

IN THE SUPREME COURT OF BELIZE, A.D. 2020

CLAIM NO. 623 OF 2020

BETWEEN:

|     |                                    |                           |
|-----|------------------------------------|---------------------------|
|     | (BRENT BORLAND                     | 1 <sup>st</sup> CLAIMANT  |
|     | (ALANA LATORRA BORLAND             | 2 <sup>nd</sup> CLAIMANT  |
|     | (COPPER LEAF, LLC                  | 3 <sup>rd</sup> CLAIMANT  |
| AND | (                                  |                           |
|     | (MARCO CARUSO                      | 1 <sup>st</sup> DEFENDANT |
|     | (MICHELA BARDINI                   | 2 <sup>nd</sup> DEFENDANT |
|     | (RICHARD DYKE ROGERS               | 3 <sup>rd</sup> DEFENDANT |
|     | (PLACENCIA ESTATES DEVELOPMENT LLC | 4 <sup>th</sup> DEFENDANT |
|     | (PANTHER PROPERTIES LP             | 5 <sup>th</sup> DEFENDANT |
|     | (REGISTRAR OF LANDS                | INTERESTED PARTY          |

BEFORE THE HONOURABLE MADAM JUSTICE LISA SHOMAN

HEARINGS:            December 02, 2020  
                             December 21, 2020  
                             February 18, 2021

Written Submissions 2020/2021  
23<sup>rd</sup> November 2020 – Claimants  
1<sup>st</sup> February 2021

29<sup>th</sup> January 2021– Defendants

APPEARANCES:      Mr. E Andrew Marshalleck SC  
                             Mr. Allister Jenkins for the Claimants  
  
                             Rt Hon Dean O Barrow SC  
                             Mr. Adler Waight for the Defendants

## RULING

1. The matters which are before this Court for resolution in this Claim are two applications – one is an Application by the Claimants for an interim Freezing Order, which was heard inter-partes; and the other is an Application by the Defendants to discharge the freezing order granted on an ex-parte basis. Each is examined and addressed in turn, and in the order that each application was filed.

### **BACKGROUND**

2. The Claimants are seeking, in this Claim several declarations and reliefs against the Defendants for breach of fiduciary duty; breach of trust; a declaration that the transfer of title of a parcel of land amounting to 1,431.285 is fraudulent; an order for the cancellation of the Deed of conveyance in relation to that parcel of land, and in the alternative, damages and interest.
3. The Claimants are Brent Borland, a director of 48 North Haven Way, Sag Harbour, New York 11963, a member and beneficial owner of Placencia Estates Development LLC (“**Brent**”); Alana Latorra Borland, a director of 48 North Haven Way, Sag Harbour, New York 11963, a member and beneficial owner of Placencia Estates Development LLC (“**Alana**”); and Copper Leaf LLC, a company incorporated in the State of Washington, USA with its principal place of business in Normandy Park, Washington USA (“**Copper Leaf**”).
4. The Defendants are Marco Caruso, a businessman who resides at The Placencia Resort, Placencia Road Stann Creek District, Belize and a member and director of Placencia Estates Development LLC (“**Marco**”); Michela Bardini, a businesswoman who resides at The Placencia Resort, Placencia Road Stann Creek District, Belize and a director of Placencia Estates Development LLC (“**Michela**”); Richard Dyke Rogers, a businessman who resides 1205 Olive Avenue, Dalhart Texas 79022 (“**Rogers**”); Placencia Estates Development LLC, a company duly formed and existing under the Laws of Nevis with registered address situate at Main Street, P.O.Box 556 Charlestown, Nevis (“**PED**”); Panther Properties LP, a company incorporated under the State of Texas, United States of America, with registered Office situate at 323 Denver Avenue, Dalhart, Texas, USA (“**Panther Properties**”).
5. The Registrar of Lands is joined to the Claim as an Interested Party.

## SCOPE OF THE CLAIM

6. The Claimants seek a declaration that the Deed of Conveyance dated 27<sup>th</sup> February 2019 by PED under the hands of Marco and Michela in favor of Panther Properties was done without lawful authority and in breach of Marco and Michela's fiduciary duty and in breach of trust.
7. The Claimants also seek a declaration that Panther Properties holds title to 1,431.285 acres under the Deed of Conveyance dated 27<sup>th</sup> February 2019 (Instrument No. LTU-201900318) on trust for PED.
8. An Order is sought by the Claimants that, that the Deed of Conveyance dated 27<sup>th</sup> February 2019 in favor of Panther Properties be surrendered to the Registrar of Lands for cancellation and removal from the record;
9. The Claimants are seeking in the alternative (to 8 and 9 above), an Order is that the 1,431.285 acres be valued and that Marco and Michela account for the value thereof to PED
10. The Claimants claim an order restraining the 3<sup>rd</sup> Defendant, whether by itself, its officers, servants, agents or assigns or otherwise from transferring, disposing otherwise alienating ownership of encumbering the Airport Property, title to which is a TCT dated the 5<sup>th</sup> day of February 2019 TCT -201990009 registered in its name, until further order of the Court.
11. And the Claimants claim an order restraining the 5<sup>th</sup> Defendant, whether by itself, its officers, servants, agents or assigns or otherwise from transferring, disposing otherwise alienating ownership of encumbering the 1,431.285 acres, title to which is Deed of Conveyance dated 27<sup>th</sup> February 2019 (Instrument No. LTU-201900318) registered in its name, until further order of the Court.
12. The Claimants also seek damages, interests and costs.

13. The Claimants filed an *ex parte* notice of application for permission to continue the derivative claim in relation to PED and for permission to serve the claim form on the 3<sup>rd</sup> Defendant (“**Rogers**”) and the 5<sup>th</sup> Defendant (“**Panther Properties**”) outside of the jurisdiction.

14. According to the Claimants, the factual background is as follows:

- (a) Marco, Brent and Alana Borland are shareholders/members of Placencia Estates Development LLC (“**PED**”); and Marco and Michela are directors of PED, and are in control of PED’s assets;
- (b) On the 3<sup>rd</sup> September, 2008, PED acquired two large tracts of land in the Riversdale Area, Stann Creek District, Belize. Both tracts are described as 977 acres situate between Riversdale and Blair Atoll, Stann Creek District, Belize, and 609.13 acres situated in Riversdale Area, Stann Creek District, Belize (together “**1,586.13 acres**”);
- (c) In or about 2012, PED subdivided the said 1,586.13 acres into three subdivisions of residential lots for a total of 391 lots which it intended to sell to third party purchasers;
- (d) On the 6<sup>th</sup> August, 2018, without the approval of members of PED, and without notice or approval of Alana or Brent, Marco entered into a Memorandum of Understanding purportedly on behalf of PED, with Rogers, who represented the Investor Group of which he is a member;
- (e) Like Copper Leaf, Rogers and his Investor Group had invested/loaned monies to Belize Infrastructure Fund I, LLC, for development of several projects, including the residential lots being developed by PED;
- (f) In the said Memorandum, Marco misrepresented to Rogers and the Roger’s controlled Investor Group that he either owned or controlled PED and that he could fully transfer

PED's property to a new entity which was to take ownership of the property that was to be owned both by the Rogers- controlled Investor Group and Marco on a fifty-fifty basis;

- (g) Marco also entered into a Subscription Agreement, without notice or approval of PED's members, by which he agreed to transfer all the "Development Land" to an entity to be owned one half by Marco and one-half by Panther Properties;
- (h) On the 27<sup>th</sup> February, 2019, Marco and Michela, purportedly, on behalf of PED, and without approval of its members, executed a Deed of Conveyance transferring title to 1,431.285 acres, the remaining residential lots owned by PED after transfers to third party purchasers, to Panther Properties, an overseas company that is controlled by Rogers and the Rogers Investor Group;
- (i) The Defendants' actions, and the subsequent transfer of the Airport Property to Panther Properties was carried out after Copper Leaf had commenced a claim against Belize Infrastructure Fund I LLC, Marco and Brent in the Southern District of New York on the 13<sup>th</sup> July, 2018, and thereafter, obtained a default judgment against both Marco and Brent in the sum of US\$10,235,711.93 plus attorneys' costs;
- (j) The default judgments obtained in that Claim, No. 1:18-cv-06377-JFk were used to file *in personam* claims in the Supreme Court of Belize in Claim No. 141 of 2019: Copper Leaf LLC v Belize Infrastructure Fund 1, LLC, Brent Borland and Marco Caruso.

15. The Defendants respond by 2 Affidavits (more on that later) and dispute the facts as set out below:

- (a) They say that the members of PED are Marco, Michela, Alana, and Brent;
- (b) They Defendants allege that Michela and Marco acted properly in transferring the Panther Property to Panther Properties; such transfer being in favour of a company ultimately controlled by the investors and in satisfaction of the endless claims that PED,

Brent, and Marco would otherwise have faced from those same investors that Brent “jilted”;

- (c) Marco and Michela disclose that the value stated in the conveyance was a value provided by the officers of the Government of Belize’s treasury. Marco further states that there is nothing in the operating agreement that prevented the directors of PED to transfer from transferring the Panther Property;
- (d) Marco and Michela also deny that there was any effective liquidation of the assets of PED. Lastly, Marco states that he retained no personal benefit in the Panther Property or Panther Properties or any other company operated and owned by the investors.
- (e) Dyke discloses that he acted on behalf of the investors and set up the structures, including Panther Properties, to allow for the settlement of the claims caused by Brent’s felonious conduct. The Panther Property was transferred to Panther Properties as consideration for settlement. The Airport Property was part of that settlement consideration and that at all times, the settlement was the consideration for the transfer;
- (f) As it relates to the claim by Copper Leaf LLC, the Defendants say that the Loan Agreement, The Note, The Modification Agreement, and the Guarantee are fraudulent and were made and issued by Brent without authority and that Copper Leaf LLC knew that the documents were contrivances issued by Brent;
- (g) The Defendants say that Brent was found guilty of misappropriating funds belonging to investors by issuing falsified documents. The Defendants also state that Brent has misled this Court by stating that the documents issued by him to bilked investors are legitimate and the “loans” sanguine;

- (h) The Defendants say that Brent has committed fraud against the investors and is seeking to use these proceedings to lessen his incarceration time and that Brent is acting on behalf of Copper Leaf to bring multiple additional joint proceedings against Marco and the other Defendants, separate from Copper Leaf's singular in personam claim against Marco.

**A. CLAIMANTS' APPLICATION FOR A FREEZING ORDER**

16. The Claimants applying via an *Ex Parte* Notice dated on 10<sup>th</sup> October 2020 and filed on October 26, 2020 sought a freezing order pursuant to Section 27 of the Supreme Court of Judicature Act, Chapter 91 of the Substantive Laws of Belize, Revised Edition 2011, and Rule 17.1(f) Supreme Court (Civil Procedure) Rules, 2005 for the following relief:
- (1) Pursuant to section 27 of the Supreme Court of Judicature Act and rule 17.1(f) of the Supreme Court (Civil Procedure) Rules, an order restraining the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup>, and 5<sup>th</sup> Defendants, whether by themselves, their servants, agents, assigns or otherwise, from transferring, disposing, otherwise alienating or encumbering any of their assets, including the 1,431.285 acres situated between Riversdale Area, Stann Creek District, Belize ("**1,431.285**"), until the determination of the proceedings herein;
  - (2) Pursuant to section 27 of the Supreme Court of Judicature Act and rule 17.1(f) of the Supreme Court (Civil Procedure) Rules, an order restraining the 1<sup>st</sup> and 3<sup>rd</sup> Defendants, whether by themselves, their servants, agents, assigns or otherwise, from transferring, disposing, otherwise alienating or encumbering their interest in membership/shares in the 5<sup>th</sup> Defendant to a place beyond the reach of the Court, in the event that damages are awarded against them;
  - (3) Such further or other relief as the court thinks fit;
  - (4) Costs in the cause.

17. The Application was supported by the Second Affidavit of Brent Borland dated the 10<sup>th</sup> day of October 2020.
18. Orders were granted by the Court without notice dated December 2<sup>nd</sup>, 2020 and continued on December 21, 2020 and were extended and still hold. The Claimants have provided an Undertaking which binds all Claimants.
19. A Freezing Order was granted ex parte against the Defendants as follows:
  - a. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> Defendants, are restrained whether by themselves, their servants, agents, assigns or otherwise, from transferring, disposing, otherwise alienating or encumbering the 1,431.285 acres situated between Riversdale Area, Stann Creek District, Belize (“1,431.285”) until the 23<sup>rd</sup> December 2020 at 5<sup>o</sup> clock in the afternoon or until the determination of these proceedings herein or further order of the Court;
  - b. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants are restrained whether by themselves, their servants, agents, assigns or otherwise, from transferring, disposing, otherwise alienating or encumbering their interest in the membership shares in the 5<sup>th</sup> Defendant to a place beyond the reach of the Court, in the event that the damages are awarded against them until the 23<sup>rd</sup> December 2020 at 5<sup>o</sup> clock in the afternoon or until the determination of these proceedings herein or further order of the Court;
20. The Order was extended and is currently extant until further order of the Court and is now the subject of an inter partes application for Injunction by the Claimants for Injunctions as prayed in the ex parte Application, as well as for an Application filed by the Defendants to lift the interim Freezing Orders granted.



## THE LAW ON GRANTING FREEZING ORDERS

21. The Belizean case of Internet Experts S.A. D.B.A. Insta Dollar v. Omni Networks Limited (In Liquidation) et al, Claim 803 of 2010 (unreported), per Justice Young at paragraph 7, says:
- “The jurisdiction to grant this type of injunction derives from the Belize Supreme Court of Judicature Act Cap. 91 Sec 27(1). It enables the court to grant same in all cases where it appears to the court to be just and convenient so to do. A freezing order is a supplementary remedy granted for the limited purpose of protecting the efficacy of court proceedings. It restrains the defendant from dealing with or disposing assets over which the claimant asserts no proprietary right but which following judgment may be attached to satisfy a money judgment. It does not provide the claimant with pretrial security nor does it give any advantage over other creditors Fourie v. Le Roux (2007) 1 WLR 320. “*
22. Young J notes further at the same paragraph 7 that a freezing order *“is one of the two nuclear weapons says Donaldson LJ in Bank Mellat v. Nikpour [1995] 87. It has even been called thermo-nuclear by another judge. As such it demands a number of procedural safeguards for the respondents and conditions for the applicant.”*
23. The test for granting a Freezing Order is still that which is set out by the court in Mareva Compania Naviera SA v. International Bulkcarriers SA [1975] 2 Lloyd’s Rep 509 as being :
- (a) A cause of action;
  - (b) A good arguable case;
  - (c) The Defendant(s) has/have assets in the jurisdiction;
  - (d) There is a real risk of dissipation of the assets by the Defendant(s) before judgment.
  - (e) The Defendant will be adequately protected by the Claimant(s)’s undertaking in damages,

24. The Supreme Court of Judicature Act at Section 27 also stipulates that the Court is empowered to grant an interlocutory injunction ***“In all cases in which it appears to the Court to be just and convenient to do so.”***
25. It is worth restating here that a freezing order is an interim remedy which is granted for the purpose of ensuring that, that the court process is effective. A freezing order does not give Applicants security for the claim, and in particular does not give any proprietary rights against the assets covered by the order. Freezing orders will therefore, not give priority over other creditors, and do not guarantee that Respondents will recover the value of any judgment eventually awarded.
26. Because the purpose of a freezing order is only to prevent Respondents from evading the court process by making unjustifiable disposals of assets, it does not prevent Respondents from carrying out ordinary business transactions. This provision is usually only necessary if the Respondent is a company or is known to be a sole trader/ self - employed. Where it is disputed, or is a matter of doubt, whether a proposed dealing with or disposal of assets is in the ordinary and proper course of business, a variation of the freezing order may be required: **Compagnie Noga v ANZ Banking Group** [2006] EWHC 602; and **Abbey Forwarding Ltd v Hone** [2010] EWHC 1532

#### **A CAUSE OF ACTION, ASSETS IN THE JURISDICTION & A GOOD ARGUABLE CASE**

27. The first three of the applicable tests can conveniently be examined together. The Claimants in this Claim have an existing cause of action in Belize. They have filed a claim seeking declarations and orders in relation to alleged fraud and breach of fiduciary duty, and the transfer of property, being 1,431.285 acres of land.
28. There are assets in the jurisdiction held by the 4<sup>th</sup> and 5<sup>th</sup> Defendants, including real property – the 1431.285 acres of land which was transferred to the 5<sup>th</sup> Defendant.

29. The Claimants need, therefore to show that they have a “**good arguable case.**” This is the minimum threshold for the exercise of the court’s discretion when considering a freezing injunction application see Ninemia Maritime Corporation v. Trave [1983] 1 WLR 1412 which imposes a test with a higher threshold higher than that of a ‘**serious issue to be tried**’, which is the standard for other types of Injunctions.
30. The Claimants say that they meet the threshold test and that they rely on the Second Affidavit of Brent Borland shows that there are serious issues to be tried. According to the Claimants, the serious issues to be tried in the claim are as follows:
- (1) The case against Marco and Michela is for fraud and breach of fiduciary duty in relation to PED;
  - (2) The case against Panther Properties is for fraud and an order that Panther Properties holds the 1,431.285 acres in constructive trust for PED; and
  - (3) The case against Rogers is for fraud in relation to his part in the fraudulent scheme by Marco.
31. Per Young J in paragraph 10 of the **Internet Experts** case, “*In fact, although the evidential burden to establish a good arguable case is high, it does not mean that a claimant is required to go as far as demonstrating that he is likely to obtain summary judgment. It was defined in The Niedersachsen (1983) 2 Lloyds Rep 600 as a case which is more than barely capable of a serious argument and yet not necessarily one which a judge believes to have a better than fifty percent chance of success. Moreover, it is not for the court at this stage to resolve disputes on which the claims of either party may ultimately depend. It simply has to ensure that the applicant has the better (or much the better) of the argument.*”

32. The task of the Court is to examine the affidavit evidence which has been put before by the Claimants as well as by the Defendants put before it to see if the Applicant(s) have been able to meet the required standard.
33. The Claimants extensively argue that they have provided sufficient evidence to support the contention that they have met the threshold in paragraphs 23 to 46 of their skeleton arguments in support of the freezing injunction dated November 23, 2020. I do not propose to reproduce the arguments here, but the main components are as follows:
- a) The 4<sup>th</sup> Defendant acquired 1,586.13 n the Riversdale area of Stann Creek which it intended to develop into residential lots;
  - b) Without the approval of members of the 4<sup>th</sup> Defendant PED, in breach of his fiduciary duty or the notice or approval of Brent and Alana, Marco entered into a Memorandum purportedly on behalf of PED with Rogers who is a member of and representing an Investor Group;
  - c) In the Memorandum Marco dishonestly represented that he owned or controlled PED and that he could transfer PED's property to a new entity which was to take ownership of the property which would owned by the Investor Group and Marco on a fifty-fifty basis;
  - d) In consideration for Marco agreeing to have PED's property transferred to the new entity according to the Memorandum's terms, Marco would be released by the Investor Group from any liability that they had against Marco;
  - e) Without the approval of PED's members, in breach of fiduciary duty and in breach of trust, Marco also entered into a Subscription Agreement with Rogers in regards to RIA Partners LP be which Marco agreed to transfer all the development land to an entity owned one half by Marco and one half by Rogers and to transfer the airport property to Riversdale International Airport LLC;
  - f) On February 27, 2019, Marco and Michela reportedly on behalf of PED and without the approval of Brent and Alana fraudulently and with intent to cause damage to PED and its members executed a Deed of Conveyance transferring title to 1,431.285 acres of the 1586.13 acres to Panther Properties;

- g) Panther Properties is an overseas company and Rogers is a Director of Panther Properties;
  - h) The knowledge and actions of Rogers may therefore be imputed to Panther Properties. Panther Properties dishonestly therefore, assisted Marco's and Michela's breach of fiduciary duty, breach of trust and fraud;
34. The Defendants of course, via the Affidavit of Marco Caruso and Richard Dyke Rogers vigorously and even vehemently dispute the allegations set out above, however, my task at this point is not to decide who is credible, or who is not, nor to decide who is right. The task of this Court is focused on the test that the Claimants need to meet. Suffice it to state that they do make a convincing case for crossing the threshold for serious issue to be tried.

#### **A REAL RISK OF DISSIPATION OF THE ASSETS**

35. The test is an objective one and in Lakatamia Shipping Co v Morimoto [2019] EWCA Civ 2203, Haddon-Cave LJ adopted the summary of some of the key principles applicable to the question of risk of dissipation by Mr Justice Popplewell (as he then was) in Fundo Soberano de Angola v dos Santos [2018] EWHC 2199 (Comm) as follows:

- “(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.*
- “(2) The risk of dissipation must be established by solid evidence; mere inference or generalized assertion is not sufficient.*
- “(3) The risk of dissipation must be established separately against each respondent.*

- (4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinize the evidence to see whether the dishonesty in question points to the conclusion that assets [may be] dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.
- (5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.
- (6) What must be threatened is unjustified dissipation. The purpose of a WFO is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A WFO is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the WFO jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.
- (7) *Each case is fact specific and relevant factors must be looked at cumulatively.*  
(Empasis added)

36. The **Lakatamia** case was one involving an appeal against the discharge of a world-wide freezing order, but the principles apply equally to the instant claim. At paragraph 35, of the decision, Haddon –Cave LJ emphasized that all that the applicant has to show to establish its case on risk of dissipation is that there is a “good arguable case” that there is such a risk. He equated this to the “good arguable case” test for establishing a jurisdictional gateway as analyzed by the Court of Appeal in Kaefer v AMS [2019] 3 All ER 979.
37. The Applicants do not have to prove the risk of dissipation on the balance of probabilities, though the Applicants have to show that the risk is “*more than barely capable of serious argument.*” The heart of the test is really, however, that there is a plausible evidential basis for saying there is risk of dissipation. Haddon-Cave LJ noted that the test is “*not a particularly onerous one.*”
38. The Applicants in this Claim say that the transfer of the 1,431.285 acres from PED to Panther Properties was a fraudulent transfer to divest PED of any assets which it may have had and against which any action for enforcement can be instituted. They say that claim is concerned with the fraudulent transfer of the 1, 431.285 acres, which fraud was committed against PED and its shareholders, as well as Copper Leaf, a creditor.
39. The Claimants say that there is a real risk that the Defendants will dispose of their assets, in particular, the the 1,431.285 acres which is a subject of the interim freezing order already granted, and in this claim.
40. The Claimants allege that PED is “just one of the project entities through which Marco was/is conducting various development projects. In respect of each of these development projects including PED, Marco devised fraudulent schemes to divest the said entities of assets to defraud the shareholders of these project entities and to avoid any enforcement by Copper Leaf against any of the said entities including the transfer of 1,431.285 acres to Panther Properties”.

41. The Defendants do not deny the transfer of 1,431.285 acres to Panther Properties from PED. Panther Properties is a company incorporated in the state of Texas, USA. The asset has changed hands once already, and this is a fact. The duty of the Court is to preserve
42. In addition to the transfer of the subject property of the claim, since I have already found in this claim that the Claimants do have a good and arguable case -I also accept that since the claim is based on allegations of fraudulent actions taken by the Defendants, that there is a sound basis for inferring a general risk of dissipation of assets.

#### **BALANCE OF CONVENIENCE – “JUST AND CONVENIENT”**

43. In my assessment, the balance of convenience at this stage does lie in favor of the grant of the freezing order, in respect of the 1,431.285 acres of property in question which is the subject matter of the interim order granted and of the declarations and orders prayed in the claim, and it would therefore be just and convenient to grant the Freezing Order at this stage of proceedings.

#### **ADEQUATE PROTECTION BY THE CLAIMANTS’ UNDERTAKING**

44. A critical ingredient of the grant of an interim Freezing Order is that the Defendants will be adequately protected by the Claimants’ undertaking in damages. The Claimants in this claim have all given an undertaking.
45. The Defendants in their application to discharge, refer to the undertaking being given by the Claimants as “woeful in all the circumstances” and say that they “are not aware that any of the Claimants have any assets within the jurisdiction”.



46. Counsel for the Claimants in response, argues that the Undertaking is made by all the Claimants (including Copper Leaf LLC), that the Defendants have not provided sufficient basis to justify their belief that the undertaking is insufficient.
47. It is the duty of the Defendants to place evidence before the Court that the undertaking would be worthless and so would require fortification and cites a case from the Court of Appeal of the British Virgin Islands, **Lucita Angeleve Watson et al v. Leonard George De La Haye** BV1HCVAP2104/0004.
48. In that Appeal, the learned Blenman JA points out in her decision at paragraph 42, that *“It behooves an appellant who wishes the court to order a claimant who seeks an injunction to fortify the undertaking to place evidence before the court upon which the court can conclude that there is a real risk that the undertaking would be worthless. The general rule is to require the claimant to undertake to pay any damages subsequently found due to the defendant as compensation if the injunction that was previously granted cannot be justified at trial providing there is proof that the defendant has suffered loss as a consequence of the grant of the injunction. However, the law is clear, that in certain circumstances, the court has a discretion to grant an injunction without requiring an undertaking as to damages. As a general rule, the court requires an undertaking as to damages as occurred in this case at first instance.*
49. In the Jamaican Court of Appeal case of **TPL Limited v Thermo-Plastics (Jamaica) Limited** [2014] JMCA Civ 50, the Court of Appeal of Jamaica concluded that the proper practice is to require evidence of willingness and an ability to provide a proper undertaking as to damages. In this claim, such evidence can be found in the affidavit of Brent Borland, and in fact, the Claimants have all given a complete binding written undertaking.
50. Furthermore, even the Defendants’ evidence per Richard Dyke Rogers is that the Defendants know of assets which Brent possesses or may possess within the jurisdiction. At paragraph 54 of his Affidavit, Mr. Rogers states as follows:

*“This same fraudster, Brent, benefits from the settlement that the Group has made. Because the settlement was reached Brent retains his ownership in PED which still owns property which should become more valuable as surrounding properties are developed by our group.”*

51. I agree with the assertion by the Claimants/Applicants that effect of the undertaking which is expressly given in the interim Freezing Order is sufficient to protect the Defendants if they suffer any damages as a result of the Freezing Order being wrongfully granted, and I find that the requirements and the basis for the Freezing Order until further order of the Court or resolution of this claim is met.

**B. DEFENDANTS’ APPLICATION TO DISCHARGE THE FREEZING ORDER**

52. The Defendants filed their Application dated January 18, 2021 and filed January 18, 2021 on behalf of the 1<sup>st</sup> to 5<sup>th</sup> Defendants, seeking the discharge of the freezing injunction granted by the Court without notice on December 2<sup>nd</sup>, 2020 continued December 21<sup>st</sup>, 2020, and seeking an inquiry into the damages caused by the freezing injunction in the matter.

53. The Defendants are applying for the following reliefs:

- 1. The Freezing Injunction contained in the Order December 2<sup>nd</sup>, 2020 continued December 21<sup>st</sup>, 2020, be vacated and discharged.*
- 2. The Claimants be directed to take immediate steps to inform in writing anyone to whom it has given notice of the Freezing Injunction, or who it has reasonable grounds for supposing may act upon the Freezing Injunction, that it has ceased to have effect.*

3. *There be an Inquiry as to damages on the undertaking given by the Claimants at paragraph 1 of the Order, for the purposes of which the following directions shall apply:*
  - a. *The Defendants shall serve upon the Claimants Points of Claim setting out the loss alleged to have been caused by the Freezing Injunction by \_\_\_\_\_;*
  - b. *The Claimants shall serve upon the Defendants Points of Defence by \_\_\_\_\_; and*
  - c. *The Defendants shall be at liberty to serve Points of Reply by \_\_\_\_\_.*
  - d. *Witness Statements shall be exchanged on or before \_\_\_\_\_.*
  - e. *The hearing of the Inquiry is set for \_\_\_\_\_.*
  - f. *The costs of complying with these directions be costs in the Inquiry.*
4. *The Claimants pay the Defendants' costs of this application in the sum of \$\_\_\_\_\_.*
5. *Liberty to Apply.*
6. *Such further and other relief as the Court deems just.*

54. The Application by the Defendants is supported by the Affidavit of Marco Caruso dated January 18, 2021 and the Affidavit of Richard Dyke Rogers dated January 18, 2021. Both were filed on January 18, 2021.

55. The Defendants' grounds for discharging the interim Freezing Order which was granted ex parte are essentially as follows:

- a. The Claimants are seeking to use the Freezing Injunction as an instrument of oppression;
- b. There is no real risk of dissipation of assets by the Defendants;
- c. There was material non-disclosure and misrepresentation of the facts by the Claimants at the without notice hearing on December 2<sup>nd</sup>, 2020;

- d. The undertaking given by the Claimants is inadequate and worthless ; and
- e. The Claimants have unduly delayed in seeking equitable relief.
- f. In all circumstances it is just and convenient that the order be discharged.

## INJUNCTION AS AN INSTRUMENT OF OPPRESSION

56. The Defendants/Respondents say that the Claimants are seeking to use the Freezing Injunction as an “instrument of oppression”.
57. Nowhere in the submissions of the Defendant is this argued. In the Affidavit of Marco, the 1<sup>st</sup> Defendant deposes at paragraphs 89 to 97, that PED is an ongoing concern in the business of developing and selling properties but that the Claimants have not disclosed that. The only property that is frozen is in fact the 1,431.285 acre parcel transferred to Panther Properties is the only affected property. No other asset or property - and none currently held by PED is affected by the order.
58. Marco avers that the “Claimants are aware that if the freezing injunction is continued it is likely to result in the complete collapse of PED. This is their goal.” Marco does not provide this Court with any detail as to how they are aware, or this is their goal, much less how such total collapse will occur.
59. Furthermore, Marco also says that “*the various injunctions are being spread out so as to pressure and oppress the Defendants to settle*”. Whether that is so or not, the Court must focus on the freezing order in this claim, and whether the Claimants herein have met the tests required to sustain this Order until further order of the Court. In my view, they have done so.
60. Marco complains that “*since the order made in this claim, the Belize Bank Limited has called in*” all the personal loans of which he and Michela are a party; averring that “*even the managing directors/members of PED have experienced “severe individual hardship*

*as making the payments due was already difficult in light of the ongoing pandemic.”*

There is no further elaboration on the theme, nor any evidence offered by the Defendants other than Bank Letters at Tab R of Marco’s Affidavit to show how any alleged collapse of PED will occur.

61. The personal difficulties faced by Marco and Michela (presumably the managing directors/members of PED to whom he refers) cannot be said to be those of PED. Nor has this Court any evidence from Marco as to how this would cause the “complete collapse of PED”
62. Marco claims at paragraph 95, *that “individually titled lots are actively being marketed and are available for sale.”* He says that *“As a consequence of the freeze, PED will be unable to complete those transactions with the effect that these Canadian investors that settled with PED property might sue PED.”* Nothing more is offered other than a sampling of Conveyances is proffered. And there is nothing other than a “might” which is cited as being likely to occur. It is not even close to being sufficient.
63. Additionally, there is no property that is currently titled to PED which is frozen that ‘might be’ affected, save for the 1,431.285 acre parcel - which the Claimants’ claim says was transferred to Panther Properties and is held on a constructive trust for PED. This cannot rise to the level of the kind of proof needed to show that the Order is oppressive. And if the Defendants propose to alienate this or any part thereof before this Claim is litigated, they will not be allowed to do so, without providing proof of loss that can be compensated with damages.
64. As to the contention that “this current freeze of PED’s assets and Panther Properties LLP could jeopardize the situation with the 39 investors defrauded by Borland potentially resulting in additional legal issues detrimental to PED and all its members”; presumably these members include Brent and Alana; however, even so, the contention that the Freeze Order “could jeopardize” settlement or result in additional legal issues detrimental to

PED is simply insufficient to expect this Court to make a finding that this Order is an instrument of oppression.

### **NO REAL RISK OF DISSIPATION**

65. Having assessed the evidence provided, I have found that there is a real risk of dissipation of the the 1,431.285 acre parcel, and the Claimants have satisfied the threshold test. I decline to discharge the injunction on this basis.

### **MATERIAL NON-DISCLOSURE AND MISREPRESENTATION**

66. The Respondents aver that there was material non-disclosure and misrepresentation of the facts by the Claimants at the without notice hearing on the 2<sup>nd</sup> of December 2020.

67. And that this would justify the discharge of the Freezing Order made on that date. In the UK Court of Appeal case of **PJSC Commercial Bank v Kolomoisky** [2019] EWCA Civ 1708, the Court at Paragraph 249 onwards, considered the Applicant's duty to make full and frank disclosure when applying for a Freezing Order without notice, and the following principles were distilled:

- a) The applicant has to make full and fair disclosure of all the material facts. What is material, is to be decided objectively by the court- it does not depend on the applicant's assessment, or that of his legal advisors;
- b) The applicant must make proper enquiries before making the application. He must disclose not only what he knows, but what he would have known if he had made proper enquiries. The scope of the enquiries that must be made depends on all the circumstances- so if the application is particularly urgent less extensive enquiries may be justified.;

- c) Whether the injunction should be discharged depends principally on the importance of the non-disclosed fact to the issues to be decided by the judge;
  - d) However, it is necessary to consider whether the non-disclosure was innocent, or deliberate;
  - e) If a non-disclosure was innocent (in the sense that the applicant did not know the fact or did not appreciate its relevance) that is an important factor, but not decisive. But the duty to make enquiries must be borne in mind. A non-disclosure is unlikely to be considered innocent if the applicant failed to make the relevant enquiries for fear of discovering inconvenient facts;
  - f) If the non-disclosure was deliberate or substantial, the court's likely starting point will be to discharge the injunction;
  - g) Ultimately the question is where the interests of justice lie. That may include continuing the freezing order, but marking the non-disclosure in some other way, such as with a suitable order as to costs;
68. The facts in the **PJSC Commercial Bank** case on the issue of non-disclosure were complex, but the Court of Appeal did overturn the trial judge's decision to set aside the freezing injunction on the basis that while the applicant should have gone further than it did in making full and frank disclosure, there was no basis for holding that the failure was deliberate in the relevant sense.
69. That decision highlights the need for any applicant for a freezing injunction to:
- (a) carefully consider what material should be disclosed and why;
  - (b) make all relevant enquiries that can be made in the time available, so that full and fair disclosure can be made; and
  - (c) be able to explain, persuasively, why material which has not been disclosed was considered, objectively, not to be relevant.

70. In the current case, there was disclosure by both Claimants and Defendants which was not material, but which was purportedly “background” this claim and a series of other claims. The parties to this claim have not requested the consolidation of any or all these claims, and, thus, while the background is useful to understanding the relationship of the Parties, the real issue is importance of the non-disclosed fact to the issues to be decided by the judge.
71. Brent, Marco and Rogers, all omit certain details in their respective affidavits, but I do not consider them to be deliberate, and neither do those omissions amount to material non-disclosure and misrepresentation of the facts by any of the Affiants. In this case, a costs order to reflect non-disclosure therefore would not be a suitable remedy.
72. The Defendants in written submissions complain that the Claimants have put forward an affidavit that *“includes many matters that are not germane to the particular facts and circumstances of Claim 623”* and that Brent’s Affidavit is designed to *“obfuscate and misrepresent the matters and circumstances relating to this claim”* *“in a manner clearly calculated to “bury” the Defendants in a deluge of material”*
73. This is not, in and of itself, determinative of there being material non-disclosure and misrepresentation of the facts by the Claimants at the without notice hearing on on the 2<sup>nd</sup> of December 2020.
74. There are paragraphs of complaint in the Affidavit of Marco that make much of the failures of Brent, the fraud that he has been convicted of and the sentencing that is to take place. The Court is urged to penalize the Claimants by discharging the Freezing Order on the basis of his misrepresentation and a failure to disclose all material facts.
75. What is material in this current claim is a matter must be weighed carefully by the Court, and the court must determine what disclosure in the circumstance is “material” to this particular claim.



76. At this juncture, the Court is not enabled or entitled to sift through the varied, colorful and fulsome narratives that is the affidavit evidence of the various deponents, as it will do at trial. There is a time and place for that exercise and we are not there yet.
77. After a careful review of all affidavit evidence, I find that the Claimants/Applicants have made full and fair disclosure of all the material facts necessary at this stage to grant the Freezing Order made.

### **WORTHLESS UNDERTAKING**

78. The Defendants seek to discharge the injunction on the basis of an insufficiency of the undertaking. They contend that the giving of an undertaking by the Claimants “*is not a flippant requirement that can be ignored*”, and that “*the undertaking is a venerated requirement of the common law without which an injunction will not be granted and without which an injunction will be discharged.*” I agree.
79. The Defendants do contend that only Brent gave the undertaking, but the Order granted the 2<sup>nd</sup> December, 2020, shows that all Claimants have specifically given an undertaking.
80. Having found above, that the undertaking which is expressly given in the interim Freezing Order is sufficient to protect the Defendants if they suffer any damages as a result of the Freezing Order being wrongfully granted, and I therefore find that the requirements and the basis for accepting a similar undertaking for the Freezing Order until trial or further order of the Court is met.

### **UNDUE DELAY IN SEEKING EQUITABLE RELIEF**

81. The Defendants contend that the Claimants have failed to address the urgency of the injunction and failed to comply with Rule 17.3(3). They challenge the “*assertions that the Claimants (only) “discovered” the alleged “forgery and fraudulent transfers...in or about July -*

*August 2020” as being untrue. The Defendants say that the Claimants “do not explain the delayed timeframe and do not offer any reason for failing to take steps to seek injunctive relief immediately being aware since late 2018 and mid-2019 of the alleged improprieties that ground their Claim”.*

82. The Claimants argue that there has not been any delay or any unreasonable delay in making the application herein. The Claimants say, as per the Affidavit of Brent, that *they “did not discover all of the fraudulent actions of the Defendants and the fraudulent scheme outlined in the claim herein until in or about July-August, 2020, and much care was taken to put all material discovered before the Court.”*
83. Sifting through the available Affidavit Evidence of Brent, Marco and Rogers on the point, I am not persuaded that the Defendants do prove that the Claimants did inordinately delay in either instituting a claim or in seeking an injunction, and I am guided on the latter point by the Eastern Caribbean Supreme Court decision in the BVI case of Hualon Corporation v Marty Limited BVIHC(COM) 2014/0090, where there was an application to discharge an injunction obtained without notice. One of the grounds for discharge was a delay of five years without explanation.
84. In that case, Farara J says at paragraph 76, *“The next ground relied on by the Defendant in discharge the injunction is in ordinate delay by the Claimant in bringing the application. This factor is not per se a ‘technical’ point. It is substantive factor to be taken into account by the court in determining the important question of whether there is a real risk of dissipation of assets A,B,C,DE,A v A. Civil Appeal No. 1 of 2011 per Webster, JA at paras [24] to [25]. Where the delay is inordinate and not properly explained, the court may conclude that there is no real risk of dissipation, and the interim relief ought not be granted or, where previously granted, ought to be discharged. However, there is no general rule that delay in applying for an injunction or freezing order is a bar simpliciter to obtaining such interim relief.”* [Emphasis added]

85. I do not find, as a matter of fact that there was either undue or inordinate delay in instituting this claim, or applying for an Injunction on the part of the Claimants and I therefore decline to discharge the Freezing Order on this ground.

### **JUST AND CONVENIENT**

86. In all the circumstances, it is still, at this stage, just and convenient to maintain the freezing order which was made ex parte on December 2<sup>nd</sup>, 2020 and continued on December 21<sup>st</sup>, 2020

### **ORDERS**

87. The Following Orders are made:

1. The Freezing Order which was made on December 02, 2020 shall continue and remain in force until further Order of the Court;
2. Costs shall be costs in the cause

DATED MARCH 31, 2021

A handwritten signature in black ink, appearing to read 'Lisa M. Shoman', with a long horizontal flourish extending to the right.

Lisa M. Shoman

Justice of the Supreme Court of Belize