EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2013/0010

BETWEEN:

LIBERTY CLUB LIMITED
(Trading as La Source)

Appellant

and

GRENADA TECHNICAL AND ALLIED WORKERS UNION

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal

On written submissions:

Mr. Dickon A. Mitchell of Grant, Joseph & Co. for the Appellant
Ms. Karina A. Johnson of George E. D. Clyne for the Respondent

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2014: May 23.

Civil appeal – Interlocutory appeal – Damages for wrongful dismissal – Special damages – Ex parte injunction – Freezing order – Adequacy of damages – Real risk of dissipation of assets

The respondent brought a claim against the appellant seeking damages for wrongful dismissal. Subsequently, on a without notice application, it applied for and was granted a freezing order against the appellant which sought to restrain the appellant, its servants or agents from disposing, alienating, selling, mortgaging or removing from the jurisdiction assets or cash in the sum of EC$2,000,000.00. It was ordered that said sum be paid into court. The order was continued at a following inter partes hearing but was amended to reflect the frozen sum of EC$1.1 million.

The appellant took issue with the order made and has appealed on various grounds which includes, but is not limited to, (1) the judge failed to consider adequately or at all that there was no evidence that the appellant was removing its assets from the jurisdiction or dissipating its assets with the intention of not paying the respondent in the event the respondent was successful; (2) the order for payment into court had the effect of preventing the appellant from paying its genuine trade creditors and placing the respondent, whose claim is disputed, in a preferential position over the appellant's other genuine trade creditors; (3) the judge failed to appreciate or adequately consider that the appellant never sought to and did not equate its genuine undisputed trade creditors to that of its "secured creditors" and that the injunction was preventing the appellant from paying its unsecured but undisputed trade creditors; and (4) the judge failed to consider adequately or at all that there were no reasons proffered as to why the application for the injunction was made without notice.

Held: allowing the appeal; ordering that the injunction be discharged and the $1.1 million be paid out of court to the appellant; and awarding assessed costs to the appellant, that:

1. An applicant for a freezing order must demonstrate that there is a real risk of dissipation of assets. This burden will be satisfied if it can be shown that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of assets remote, if not impossible in fact or in law. The affidavit evidence which was given to justify the granting of the injunction against the appellant fell substantially short of this bar. There was no evidence provided which demonstrated that the appellant was dissipating or attempting to dissipate its assets in the event that the respondent was successful in the claim. In actuality the un-disputed evidence of the appellant say the converse. Accordingly this ground of appeal is allowed.

   Chitel v Rothbart [1982] 39 OR (2d) 513 applied; Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M) [2008] EWHC 1615 applied.

2. A claimant who obtains a freezing injunction is not in a position of a secured creditor and has no proprietary claim to the assets subject to the injunction; thus there can be no objection in principle to the defendant's dealing in the ordinary way with his business and with his other creditors, even if the effect of such dealings is to render the injunction of no practical value. In that regard, the freezing injunction of $1.1 million operated oppressively and prevented the appellant from paying its creditors. The appellant is entitled to operate its ordinary business dealings and a freezing order should not operate to hamper it from so doing.

   Halifax Plc v Rupert Sydney Chandler [2001] EWCA Civ 1750 applied.

3. An injunction may be granted on a without notice application if the court is satisfied that giving notice would defeat the purpose of the application or in the case of urgency no notice is possible. The affidavit evidence disclosed no information which could have supported a conclusion that the giving of notice would have defeated the purpose of the application. The learned judge erred in principle by taking into account or by being influenced by irrelevant factors and considerations and because of that error her decision was clearly wrong.

National Commercial Bank Jamaica Ltd v Olint Corpn Ltd [2009] UKPC 16 applied; Rule 17.4(4) of the Civil Procedure Rules 2000 applied.

JUDGMENT

[1] BAPTISTE JA: On 19th January 2007, the respondent (claimant in the court below) filed a claim against the appellant (defendant in the court below) seeking general damages for wrongful dismissal and special damages. In its defence the appellant denied that it terminated or wrongfully terminated the employment of the respondent.[1] The appellant further asserted that as a result of the destruction caused to the hotel, La Source, by Hurricane Ivan, the individual contracts of employment between its employees and the respondent became impossible of performance and the respective contracts of employment were frustrated.

[2] On 24th October 2012, on a without notice application made by the respondent, Rhudd J [Ag.] made a freezing order, restraining the appellant, its servants or agents from disposing, alienating, selling, mortgaging or removing from the jurisdiction assets or cash in the sum of EC$2,000,000.00 until 14th December 2012 or further order. The judge also ordered the appellant to deposit the sum of EC $2,000,000.00 into court or such place as the court directs until trial and determination of the action or further order.[2] The matter subsequently came up before Mohammed J on an inter partes hearing who, on 5th December 2012, ordered the continuation of the injunction until trial and determination of the action unless further ordered, varied the sum frozen from $2 million to $1.1 million and

[1] The Grenada Technical and Allied Workers Union was substituted in its representative capacity to act on behalf of the respondent.
[2] The order recited that the return date of the application was 15th November 2012.

further ordered that the said sum be deposited into court on or before 6th December 2012.

[3] The grounds of the without notice application:

1. The applicant has made a claim against the defendant company, which, if successful could result in payment in damages in excess of EC$ 2,000,000.00.
2. The defendant company has no other assets within the jurisdiction save and except the property known as “La Source”.
3. The said property as of October 2012 is now closed.
4. Published reports in the national media are that the property is to be sold.
5. The applicant is therefore fearful that upon any judgment being entered in their favour that the defendant company will have no assets to satisfy the same.
6. The applicant therefore seeks to restrain the defendant company from removing assets or cash the equivalent of EC$2,000,000.00 pending the outcome and determination of this present suit which is now ready for trial.

[4] In this appeal, the appellant seeks a reversal and setting aside of the order, a discharge of the injunction, the payment out of court of the $1.1 million EC and costs. The appellant complains that:

(a) the judge erred in not discharging the ex parte injunction as she failed to consider adequately or at all that the substantive claim was for damages and as a basic principle of injunction law, prima facie, an injunction should not be granted where damages are a proper remedy;

(b) the judge failed to consider adequately or at all that there was no evidence that the appellant was removing its assets from the jurisdiction or dissipating its assets with the intention of not paying the respondent in the event the respondent was successful. In the circumstances there was no basis upon which the court’s discretion could be exercised to freeze or

restrain the appellant's $1.1 million or order the payment of that sum into court;

(c) the judge failed to adequately consider that her order for payment into court and refusal to discharge the ex parte injunction but to vary it had the effect of preventing the appellant from paying its genuine trade creditors and placing the respondent, whose claim is disputed, in a preferential position over the appellant's other genuine trade creditors;

(d) the judge failed to appreciate or adequately consider that the appellant never sought to and did not equate its genuine undisputed trade creditors of that of its "secured creditors" and that the injunction was preventing the appellant from paying its unsecured but undisputed trade creditors;

(e) the judge failed to consider or adequately consider that there was material non-disclosure on the part of the respondent when it obtained the ex parte injunction on 24th October 2012;

(f) the judge failed to consider adequately or at all that there were no reasons proffered as to why the application for the injunction was made without notice. There was no evidence to establish that the giving of notice would have enabled the appellant to take steps to defeat the purpose of the injunction or that there was no time to give the notice before the injunction is required to prevent the threatened wrongful act;

(g) the judge failed to ensure that the order reflected that the respondent ought to give an undertaking in damages should the respondent be unsuccessful in the substantive claim as the appellant would have been restrained unjustly from dealing with the $1.1 million until the determination of the substantive claim.

Arguments of the parties on first two grounds of appeal

[5] The appellant argues, and the respondent takes no issue with the argument, that no injunction should be granted to prevent an actionable wrong where damages would be an adequate remedy. The respondent however contends that the issue whether or not damages would be an adequate remedy is not one which the court has to consider in deciding whether or not to grant a freezing order. The respondent submits that the applicable principle of law is that a freezing injunction may be made to prevent the frustration and defeat of a money judgment, dissipation of assets being one of the ways that a judgment may be frustrated or defeated.[3] The respondent further submits that there was sufficient evidence before the court to allow the conclusion to be drawn that there was a real risk of dissipation of assets or of otherwise defeat of a money judgment against the appellant. The appellant's position is that there was no evidence that it was moving or attempting to move its assets out of Grenada, or it was dissipating or attempting to dissipate its assets or attempting to deal with its assets so that they become untraceable or unavailable in the event that the respondent would succeed in the claim. In that regard, the appellant referred to the affidavit of Bert Patterson in support of the injunction, and pointed out that the affidavit evidence asserted that that the appellant was in financial difficulty and that because of rumors of pending insolvency, the respondent should be granted a freezing order.

Discussion

Dissipation of assets – adequacy of damages

[6] I will deal with dissipation of assets first before considering adequacy of damages. An applicant for a freezing order must demonstrate that there is a real risk of dissipation of assets. A fundamental principle in relation to freezing orders is that such orders are not granted in order to provide security for a claim. By procuring an order that assets are frozen, an applicant is not put in a better position than any

[3] Michael Cherney et al v Frank Neuman et al [2009] EWHC 1743 at paras. 69 and 70.

other creditor. The mere fact that a defendant's creditworthiness is doubtful does not justify the making of a freezing order.[4]

[7] The purpose of a freezing order is to stop the injuncted defendant dissipating or disposing of property which could be 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.[5] The principles relating to the risk of dissipation are summarized in the judgment of Flaux J in Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M) at paragraph 49:[6]

> "The relevant legal principle in determining whether for the purposes of granting or maintaining a freezing order a claimant has shown a sufficient "risk of dissipation" is that a claimant will satisfy that burden if it can show that:
>
> - (i) there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the defendant will dissipate or dispose of its assets other than in the ordinary course of business… or
> - (ii) that unless the defendant is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes:…"[7]

[8] What was the evidence relied on in support of dissipation? What burden rests upon the applicant to persuade the court that there is a real risk of dissipation? In Chitel v Rothbart[8] the court said:

> "The applicant must persuade the Court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of assets remote, if not impossible in fact or in law."[9]

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[4] Mobil Cerro Negro Ltd v Petroleos de Venezuela SA [2008] EWHC 532, para. 36 per Walker J.
[5] Z Ltd. v A-Z [1982] QB 558 at pp. 571 and 585 (per Lord Denning MR and Kerr LJ); JSC BTA Bank v Mukhtar Ablyazov [2013] EWCA Civ 928, para. 34.
[6] [2008] EWHC 1615; [2008] 2 Lloyd's Rep 602.
[7] See para. 23 of Cosmotrade S.A. v Kairos Shipping Ltd. & Ors. [2013] EWHC 1904.
[8] [1982] 39 OR (2d) 513.
[9] At para. 58.

In my judgment, the affidavit evidence falls palpably short of that requirement. In an affidavit filed on 23rd October 2012 in support of the without notice application for the injunction, Bert Patterson deposed that:

> "5. In the meantime the Defendant Company is now reported to be in financial difficulties and as of the 15th October 2012 the property known as La Source, the sole asset of the Defendant Company has closed its doors for operation.
>
> …
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> "7. The Claimants [respondent] are now concerned that upon their matter coming on for trial, that if they are indeed successful at trial that any judgment entered in their favour will be an empty judgment.
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> "8. We have also been informed by our Solicitors … that the Defendant company is presently engaged in litigation with Beacon Insurance Company Limited [for liquidated damages in a sum in excess of $16,000.00].
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> …
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> "12. Further, published reports in the National Media are to the effect that La Source Hotel property the main asset of the Defendant is soon to be sold.
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> …
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> "15. The Claimants are therefore mindful that any other monies which may come into the possession of the Defendant Company may be diverted in an attempt to keep the Defendant Company afloat…"

[9] Apart from disclosing or demonstrating that the appellant was in financial difficulty, the affidavit of Bert Patterson provided no evidence that the appellant was dissipating or attempting to dissipate its assets in the event that the respondent was successful in the claim. That being the case, the respondent did not satisfy one of the primary conditions for the grant of a freezing order. Accordingly, this ground of appeal succeeds. The mere fact that the actual or feared conduct would risk impairing the claimant's ability to enforce a judgment does not in every case mean that a freezing order should be granted.[10] There must be a real risk that the asset will be used otherwise than for normal and proper commercial purposes.[11]

[10] See Steven Gee: Commercial Injunctions (5th edn., Sweet & Maxwell 2004) at paras. 12-034 to 12-036.
[11] See para. 41 of Mobil Cerro Negro Ltd v Petroleos de Venezuela SA [2008] EWHC 532.

[10] Quite apart from the respondent's evidence, the un-disputed evidence of the appellant clearly showed that it had taken no steps to dissipate its assets or put them outwith the jurisdiction. Paragraphs 18, 19 and 20 of the affidavit of its managing director, Leon Taylor, filed on 13th November 2013, showed that: the appellant's hotel and all its other assets were mortgaged and charged to the Bank of Nova Scotia; the hotel was also charged by virtue of a second mortgage to the National Insurance Board; and that any potential proceeds from the Beacon Insurance litigation was also charged to the National Insurance Board. Taylor's supplemental affidavit filed on 26th November 2012 also showed that the appellant's hotel was subsequently sold by the Bank of Nova Scotia and not the appellant. An exhibit to the affidavit also showed a breakdown of the funds available to the appellant after the sale. In all the circumstances, the learned judge was plainly wrong in not discharging the freezing order.

Issue of adequacy of damages

[11] The initial threshold for the grant of an interim injunction is that the applicant must first satisfy the court that there is a serious issue to be tried. On the issue of adequacy of damages, the court has to consider, whether, if the claimant were to succeed at trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss sustained as a result of the defendant continuing to do what was sought to be enjoined between the time of the application and trial. If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the claimant's case appear to be at that stage.[12]

[12] Applicants for freezing injunctions must establish two primary conditions: (a) that the applicant has a good arguable case in respect of his substantive claim against the respondent; and (b) that there is a real risk of dissipation of the respondent's assets. When one considers the rationale of a freezing order, namely, to prevent

[12] American Cyanamid Co. v Ethicon Ltd. [1975] AC 396, 408.

the defendant from dissipating his assets in order to evade enforcement of a judgment rather than to prevent a defendant from dealing with his assets in the ordinary and proper course of business, it becomes clear that unlike a non-freezing injunction, the issue of adequacy of damages is not a relevant factor to be considered by the court. While there are areas of convergence with respect to both types of injunctions, a fundamental area of divergence concerns the issue of the risk of dissipation of assets and the adequacy of damages. Accordingly, there is no merit in this ground.

Injunctions – preferences – and competing creditors

[13] The third and fourth grounds of appeal relate to the appellant's complaint that (a) the judge's order had the effect of preventing it from paying its genuine trade creditors and putting the respondent, whose claim it disputed, in a preferential position over its genuine trade creditors and (b) the judge's lack of appreciation that the appellant never sought to equate its genuine undisputed trade creditors to that of its secured creditors and the injunction was preventing it from paying its unsecured but undisputed trade creditors.

Submissions of parties

[14] The nub of the appellant's complaint here is that the judge's order has the effect of giving the respondent's disputed claim preference over its (the appellant's) other trade creditors. This, the appellant contends, is an impermissible use of injunction law. In that regard, Mr. Mitchell referred to the following passages from David Bean on Injunctions[13] at paragraph 7.44:

> "The claimant who obtains a freezing injunction does not thereby acquire a proprietary interest in the assets enjoined, nor is he given preference over other creditors in the event of the defendant's insolvency... And if the defendant has genuine trade debts awaiting payment, he will be allowed to pay them, even if there will be little or nothing left to meet the claimant's unsecured and undisputed claim."

[15] The respondent submitted that the 'genuine trade creditors' which the appellant refers to are not secured creditors. As such there is no legal basis that entitles

[13] 9th edn., Sweet & Maxwell, 2006.

them to a priority, a preference or special protection in law. Further, the appellant's difficulties in meeting its obligations to its creditors pre-dated the freezing order and formed the basis upon which the order was sought.[14] The respondent further submitted that the court took due and sufficient account of the appellant's constraints in meeting its obligations both to its genuine trade creditors as well as to it (the respondent) in the event of a judgment in its favour. The respondent also contended that the freezing order did not place it in a preferential position to genuine trade creditors as it had no proprietary interest in the sums frozen. Further it was open to the appellant's trade creditors to apply to vary the order. The respondent concluded that it is unfounded to say that the freezing order prevents the appellant from paying its creditors. At paragraph 14.9 of its submissions, the respondent summarised the effect of the order thus:

> "The effect of the Order is simply that should the claim be made out the Order then facilitates the Appellant/Defendant complying with its Court-ordered obligation to make good the sum due to the Respondent/Claimant. Should the Respondent/Claimant's claim not be made out the funds will still be available to satisfy other debts of the Appellant/Defendant - this is the plain effect of the Order of 24th October 2012 as varied by the Order of 5th December 2012."

[16] Mr. Mitchell also pointed to the undisputed evidence of Leon Taylor (in paragraph 32 of his affidavit) that there were outstanding creditors of approximately EC$7.8 million. The net proceeds received from the Bank of Nova Scotia were $4,345,516.94. The appellant faced a shortfall of approximately $3.4 million. The freezing of $1.1 million would prevent the appellant from paying its creditors.

Mr. Mitchell argued, and I agree, that the learned judge erroneously mixed up the appellant's reference (paragraph 32 of the affidavit of Leon Taylor) to its genuine trade creditors with that of secured creditors and mistakenly held that the appellant was equating its genuine trade creditors with its secured creditors. This is borne out in the judge's finding that "there was no evidence before the court of any secured creditors who would be prejudiced by the freezing order". The learned judge erroneously concluded that it was only secured creditors and not the

[14] See paras. 14.3 and 14.6 of the respondent's submissions.

appellant's creditors in general who should not be prejudiced by the freezing order. The learned judge failed to appreciate that the appellant was entitled to pay its unsecured but undisputed creditors as they fell due. The appellant is entitled to operate its ordinary business dealings and a freezing order should not operate to hamper it from so doing. In Halifax Plc v Rupert Sydney Chandler[15] Clarke LJ said at paragraph 17:

> "A defendant is entitled to pay his debts as they fall due even if the creditor could not recover them at law."

Clarke LJ said at paragraph 18:

> "In cases of what may be called ordinary business expenses the court does not usually consider whether the business venture is reasonable, or indeed whether particular business expenses are reasonable. Nor does it balance the defendant's case that he should be permitted to spend such monies against the strength of the claimant's case, or indeed take into consideration the fact that any monies spent by the defendants will not be available to the claimant if it obtains judgment. As I see it, that is because the purpose of a freezing injunction is not to interfere with the defendant's ordinary business or his ordinary way of life."

At paragraph 20, Clarke LJ endorsed as a correct principle of law the following passage from Gee on Mareva Injunctions and Anton Pillar Relief,[16] at page 318:

> "The court will always be concerned to ensure that a Mareva injunction does not operate oppressively and that a defendant will not be hampered in his ordinary business dealings any more than is absolutely necessary to protect the plaintiff from the risk of improper dissipation of assets. Since the plaintiff is not in a position of a secured creditor, and has no proprietary claim to the assets subject to the injunction, there can be no objection in principle to the defendant's dealing in the ordinary way with his business and with his other creditors, even if the effect of such dealings is to render the injunction of no practical value."

[15] [2001] EWCA Civ 1750.
[16] Steven Gee, Mareva Injunctions and Anton Pillar Relief (4th edn., Sweet & Maxwell, 1998).

Material Non-disclosure

[17] It is recognised that freezing orders can be draconian in effect. Such orders are capable of having such devastating effects that the courts place a high duty on a party seeking such an order without notice.[17] In The Complete Retreats Liquidating Trust v Geoffrey Logue et al,[18] Mr. Justice Roth stated at paragraph 23:

> "The draconian remedy of a freezing order, obtained at a "without notice" hearing where the defendant subject to the order is not present to put his case, was described by Donaldson LJ as one of the law's two nuclear weapons (the other being a search order) : Bank Mellat v Nikpour [1985] FSR 87, 92. Subsequently, Jacob J referred to it as a "thermo-nuclear weapon" because its consequences can be much more devastating than a search order: Alliance Resources Plc v O'Brien (unreported, 8 December 1995). It is in that context that the duty on the applicant to make full and fair disclosure assumes such importance."

In Fourie v Le Roux and Others,[19] Lord Scott stated at paragraph 33 that:

> "Assets of the defendant to which the claimant has no proprietary claim whatever are to be frozen so as to constitute a source from which the claimant can hope to satisfy the money judgment that, in the substantive proceedings, he hopes to obtain. The frozen assets are removed for the time being from any beneficial use by their owner, the defendant. This is a draconian remedy and the strict rules relating to full disclosure by the claimant are recognition of the nature of the remedy and its potential for causing injustice to the defendant."

In Memory Corporation Plc. and Another v Sidhu and Another (No.2)[20] Mummery LJ referred to the "high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case."[21] This passage was cited with approval by the House of Lords in Fourie v Le Roux and Others at paragraph 34.

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[17] Per Mr. Justice Blair in Russian Commercial Bank (Cyprus) Limited v Fedor Khoroshilov [2011] EWHC 1721 at para. 59.
[18] [2010] EWHC 1864 (Ch).
[19] [2007] UKHL 1.
[20] [2000] 1 WLR 1443.
[21] At p. 1460.

[18] The scope of the duty of disclosure of a party applying ex parte for injunctive relief was set out and explained by Bingham J in Siporex Trade SA V Comdel Commodities Ltd[22] at page 437:

> "Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarise his case and the evidence in support of it by affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identifying any likely defences. He must also disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state."

[19] The appellant complains that the court failed to consider that there had been material non-disclosure on the part of the respondent when it obtained the ex parte injunction. The appellant contends that the respondent failed to make proper inquiries as to the state of its (the appellant's affairs) and had proper inquiries been made, the respondent would have known that it was false to assert that the appellant was seeking to divert funds.

[20] The judge clearly addressed the issue of non-disclosure. The judge accepted that if the respondent had made proper inquiries under its duty of disclosure, it would have been aware of the mortgage of the appellant's assets firstly to the Bank of Nova Scotia and secondly to the National Insurance Board and that under the second mortgage any potential proceeds from the Beacon litigation was also assigned to the National Insurance Board. However, the judge did not accept that if the information was disclosed the court would not have made the order. The judge concluded that having regard to the facts which were not disclosed initially, but which were disclosed by the date of the return hearing, on which the December order was premised, the non- disclosure did not have any material

[22] [1986] 2 Lloyd's Rep 428.

prejudice on any of the appellant's secured creditors. In light of the foregoing, this ground of appeal is not made out.

Without notice

[21] The appellant submits that on the facts of the case there was no reason why the application for the injunction should have been made without notice. The appellant contends that no basis was set out in the without notice application for the application to be heard without notice and no reasons were advanced in the affidavits of Bert Patterson filed on 23rd October as to why the application should have been heard without notice. The respondent contends that the judge was satisfied that the urgency which attended the ex parte application was made out in the affidavit of Bert Patterson filed in support of the application.

[22] Rule 17.4(4) of the Civil Procedure Rules 2000 provides that the court may grant an interim order (freezing order) on an application made without notice for a period of not more than 28 days if it is satisfied that (a) in a case of urgency no notice is possible; or (b) that to give notice would defeat the purpose of the application. In National Commercial Bank Jamaica Ltd v Olint Corpn Ltd,[23] the Board stated:

> "a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act."[24]

[23] In her judgment the learned judge stated that the reasons for the urgency for seeking the order ex parte could be found in paragraphs 5, 8 to 13 and 14 of the affidavit of Bert Patterson filed in support of the ex parte application. The learned judge concluded that even if the respondent was aware of the mortgages in favour of the Bank of Nova Scotia and National Insurance Board, it could not be faulted for failing to give notice. A summary of the paragraphs relied upon by the learned judge shows that paragraph 5 speaks to a report that the appellant was in financial

[23] [2009] UKPC 16.
[24] At para. 13.

difficulties and its sole asset, La Source was closed. Paragraphs 8, 9, 10 and 11 speak to information that the appellant was involved in litigation with Beacon Insurance Limited in a claim for liquidated damages in the sum of $16,000,000.00; Beacon had already advanced some funds, and despite written assurances from the appellant that they would be paid from money obtained from Beacon, no payment was forthcoming. Paragraphs 12 and 13 speak to media reports that the main asset of the appellant, La Source, was soon to be sold and that the appellant's liabilities exceeded its assets. Paragraph 14 speaks to the respondent being unaware of any other claim which the appellant has. There is nothing in the paragraphs referred to by the learned judge which could support a conclusion that the giving of notice would defeat the purpose of the application. The learned judge erred in principle by taking into account or by being influenced by irrelevant factors and considerations and because of that error her decision was clearly wrong. There was no demonstrable or real risk that the appellant was dissipating its assets or removing its assets from the jurisdiction so as to frustrate any attempt by the respondent to secure payment of a judgment which it might in the future secure.

Undertaking in damages

[24] The appellant argued that the order of 5th December 2012 varying the order of 24th October 2012, did not reflect an undertaking in damages, neither was one given or made part of the December 5th order. I agree with the respondent that the 5th December order varied the October order with respect to the sum injuncted and the sum that was to be paid into court. The order of 24th October contained the undertaking as to damages. Further, the order of 5th December did not discharge the order of 24th October. The order of 5th December expressly declared that the injunction granted on the 24th October was not discharged and was to continue until trial and determination of the claim unless further ordered. In the circumstances the undertaking of the respondent as to damages in the October 24th order remained in force.

Conclusion

[25] The appellant succeeds on most of its grounds of appeal. It is ordered that:

1. The injunction granted on 24th October 2012 and continued in a varied form on 5th December 2012 is discharged.
2. That the $1,100.000.00 paid into court by the appellant be paid out of court and to the appellant.
3. That the appellant is awarded the assessed costs in the court below of $2,500.00 and costs in this Court of $1,500.00.

Davidson Kelvin Baptiste
Justice of Appeal