BRITISH VIRGIN ISLANDS

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

BVIHCV2019/0113

BETWEEN

[1] DOUGLAS RIEGELS

[2] TREFOR GRANT

Claimants/Applicants

and

[1] CHARLES PETERSON

[2] GLOBAL WATER ASSOCIATES LIMITED

Defendants/Respondents

Appearances:

Mr. Peter Ferrer with him Ms. Marcia McFarlane for the Applicants
Mr. Adrian Francis with him Ms. Akesha Adonis for the Respondents

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2021: March 23
August 6

Application for Freezing Order and Order for Disclosure of Information – Application framed as an American Cyanamid Application – Freezing order sought not related to propriety rights but grounded in a claim for damages for breach of contract – Second Respondent being a special purpose vehicle without any or any substantial assets expected to benefit from a settlement sum - Applicants' underlying claim presenting an arguable case – dispute as to whether or not Applicants entitled to a portion of the settlement sum – First Respondent not ordinarily resident in the jurisdiction – Second Respondent not actively trading – Respondents refusal to provide any undertaking – Real Risk of dissipation – In the interests of Justice to grant freezing Order and Order for Disclosure.

DECISION

[1] **RAMDHANI J. (Ag.)** This began as ***ex parte*** application made pursuant to Part 17 of the Eastern Caribbean Supreme Court Civil Procedure Rules (CPR), section 24 of the West Indies Associated States Act, and or the inherent jurisdiction of the Court

for primarily two orders, one being a freezing order and for the disclosure of certain information. The application was heard ***inter partes*** with the result being the application for a freezing order is refused but that the order for disclosure is granted in the terms set out in this decision.

[2] The application was framed on paper as an American Cyanamid application. It contends that there is a serious issue to be tried and that balance of convenience favours the grant of the orders. The main contention is that the Respondents were likely to remove from the jurisdiction, money which they were about to collect from the government as part of a settlement, so thereby thwarting the enforcement of any judgment which the Applicants might obtain in pending proceedings. The Applicants' claim is that they are entitled to at least 60% of the settlement sum less any legal fees which would be incurred by the Respondents in securing the settlement.

The Underlying Dispute Between the Parties.

[3] The underlying claim was filed on 23 April 2020 by the Applicants, for damages arising out of allegations that the Respondents' have breached an oral agreement (the Agreement) between the Parties.

[4] The claim is grounded in events[1] which began in late 2011 and early 2012 when Mr. Peterson, the First Respondent entered into discussions with Mr. Riegels, the First Applicant regarding the provision of funding for litigation between Global Water and the Government of the Virgin Islands (the "Government"). The litigation in question was in respect of various breaches by the Government of two agreements both dated 19 September 2006; one for the design and build of a sewage treatment plant and the other for its management, operation and maintenance (together the "Government Contracts").

[1] The undisputed aspects of the narrative is adopted from the Applicants' case.

[5] Through various discussions, the First Applicant and the First Respondent agreed that: The Applicants would lobby the Government on behalf of Second Respondent with the objective of persuading it either to honour the Government Contracts or to agree to the payment of compensation on terms acceptable to the First Respondent (in his capacity as director of the Company).

[6] In the event, the first objective was not achieved within a reasonable time the Applicants would lobby the Government on behalf of the Company with the alternative objective of persuading it to enter into new contracts with the Company, on terms wider in scope and financially more advantageous to Global Water than under the Government Contracts; the precise terms of which would be acceptable to, and agreed by Mr. Peterson (acting for and behalf of Global Water).

[7] If the Applicants were unable to achieve either objective within a reasonable time, and in any event sufficiently in advance of the expiration of the limitation period to enable a claim for breach of the Government Contracts to be brought in a considered and orderly fashion, the Applicants would personally provide Second Respondent with necessary funding for it to bring such proceedings.

[8] The Applicants would be responsible for the time spent, and all costs and expenses incurred, by them in furtherance of the said objectives. In consideration of the above, the Applicants would acquire all of the Company's Class B Preference Shares, either directly or through some other nominated entity.

[9] The parties parted company in 2013, each claiming that the other had broken the oral agreement. The short of it was that in June 2013, the Respondents, contending that the Applicants had refused to fund the litigation, moved on to arbitration proceedings against the government and funded these proceedings themselves.

[10] The arbitration was successful against the Government, and several appeals later, on the 13th July 2020, the Privy Council allowed the Second Respondent's appeal and referred the matter back to arbitration for an assessment of damages. The matter is currently before the arbitrators and a decision on the quantum of damages

due to the Second Respondent is expected. The Applicants say this is likely to be soon.

[11] On 23 April 2020, the Applicants issued their claim for damages for breach of the Oral Agreement, damages for loss of chance amounting to 60% of the anticipated net profits arising from the Government Contracts or alternatively 60% of the value of any award made in favour of the Company or alternatively compensation on a quantum meruit basis.

[12] The crux of the Applicants' narrative is that they fulfilled their obligations under the oral agreement and are therefore entitled to damages for an alleged breach of the oral agreement by the Respondents.

[13] On 6 November 2020 and on 3 March 2021, the Applicants sought an undertaking from Mr. Peterson in respect of the proceeds of settlement. That undertaking was refused on the basis the Claimants are not entitled to the relief sought or otherwise to interfere with Global Water's freedom of action.

[14] This refusal and other circumstances set out in the application, led to the present application which sought interim relief. The Applicants effectively seek orders (1) to compel the Respondents to produce information on any settlement discussions with the Government and details of any payments made, and (2) to prevent the Respondents from disposing of, dealing with or diminishing the value of their assets in or outside the Virgin Islands up to the value of 60% of any settlement received by the Respondents from the Government.

[15] There has been quite a lot of submissions made by the applicant that American Cyanamid principles are relevant to the court's functions. These were met by equally forceful submissions by the respondent that the American Cyanamid principles were not applicable. The Court is satisfied that on this point, the Respondents are right and the Applicants would have to show more than what is required by the American Cyanamid principles to get the orders sought. The authorities have made it clear that the American Cyanamid principles and the test for the grant of an injunction

applicable to proprietary claims to enforce a legal or equitable right and are not applicable to a monetary claim or a claim for an account, where only freezing injunction may be granted. **Madoff Securities International Ltd and another v Raven and others [**2012] 2 All ER (Comm) 634

[16] Notwithstanding, the Applicants contended that on the evidence before the court demonstrated, even if they were wrong on American Cyanamid principles, there was sufficient material before the court to justify the grant of the orders sought.

[17] I have considered the Application, the evidence in support and in opposition, the written and oral arguments of the parties and do agree it would be proper to make the orders sought in this case.

<u>A Freezing Order</u>

[18] The court's jurisdiction to grant a freezing order is grounded in section 24(1) of the West Indies Associated Supreme Court (Virgin Islands) Act. This section provides as follows: -

> *"24. (1) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or of a judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court or judge thinks just".*

[19] CPR 2000 Part 17.1(1)(j) brings this provision to life by empowering the court to grant an interim freezing order to restrain a party from dealing with any assets whether or not located in the jurisdiction as well as restraining its removal from the jurisdiction. The court will engage this discretion to restrain the removal of assets from the jurisdiction where there is a real risk that a party may dissipate or remove his assets from the jurisdiction. The discretion is exercised to ensure that assets will be available to satisfy any judgment which may be granted against that party.

[20] In this jurisdiction, the principles are well settled on an application for the grant of a freezing order, where the underlying claim is a monetary claim for a breach of contract. The applicant would have to show: (a) that there was a good arguable case on the merits; (b) that there is a real risk that there will be an unjustified dissipation of the Defendant's assets (wherever located) before judgment can be enforced; and (3) That the respondent will be adequately protected by the applicant's cross undertaking in damages. See the cases of **Rybolovleva v Rybolovleva** (BVIHOV 2008/0403), per Foster J at [24]; **Irish Response Limited v Direct Beauty Products Limited** [2011] EWHC 37 (QB).

[21] I have noted that in this case the 'assets' would be the settlement sum if any, which have not yet been realized. I see no reason why a freezing order would not be available against future assets in circumstances which exists in the present case.

[22] In the exercise of the discretion to grant a freezing order, the court should have regard to the relevance of any delay in making the application.

[23] I turn to the first matter which must be shown, that is, a good arguable case.

Good Arguable Case

[24] What is a good arguable case? It is any different from a 'serious issue to be tried'?

[25] In the Madoff case, the Commercial court made reference to ***Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG****, The Niedersachsen* [1984] 1 All ER 398 where at 404 Mustill J (as he then was) described a good arguable case for these purposes as one 'which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success'. The Commercial Court stated: "It can immediately be seen that this either is the same test as 'serious issue to be tried' for the purpose of resisting a strike out application or, if there is any difference between the two tests, it is an imperceptible one."

[26] In a reminder that the burden was on the applicant to present evidence on the relevant questions, Kerr LJ giving the judgment of the Court of Appeal in Ninemia Maritime Corporation v. Trave Schiffahrtgesellschaft m.b.H. und Co. KG ("The Niedersachsen") [1983] 1 WLR 1412 at page 1417E –F:

> *"It follows that the evidence, including the evidence on the second question posed by the judge to which we turn in a moment, must be looked at as a whole. A "good arguable case" is no doubt the minimum which the plaintiff must show in order to cross what the judge rightly described as the "threshold" for the exercise of the jurisdiction. But at the end of the day the court must consider the evidence as a whole in deciding whether or not to exercise this statutory jurisdiction."*

[27] In this case, the Respondents have been rather tongue-in-cheek about whether they accept that there is a real arguable case. In the written submission, they state, 'the Defendants do not seek to argue on this application that the Claimants do not have a good arguable case. This is because it is not necessary to do so, as the application is demonstrably misconceived..'

[28] Whether they were prepared to make a clear concession or not, this Court considers that there is indeed a real arguable case on the merits. It is whether there the Respondents are in breach of the oral agreement. In this case, both sides appear agreed on many of the terms of the oral agreement and it seems that issues of fact which remain include whether the Applicants have acted unreasonably and whether they failed to respond within a reasonable time as to whether they would fund the litigation.

[29] I turn to the next matter with regards to which the Applicants must satisfy the court.

Real Risk of Dissipation

[30] An application for the freezing order, will in most cases, turn on this issue as the first limb is usually present.

[31] In Madoff Securities Ltd., Flaux J noted that an applicant must be able to satisfy the court that[2]:

> *'(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 his assets other than in the ordinary course of business: see* Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH und Co KG, The Niedersachsen *[[1984] 1 All ER 398] per Mustill J as interpreted by Christopher Clarke J in* TTMI Ltd of England v ASM Shipping Ltd of India *[2005] EWHC 2666 (Comm) at [24]–[27], [2006] 1 Lloyd's Rep 401 at [24]–[27] 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:* Stronghold Insurance Co Ltd v Overseas Union Insurance Ltd *[1996] LRLR 13 at 18–19 per Potter J and* Motorola Credit Corp v Uzan *(No 2) [2003] EWCA Civ 752 at [142]–[146], [2004] 1 WLR 113 at [142]–[146]…'*

[32] Whilst an applicant may in many cases be able to rely on the underlying dispute (grounded in pleadings which may be already filed) to demonstrate that there is a good arguable case, the applicant must present relevant evidence on this point to meet this threshold.

[33] In making this point, the Ontario Court of Appeal in **Chitel v Rothbard** (1983), 39 O.R. (2d) 513, referred to the judgment of Lord Denning in **Third Chandris Shipping Corp v Unimare** [1979] Q.B. 645 and stated:

[2] The Court is grateful for Mr. Francis's summary of the legal principles and adopts it.

> *"Turning finally to item (iv) of Lord Denning's guidelines - the risk of removal of these assets before judgment - once again the material must be persuasive to the court. 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 of living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law."*

[34] The evidence which is to be presented to the Court must be 'solid evidence' to meet the required standard of proof to show a real risk of dissipation.

[35] In the unreported decision of **Yukos CIS Investments Limited and Anor v Yukos Hydrocarbons Investments Limited and Ors**, as part of his dissenting judgment, Justice of Appeal Redhead of the BVI Court of Appeal addressed the required standard of proof an applicant must meet: that there must be "solid evidence" of a risk of dissipation ([35]-36]); and that the court is not concerned with the probabilities of what will happen but with whether there is evidence establishing a real risk that assets may be dissipated ([44]). **Enercon GmbH and another v Enercon (India) Ltd** [2012] EWHC 689 (Comm) 2011

[36] In **Thane Investments Ltd and ors v Tomlinson and Ors**, at [21] the English Court of Appeal held that unsupported statements, suspicions or expressions of fear have little weight in establishing risk of dissipation.

[37] In the more recent English case of **Mobil Cerro Negro Ltd v Petroleos de Venezuela** SAB the Commercial Court held at [41]-[42] that there must be a risk that the asset will be used otherwise than for a normal and commercial purpose.

[38] Every defendant can dissipate assets. There is always a possibility of such being done for reasonable and justifiable purposes. Not every risk of a judgment being unsatisfied would justify the grant of the order.

[39] A useful list of a number of considerations or factors which may be relevant to a finding that there is a real risk of dissipation were identified in Sir Peter Pain in **O'Regan v. Iambic Productions Ltd**. (1989) 139 NLJ 1378 and are set out at paragraph 12.039 of Gee's Commercial Injunctions, 5th edn. These are:

> *"(1) The nature of the assets which are to be the subject of the proposed injunction, and the ease or difficulty with which they could be disposed of or dissipated. The claimant may find it easier to establish the risk of dissipation of a bank account, or of moveable chattels, than the risk that the defendant will dispose of real estate, e.g. his house or office. Nevertheless, in appropriate cases Mareva injunctions can be, and have been, granted where the defendant's only known asset within the jurisdiction is his house (e.g. if he has put it up for sale and has evinced an intention to go and live abroad).*
>
> *(2) The nature and financial standing of the defendant's business: see Lord Denning's remarks about certain types of offshore company in Third Chandris Shipping Corporation v. Unimarine, and Lawton L.J. , and Siporex Trade SA v. Comdel Commodities Ltd. Contrast, however, The Niedersachsen: even a "one-ship" company incorporated in Panama or Liberia may be a subsidiary of a substantial company incorporated elsewhere, and would be likely to honour its debts.*
>
> *(3) The length of time the defendant has been in business. Stronger evidence of potential dissipation will be needed where the defendant is a long-established company with a reasonable market reputation than where little or nothing is known or can be ascertained about it.*
>
> *(4) The domicile or residence of the defendant. At one time, Mareva injunctions were granted to prevent only foreign defendants from removing their assets from the jurisdiction to defeat a judgment or arbitration award.*

While the jurisdiction has widened to include domestic defendants, the court will be less ready to infer that a defendant who is based in England, and has a home or established business here, will remove or dissipate his assets. On the other hand, if the defendant company, though English, is controlled by an offshore company of the kind described by Lord Denning in Third Chandris Shipping Corporation v. Unimarine, the inference that there is a real risk that a judgment or award may go unsatisfied may be more readily drawn.

(5) If the defendant is a foreign company, partnership, or trader, the country in which it has been registered or has its main business address, and the availability or non-availability of any machinery for reciprocal enforcement of English judgments or arbitration awards in that country. If such machinery does exist, the length of time it would take to implement it may be an important factor.

(6) The defendant's past or existing credit record. A history of default in honouring other debts may be a powerful factor in the claimant's favour – on the other hand, persistent default in honouring debts, if it occurs in a period shortly before the claimant commences his action, may signify nothing more than the fact that the defendant has fallen on hard times and has cash-flow difficulties, or is about to become insolvent. The possibility of insolvency does not justify the granting of Mareva relief. As a factor it may weigh against it, on the grounds that an injunction would be oppressive because it might deprive the defendant of a last opportunity to put his business affairs in good order again. The fact that a Mareva injunction has been granted over the defendant's assets may well discourage a bank or other company from lending him money or otherwise coming to his aid.

(7) Any intention expressed by the defendant about future dealings with his English assets, or assets outside the jurisdiction.

> *(8) Connections between a defendant company and other companies which have defaulted on arbitration awards or judgments. If the defendant company is the subsidiary of a foreign company which has allowed other subsidiaries to default on awards or judgments, or go into liquidation owing large sums of money to trade creditors, this may be a powerful factor in favour of granting an injunction.*
>
> *(9) The defendant's behaviour in response to the claimant's claims: a pattern of evasiveness, or unwillingness to participate in the litigation or arbitration, or raising thin defences after admitting liability, or total silence, may be factors which assist the claimant."*

[40] Mr. Ferrer's oral and written arguments largely centered on the American Cyanamid's principles, and he urged that the balance of convenience favoured the grant of the injunction. In his submissions he argued that on those matters considered in the balance, as far as a risk of dissipation of assets is concerned, 'there are several factors pointing to such a risk.

The Respondent's conduct in dealings between the Parties

[41] In this regard, Mr. Ferrer for the Applicants submits that *'the First Respondent, by his conduct with the Oral Agreement and in these proceedings has sparked concern that he is prone to dishonour his word and will do his utmost to thwart [the Applicants'] justifiable claims.'* Reference was also made to the First Respondent's conduct related to the mediation process.

[42] Mr. Francis for the Respondents response was that a real risk could not be grounded on 'the Defendants' alleged breach of contract because '[a]n allegation of breach of contract does not suffice to establish a risk of unjustified dissipation. If it did, a freezing order would be obtained automatically in every breach of contract case.'

[43] So too, Mr. Francis argued '[t]he Defendants' refusal to settle by mediation could not be relied on to ground a finding of a real risk of dissipation as the Applicants 'may not refer to, let alone rely on, without prejudice communications for the purpose of establishing a risk of unjustifiable dissipation or indeed for any purpose. In any event, a refusal to settle proceedings is incapable of giving rise to an adverse inference of a risk of unjustified dissipation. Otherwise, a freezing order once again, be obtained automatically in every case once a without prejudice offer is refused.

[44] As far as this Court is concerned, I do not see how any of the underlying alleged conduct of the first respondent rises to support any view that he is prone to not keeping his word. These ground the breach of contract claim and are merely allegations at this stage. If I were to accept this argument it would mean that this Court would have accepted the underlying allegations as facts. There is nothing here which the First Respondent concedes which can be used to justify a finding that he is likely to take actions to thwart enforcement.

Shell Company and No Ties to the Jurisdiction:

[45] The Applicants have also relied on the fact that *the First Respondent is not ordinarily resident within the BVI and is not known to have any, or sufficient, assets in the jurisdiction of the Court, capable of satisfying the Breach of Contract Claim.*

[46] Reliance has also been placed on the *Second Respondent being simply a shell company which was formed solely for the purpose of receiving the Government Contracts. The sole asset of the Second Respondent is its entitlement to any award to be paid by the Government to the Respondents arising from the breach of the Government Contracts.*

[47] Mr. Francis for the Respondents submitted that Global Water being a special purpose or shell company and the settlement proceeds being its only assets meant nothing as 'there is no automatic right to a freezing order against any type of company, including a company with a single asset or only cash assets. These facts

are incapable of giving rise to an adverse inference of a risk of unjustifiable dissipation.

[48] I note paragraph 1 of the first respondent's witness statement in which he states:

> *"I am a director of the second respondent (the "Company" or "Global Water"). I am a resident of the United States and the British Virgin Islands. I have done business in the BVI for over 23 years and I also have a residence at Sabbath Hill, Tortola, BVI. I am in the business of supplying water and sewage services to the Territory. I have a number of businesses, which include the provision of sewage equipment and water in various locations on island."*

[49] A court has to approach this matter in a practical manner. This is no clear denial by the Respondents that the Second Respondent was established as a special purpose vehicle to secure the government contract. This is a company that is not trading and has no day-to-day operations. It has no assets and it is now simply engaged in resolving the dispute with the government to receive its settlement sum. This is one of the factors which have been identified in Gee as being important. I consider that it is a significant matter in this case.

[50] As far as the First Respondent is concerned, I am of the view that he can dispose of his residential property fairly easily, especially where he maintains homes in several jurisdictions. The fact that the First Respondent has been doing business in the BVI for the last 23 years does not change this view in this case. The first Respondent and his wife are ordinarily resident outside of the BVI. The first and second factors set out in Gee (quoted above) rings here.

[51] These matters, when considered against the refusal to give the undertaking, give rise to a real risk.

Refusal to give Undertaking

[52] The Applicants say that following the recent the Privy Council ruling, they became aware of the Government's interest in settling the Respondents' claim and that by letter dated the 6th November 2020, their legal practitioners wrote to the Respondents' legal practitioners seeking an undertaking in the following terms:

> *"We refer to the recent favourable Privy Council judgment, Global Water Associates Limited v Attorney General of the Virgin Islands. The Privy Council has determined that your client (Global Water) is entitled to damages for loss of profit arising from a breach of contract (the Breach of Contract Claim) by the Government of the British Virgin Islands (BVI Government).*
>
> *We understand that consequent on the Privy Council's judgment, the BVI Government would like to negotiate a settlement regarding the quantum of damages payable to Global Water. As you are no doubt aware, our clients claim a 60 per cent interest in any damages paid to Global Water resulting from its Breach of Contract Claim against the BVI Government.*
>
> *If there should be negotiations, or indeed a settlement between Global Water and the BVI Government, pending the hearing of our clients' Claim, our clients are concerned to ensure that the proceeds of any settlement are not dissipated by Global Water and/or Mr. Peterson but are preserved pending the outcome of our claim.*
>
> *In the circumstances, our clients seek an undertaking from your client that Global Water will pay into and hold at least 60 percent of the proceeds of any settlement, less an appropriate proportion of Global Water's legal fees, into a segregated fund (the Fund) and that Global Water, whether by itself, officers, agents and/or servants, will not in any way deal with or diminish the Fund until the determination of our claim, including any appeal.*

We look forward to your response on or before 16 November 2020 by 4pm."

[53] The Respondents responded by letter dated the 23rd November 2020 in the following terms:

> *"Firstly, we note that you stated the BVI Government would like to negotiate a settlement; we would be interested to know the source of that information not least because at the moment the BVI Government has failed to engage in any settlement discussions and have given no indication that they are willing to do so.*
>
> *It follows that even if there was an intention on the part of Global Water or Mr. Peterson to dissipate settlement proceeds there is no possibility of it for the foreseeable future. We do think therefore that the alleged concerns expressed have no basis and are not genuine.*
>
> *Secondly, your letter provides no basis for your clients' alleged concern that the proceeds of any alleged settlement will be dissipated by Global Water or Mr. Peterson. Your letter appears to us to be a transparent attempt to put pressure on our clients. Our clients are not in these circumstances prepared to submit to this strategy and will not be offering any undertakings.*
>
> *Lastly, we note that your clients have not sought to progress these proceedings and have shown no indication of a willingness to do so. We infer from that a reluctance to take this matter to trial.*
>
> *For all of those reasons there is no question of our clients offering an undertaking."*

[54] Mr. Francis response was that the Applicants could not show such a risk 'merely by referring to 'the Defendants' refusal to offer an undertaking in relation to the

settlement proceeds. Learned Counsel submitted that this is because 'the Defendants are under no obligation to limit their freedom of action over the settlement monies, once received, their refusal to offer an undertaking is within their rights and incapable of giving rise to an adverse inference of an intention to dissipate assets unjustifiably. If it were otherwise, a claimant would never have the burden of establishing a risk of unjustified dissipation and freezing relief would be obtained automatically in every case, in the form of either an undertaking or an injunction.'

[55] It appears that the Respondents' stance in this case is that the Applicants do not have any viable chance of succeeding on their claim so much so that it would seem that they would hardly consider an undertaking.

[56] In my view, in certain circumstances a refusal to give an undertaking may give to rise to a risk that a party may seek to thwart enforcement of a future judgment. In this regard I note Redhead JA own views on a party's refusal to give an undertaking in Yukos' case when he said at paragraph 33:

> "The Respondents in evidence have said that they would not transfer wealth or diminish the initial value of their assets pending the final determination of the question of ownership. But yet they refused to give the undertaking. On the one hand they said that there is no intention on the part of the Respondents to dissipate so there is no need to give an undertaking. On the other hand, learned counsel for the appellants contended that in light of what the Respondents say, if true, it is difficult to understand why they would refuse to give the undertaking. I agree with the contention of learned counsel for the appellants."

[57] Additionally, the undisputed affidavit evidence of Douglas Reigels is to be noted, when he said:

> *"Following the decision of the Privy Council, I have received enquiries from the Ministry of Natural Resources and Labour asking if I am willing to meet*

with Ministers of Government to discuss a settlement of the Second Respondent's claim to which I have responded that I am no longer involved with the Second Respondent, and I directed the Ministry to the First Respondent. I am no longer receiving any such enquiries from which I deduce that Government has now made direct contact with the First Respondent."

[58] The Government has made contact with the Applicants on this issue. There is likely to be a similar attempt to make contact with the Respondents; that's a viable likelihood.

[59] This is a case where the Respondents have not indicated that there are sufficient assets in the jurisdiction to meet any possible judgment and where the underlying claim may or may not result in the Applicants being entitled to a portion of the future settlement sum. This is also a case where the Second Respondent is not an actively trading company. In these circumstances one would expect that reasonable commercial men should be willing to give a suitable undertaking. I consider that having regards to the other matters, there is solid evidence of a real risk existing in this case that the settlement sum when obtained would be either moved out of the jurisdiction or dissipated to thwart the enforcement of any judgment which may be obtained by the Applicants.

[60] As a consequence, I have considered that this is a fitting case in which I can exercise my discretion. In particular, I have considered whether the grant of this order will cause the prejudice to the Respondents.

Lack of Prejudice to the Respondents

[61] On this matter, Mr. Ferrer submitted that '[t]he Second Respondent is not a trading entity and is therefore has no business operations that will be impacted by the injunction. The injunction will compel the Respondents to provide information and to refrain from depleting 60% of any payments received from the Government pending

a determination on the Applicants' claim. There is no damage or prejudice to be suffered by the Respondents by reason of the injunction.

[62] Mr. Francis for the Respondents submitted that '[t]he burden is on the [Applicants] to establish grounds for the Court to interfere with the [Respondents'] freedom of action, by proving a risk of unjustified dissipation. The [Applicants] have no prima facie right to a freezing order absent harm caused thereby and the [Respondents] carry no burden of proof of such harm.'

[63] It has not been suggested that the Second Respondent is carrying on business. I agree that it appears that it is simply awaiting its payment from the government. On the other side, there is this claim pending with the Applicants contending that they should be paid for their services out of this money.

[64] In all of the circumstances, I do believe it is in the interests of justice to grant the injunction sought.

An Order for Disclosure of Information

[65] The Applicants are also seeking an order for disclosure. They ask that the Respondents be compelled to disclose to the Applicants legal representatives the information related to any settlement agreement which may be concluded with the Government and is asking to be notified of the sum of such settlement.

[66] The Court's power to grant such an order is found in CPR Part 17.1(1) (e) which provides that:

"The Court may grant interim remedies including –

> *(a) …(d)…*
>
> *(e) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are may the subject of an application for a freezing order."*

[67] For the reasons given earlier, I am of the view that: (1) the nature of the assets of the company, (2) the fact of that first respondent is not ordinarily resident in the jurisdiction, (3) the company is essentially a shell company which was set up for the work which would have arisen from the government contract, and in a limited way, (4) the current stance being taken by the applicant relating to a refusal to provide information, altogether supports the Applicants' case for an injunction. These matters, to my mind, give rise to a real risk that any settlement sum paid to the Respondents may be removed from the jurisdiction or dissipated and any judgment granted may be frustrated.

[68] In the circumstances, I do consider that there is a proper basis, and it is in the interests of justice to grant both the injunction and the order for information which are being sought.

[69] The Order of the Court shall be as follows:

The Respondents shall:

(1) Disclose to the Applicants' legal representative the following:

(i) details of any concluded settlement agreement (Settlement Agreement) entered into with the Government of the Virgin Islands (the Government) arising from an arbitration between the Government and the second respondent conducted by an arbitration tribunal consisting of Dennis Barrow S.C. and E. Anthony Ross Q.C. which made an award on the 18th August 2014 which award was subsequently the subject of appeals to the high court (commercial division)in BVI HC (Com) 2014/115, the Court of Appeal in BVI HC MAP 2016/0007, and the Judicial Committee of the Privy Council in Appeal No. 0107 of 2018 [2020] UKPC 18, in relation to damages payable to the Second Respondent for the breach by the Government of certain contracts.

(ii) The total amount of any settlement sum (however payable) agreed between the Government and the Second Respondent as damages for breach of contract by the Government (the Settlement Sum); and

(iii) Details of the account to which payment of the Settlement Sum will be made and the expected payment date.

(2) Upon concluding any Settlement Agreement, the Respondents shall be restrained, until the return date or further order of the Court, from:

(i) accepting payment of any Settlement Sum in excess of 40% thereof outside the jurisdiction of this Court;

(ii) removing from the British Virgin Islands (BVI) or in any way disposing of, dealing with or diminishing the value of their assets which are in the BVI up to the value of 60% of the Settlement Sum;

(iii) transferring, disposing of, pledging, charging, diminishing the value of, encumbering, granting an option over or dealing with any of its assets, whether located within or outside of the BVI, up to the value of 60% of the Settlement Sum;

(iv) licensing or otherwise permitting any third party to use, transfer, dispose of, pledge, charge, diminish the value of, or deal with any of its assets, whether located within or outside of the British Virgin Islands, up to the value of 60% of the Settlement Sum; and

(v) in any way disposing of, dealing with or diminishing the value of any assets whether they are in or outside the BVI up to the same value.

[70] The Court accepts the Applicants' undertaking in damages and it is an order of this Court that if the Court were to later find that this order has caused loss to the

Respondents and decides that the Respondents should be compensated for that loss, the Applicants shall comply with any order the court may make.

[71] Anyone notified of this order will be given a copy of it by the Applicants' legal representatives.

[72] If this order ceases to have effect, the Applicants will immediately take all reasonable steps to inform, in writing, anyone to whom it has given notice of this order, or who it has reasonable grounds for supposing may act upon this Order, that it has ceased to have effect.

[73] The Applicants will not, without the permission of the Court, seek to enforce this order in any country outside the BVI. Notwithstanding, the terms of this order will affect the following persons in a country or state outside the jurisdiction of this Court:

(a) The Respondents or their agents appointed by power of attorney or in the case of the Second Respondent any of its officers;

(b) Any person who:

   (i) is subject to the jurisdiction of this court;

   (ii) has been given written notice of this order at it, her or his residence or place of business within the jurisdiction of this Court; and

   (iii) is able to prevent acts or omissions outside the jurisdiction of this Court which constitute or assist in a breach of the terms of this order; and any other person, only to the extent that this order is declared enforceable by or is enforced by a Court in that country or state.

[74] Anyone who has notice of this order and who fails to comply with this order or to encourage, participate or direct a breach of this order, whether personally or through any agency, shall be in contempt of court and liable for consequences, including but not limited to imprisonment.

[75] Costs to be assessed if not agreed.

[76] Before leaving this matter, the Court will direct that the underlying claim be listed for case management as soon as possible and that an early trial date be fixed in this matter.

[77] Finally, the Court is grateful for the assistance of counsel on both sides and for the patience of the parties.

Darshan Ramdhani
High Court Judge (Ag.)

By the Court

Registrar