSK will not pay the money to Mr DeBari; it will hold the money for Continental Incorporated in the US which has issued a garnishee writ against Mr DeBari, and then any balance will be held for the Claimants. Furthermore, confidentiality agreements have been signed by GSK IT expert, or are proposed to be signed GSK IT experts regarding data belonging to GSK and data belonging to other persons so as not to violate privileged information /assets of GSK or of assets that may be owned by other clients of OWL (SVG).
7. It is an abuse of process for a Claimant to attempt to obtain [or continue] a Freezing Injunction merely to obtain security for a prospective judgment¹⁵: **Z Ltd v A-Z**
8. An interlocutory injunction may be granted only to protect a legal or equitable right that could be enforced by a final judgment and in this particular case the Claimants' legal entitlement is against OWL (SVG) with whom they had a contract of employment and who has breached that contract of employment.
9. Given the nature of the assets and the potential for loss and damage to be sustained by GSK, the balance of convenience lies in varying the Freezing Order to exempt from its grasp, the assets of GSK.
10. If the court were not to vary the Freezing Order, the practical consequences are likely to be catastrophic in that (i) GSK will be placed at risk of losing its data to competitors; (ii) it will be exposed to possible legal action against it.; (iii) it will likely incur reputational risks.

¹⁵ Z Ltd v A-Z [1982] 2 WLR 286.

11. The purpose of a Freezing Order is to stop the enjoined Defendants dissipating of property which is the subject of enforcement if the Claimant goes on to win the case it has brought, and not to give the Claimant security for its claim:¹⁶
12. It is the law that a Claimant is not to be deprived of the benefit of an injunction merely because a third party asserts a claim over part of the assets: **SCF Finance Co Ltd v Masri and another**, supra. Nevertheless, this is not a case like **SCF Finance Co Ltd v Masri and another**, where although the Defendant's wife was not joined in the action, the court found that the assets in her name were in truth the assets of the Defendant and thus the assets in her name were frozen. Nor is this a case like **C Inc pie v L and another**, supra where the Defendant personally had very limited personal assets, but the court had good reason to believe that the Defendant's wife and a company controlled by the Defendant has substantial assets which in fact belonged to the Defendant.; and thus granted the injunction over those third party assets in order not to frustrate the injunction, even though the Claimant had no cause of action against his wife or the Company
13. This is a case where it is not in dispute that at least 75 % of the assets frozen at the Processing Facility in St Vincent and the Grenadines belong to GSK. This is a case where the assets consist, not of money in a bank, or of land to be sold on the open market; or shares in a company. This is a case where the assets consist of confidential and sensitive data over which OWL (SVG) has no identifiable or crystallised right. The Claimants could not go on the open market and sell GSK's assets because it has no value to anyone but GSK. The data is privileged and private. If released or leaked to the public, it would be detrimental to both the Claimants and GSK.
14. There is no basis in law to maintain the freezing order against the assets of GSK. GSK has no contract with the Claimants. No claim has been made against GSK in these proceedings and GSK is not a party to these proceedings for the purpose of defending or disposing of any claim made against it. Under the GSA and under the Stipulation Order, Mr DeBari has an obligation to cooperate for the return of the data, and, as said before,

¹⁶ **Liberty Club Limited (Trading as Le Source) v**

Grenada Technical and Allied Workers Union, GOA HCAP 2013/0010 per Baptiste J.A.; and **Z Ltd v A-Z** [1982] QB 558 at 571 and 585, per Lord Denning, MR and Kerr L.J.)

he is not opposing application by GSK. He cannot approbate and reprobate at the same time.

CONCLUSION

[71] I have reached the conclusion that for all the above reasons, the court ought to accede to the application of GSK. And I so do. Accordingly, I make the following orders:

1. The Freezing Order granted in these proceedings on 5th December 2013, as varied by the Consent Order dated 18th December 2013 is hereby further varied to so as to exclude from its remit all property: (including confidential information, electronic data, and other intangible property shown to belong to the Applicant GSK. (the GSK Information).
2. GSK and its agents, including its lawyers and their IT experts Berkley Research Group LLC (the IT Experts), be and are hereby permitted to enter OWL (SVG) Processing Facility located at Alternative Hardware and Building Supplies, Lower Middle Street, Kingstown, St Vincent and the Grenadines, in order to retrieve, catalogue and or destroy the GSK Information. (the Work)
3. GSK and its agents may as far as is necessary to carry out the Work, access computers, servers, electronic devices and all other digital media which may contain other data not belonging to GSK, and which is the subject of the Freezing Order. However, except without the prior written consent of Mr OeBari, OWL (SVG) or by order of the Court, GSK and its IT Experts shall not furnish, show or disclose non-GSK Information to any person or entity except to
 - (a) personnel of GSK or OWL (SVG) actually engaged in assisting in carrying out the Work or as permitted or required under this Order, or as required by law, who each shall be similarly bound by confidentiality;
 - (b) counsel for GSK and OWL (SVG) and their associated attorneys, paralegals and other professional personnel (including support staff) who are directly assisting such counsel in implementing the terms of this Order, are under the supervision or control of such counsel, and who have been advised by such counsel of their obligation hereunder;

- (c) consultants retained by GSK and DWL(SVG) or their counsel to furnish technical or expert service in connection with this Order; provided, however that non-GSK Information is furnished, shown or disclosed in accordance with the terms hereof;
 - (d) the Court and court personnel; and
 - (e) any other person 1 agreed by GSK, Mr OeBari and OWL (SVG)
4. GSK and its agents, including its lawyers and their IT Experts shall:
- (a) use reasonable administrative, physical and technical safeguards, including but not limited to, the adoption of reasonable policies and procedures, as necessary to prevent a breach of non-GSK Information and to reasonably and appropriately protect the integrity and availability of non-GSK Information.
 - (b) require any subcontractor, or other third parties with which GSK or the IT Experts do business that are provided with non-GSK Information, to agree, in writing to implement reasonable and appropriate safeguards and to adhere to the same restrictions, conditions and obligations with respect to the use, disclosure, and protection of non-GSK Information that apply to GSK and the IT Experts under this Order. Such written agreement shall identify OWL and any of its clients whose information was revealed as a third party beneficiary with rights of enforcement and indemnification from such subcontractors in the event of any violation of the written agreement; and
 - (c) disclose to its subcontractors or other third parties, and request from Mr OeBari or OWL, only the reasonably minimum non-GSK Information necessary to identify all the GSK Information and to complete the Work
5. At all times GSK and the IT Experts shall:
- (a) use the same standard of care to protect the non-GSK Information as they use to protect GSK confidential information of a similar nature, but no less than a commercially reasonable standard of care;
 - (b) not use the non-GSK Information other than is necessary to effectuate GSK's rights under this order; and

- (c) disclose non-GSK Information to GSK's agents and/or affiliates on a 'need to know' basis only, provided that each affiliate and agent is bound by obligations of confidentiality and restrictions against disclosure at least as restrictive as those restrictions contained herein.
6. The Claimants (particularly Mr Jessamy) DWL (SVG) and Mr DeBari and the owners of Alternative Hardware and Building Supplies are required to cooperate fully with GSK to ensure that GSK's data is returned to it. In this regard, the Claimants, particularly Mr Jessamy. DWL (SVG) and Mr DeBari and the owner (s) of Alternative Hardware and Building Supplies are required to permit GSK and its agents, including its lawyers and IT experts Berkley Research Group LLC entry to the Processing Facility located at Alternative Hardware and Building Supplies, Lower Middle Street, Kingstown, St Vincent and the Grenadines, in order to retrieve, catalogue and or destroy the GSK Information.
7. GSK shall pay the reasonable costs of the Claimants in these proceedings up to a maximum of USD\$5,000.00.
8. There shall be no order as to costs on this application.
9. A Penal Notice is to be attached to this Order; and GSK is required to serve this Order on the owner (s) of Alternative Hardware and Building Supplies

[72] Although it is not necessary for my decision on the application by GSK, the court would wish to record its concern about the plight of the Claimants who have not been paid their salaries and severance and who appear to have merely a paper judgment. The court recognises and accepts that GSK has no obligation to the Claimants in relation to their judgment. nor other debts and expenses of DWL (SVG). However, it would certainly be greatly appreciated if GSK and its Management could be so moved, to arrive at some form of compromise, given GSK's apparent solid financial position, to contribute towards settlement of the judgment debt., and importantly, towards settlement of outstanding rent and other debts associated with the building which houses DWL (SVG) and GSK's data. I would encourage GSK to do just that.. It is the logical thing to do, going forward. At the same time, Mr DeBari is obliged to take all necessary, reasonable, and lawful steps to ensure that the judgment debt in particular, is settled. That being said, I have great sympathy for the Claimants, but neither the Claimants, nor Mr DeBari nor DWL (SVG) are entitled to hold GSK's Information under siege as security for the judgment debt, or for "effectiveness of redress".

[73] Last, but by no means least, I would like to express my gratitude to Counsel on each side for their very helpful submissions. I would be remiss, however, if I did not specially recognize the impressive written and oral submissions, authorities, speaking notes, hearing bundle et cetera handed up on behalf of GSK which greatly assisted me in the preparation of this Decision.



PEARLETTA E LANNS

High Court Judge [Ag]