**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2014HCV0429**

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| **BETWEEN** | **JAMAICA TEACHERS' ASSOCIATION** | **APPLICANT** |
| **AND** | **MARLON FRANCIS** | **FIRST DEFENDANT** |
| **AND** | **MARGARET ANGELA CREARY** | **SECOND DEFENDANT** |
| **AND** | **ALTHEA MARIE ENNIS** | **THIRD DEFENDANT** |
| **AND** | **CITY LIGHTS IMPORTS LIMITED** | **FOURTH DEFENDANT** |

**IN CHAMBERS**

**Ransford Braham QC, Caroline Haye and Grace Ann Thomas for the claimant**

**Keith Bishop, Romaine Tulloch instructed by Bishop and Partners for the second and third defendant**

**Clive Mullings for the fourth defendant**

**April 23, 24 and May 15, 2015**

**CIVIL PROCEDURE – FREEZING ORDER – CONTESTED HEARING – WHETHER FREEZING ORDER SHOULD BE DISCHARGED – SUMMARY JUDGMENT APPLICATION**

**SYKES J**

**[1]** The Jamaica Teachers' Association ('JTA') has been hit very hard by an alleged $99m fraud. The JTA believes that the fraud was committed by Mr Marlon Francis who was employed to the JTA between April 10, 1997 and July 23, 2013. The alleged fraud came to light during the annual audit when some irregularities were uncovered. This discovery led to further exploration. The further exploration involved two auditors: BDO, JTA's external auditor, and PricewaterhouseCoopers ('PwC' and yes it is all one word without spelling errors), an independent auditor. BDO's audit stated that it covered the period April 1, 2012 to March 31, 2012 (phase 1) and April 1, 2013 to July 22, 2013 (phase 2). PwC was asked to do an audit for the period April 1, 2008 to March 31, 2013. The report placed before the court from PwC covered the period April 1, 2011 to July 31, 2013. The JTA was to decide whether the other years should be covered. According to PwC the total of suspicious disbursements was $95.5m approximately. At the end of the audits the JTA pointed the finger of accusation at Mr Francis who, it appears, cannot be found within the geographical boundaries of Jamaica despite the best efforts of the police and others.

**[2]** Something more must be said about Mr Francis. Mr Francis began life at the JTA as a junior accounting clerk and moved up to an accounts payable clerk. His salary, at its peak, was approximately JA$1.5m.

**[3]** One of the most remarkable things alleged about Mr Francis is that with a salary of $1.5m he was able to purchase either solely or in the name of himself and his mother properties valued over $50m. From the evidence presented none of these properties was purchased with a mortgage from a financial institution. Of course this does not rule out a vendor's mortgage but the evidence presented does not raise this possibility.

**[4]** As can be seen from the title of this claim, there are three additional defendants. An introduction to them would be in order. Miss Margaret Creary is Mr Francis'

mother. Mrs Althea Ennis is either his aunt (according to her) or his cousin (according to the JTA). City Lights Imports Limited ('CLIL') a company in which Mr Francis' present girlfriend (according to the JTA) or former girlfriend (according to her) is the managing director. Her name is Miss Kedene Necole Chambers. She is the person who has provided the affidavits and filed the defence on behalf of the company.

**[5]** Miss Creary alleges that her son had other businesses. Presumably she means business other than his employment at JTA. Mrs Ennis is silent on the employment of Mr Francis. Miss Chambers does not indicate whether or not she knew that he was working at the JTA. What she says, on behalf of CLIL, is that he was engaged in the business of selling used cars. It must be said that no documentary evidence of any kind has been presented to suggest the nature of Mr Francis' business if he really had other business. No letter head. No email. No receipt book. No correspondence. No tax records. No known place of business. No TRN. No GCT registration. The best efforts of the JTA even when assisted by a state investigative agency have not been able to produce any evidence of Mr Francis' other business activities. None of the other defendants seem to be able to provide details of the extent of Mr Francis' used car business assuming that that is what he was really involved in. Mr Francis is a business and financial ghost; a business without any presence, to date, in the natural and material world.

**[6]** Without getting into the details of how the fraud was committed, it is safe to say that the JTA has concluded that Mr Francis manipulated the system of payment and control at the JTA in such a manner that enabled him to take out $99m. It is alleged that he did this by creating fictitious invoices, forgery and issuing or causing to be issued unauthorised cheques.

**[7]** A claim has been filed alleging all sorts of misdeeds against Mr Francis ranging from wrongfully procuring or causing money to be paid out to fraud to breach of fiduciary duty.

**[8]** The JTA's hunt for the millions led them to the door steps of Miss Margaret Creary, Mrs Althea Ennis and the CLIL. The JTA has alleged that the alleged misappropriated funds were used to acquire real estate in the names of Miss Creary and Mrs Ennis. The case against CLIL is that it knowingly received money or assisted Mr Francis is getting money knowing that he had misappropriated the money. CLIL admitted receiving the money into its accounts from Mr Francis but accounted for this by saying that it thought the money came from the sale of used cars. CLIL has alleged that the money was taken out to pay attorneys for Mr Francis in relation to transactions other than this present case. The company stated that it received manager's cheques only and did not receive any of the cheques which bore the JTA's name or any of the persons who could authorise the transaction and therefore had no reason to believe that the money was coming from any theft. It is useful, at this stage, to identify the properties in dispute and the legal title holders of those properties.

**Real property held by Mr Marlon Francis alone**

**[9]** These two properties are held by in Mr Francis' name. They are (a) property at lot 154 Keystone Farms in the parish of St Catherine registered at volume 1101 folio 198 of the Register Book of Titles in the name of Mr Marlon Francis on November 3, 2010 acquired at a cost of $2m; and (b) property at lot 17 Coopers Hill, West Coopers Hill Road in the parish of St Andrew registered at volume 984 folio 409 of the Register Book of Titles registered in the name of Mr Marlon Francis on January 6, 2011. No purchase price was stated for this property.

**Real property held by Mr Marlon Francis and Miss Margaret Creary**

**[10]** Miss Creary is the mother of Mr Francis. The following properties are held by Mr Francis and Miss Creary jointly: (a) property at 5 Dupont Avenue, Red Hills

Gardens, Kingston 20, in the parish of St Andrew registered volume 829 folio 8 of the Register Book of Titles registered in both names on January 30, 2013 acquired at a cost of $12.5m; and (b) property at lot 19B Chancery Hall, Kingston 19, in the parish of St Andrew registered at volume 1144 folio 588 of the Register Book of Titles registered in both names on March 14, 2013 acquired at cost of $20m.

**Real property held by Miss Margaret Creary alone**

**[11]** Miss Creary holds the following property by herself: (a) property at 10 Lecce Close, Angels Estate, Phase 2, Spanish Town in the parish of St Catherine registered at volume 1339 folio 588 of the Register Book of Titles registered in the name of Margaret Creary on November 14, 2012 acquired by way of gift while simultaneously, an outstanding mortgage of $1.1m was paid off; and (b) property at lot 162 Queens Hill in the parish of St Andrew registered at volume 1117 folio 911 of the Register Book of Titles registered in the name of Margaret Creary on July 2, 2013 acquired at a cost of $32m.

**Real property held by Mrs Althea Ennis alone**

**[12]** Mrs Ennis, who is either the aunt of Mr Francis according to the JTA or his cousin according to her, became the registered proprietor of property at lot 8 Angeline Crescent, Angels Estate, Spanish Town in the parish of St Catherine registered at volume 1309 folio 47 of the Register Book of Titles on June 30, 2011 acquired at a cost of $11.7m.

**Personal property held by Mr Marlon Francis**

**[13]** Mr Marlon Francis is the registered owner of a 2004 White Toyota Caldina Motor car. He has several chequing and savings accounts at the Bank of Nova Scotia Jamaica Ltd.

**Personal property held by CLIC**

**[14]** CLIL holds money at financial institutions.

**Freezing orders and their purpose**

**[15]** In approaching this matter it is useful to remind ourselves of the purpose of this exceptional power granted to the courts. What the court is about to say is the accumulated wisdom acquired by the courts in Jamaica and England and Wales since 1975 when this jurisdiction made its first appearance on the legal landscape.

**[16]** The sole purpose of the freezing order is to prevent a defendant from taking steps to that would defeat any judgment made against him. A freezing order prior to trial does not invalidate the law of insolvency and neither does it prevent the defendant from conducting lawful business with his property. A freezing order creates no security interest over the property and gives no property right.

**[17]** A freezing order granted in the pre-trial stages is always exceptional if for no other reason than that it restricts the freedom of the defendant in dealing with his property even though no judgment has been entered against him. If the initial application is made without notice to the other side then granting such an order is more than exceptional because the judge would be acting in breach of natural justice in that he would be making an order against a person who has not had been notified and has no knowledge of the hammer that is about to hit him. A freezing order can cause default of financial obligations. It may open persons to a law suit. Socially, it may make one a pariah because of the opprobrium that is associated with asset freezing. This explains why the price of a freezing order has two components: a high standard of complete disclosure and an undertaking as to damages. In some instances the courts have scrimped on the latter but never the former.

**[18]** The case of **Jamaica Citizens Bank Limited v Yap** (1994) 31 JLR 42 is a cautionary tale. Mr Yap was pursued for several years, through the courts by his former employer. His life was disrupted. His reputation ruined. The law indicated that a freezing order should be granted. In the end, the bank's case collapsed in

spectacular fashion. When the case finally ended in the Judicial Committee of the Privy Council not a single allegation made by the bank was left standing. He was completely exonerated. The sad thing about this saga is that it took Mr Yap many, many years and substantial financial resources to fend of the allegations by the bank. The moral of the story is that the judge must exercise great care in freezing someone's assets when examining untested and really unproven allegations against another. This is how this cautionary tale unfolded. A without notice freezing order (then known as a Mareva injunction) was granted by a judge of the Supreme Court. It was discharged by another judge on application by the defendant. The bank appealed and it was restored. It must be said, however, that Mr Yap did not help his case by being reticent in some of his responses to the bank's allegations (see Rattray P at page 49; Forte JA at page 58 and Downer JA at page 68). The second moral from **Yap's** case is that a less than full and frank response from a defendant in the face of strongly worded claim is a high risk strategy.

**[19]** As was stated recently by the Privy Council in another context, the applicant for a without-notice order must place himself in the shoes of the party against whom the order is sought and must bring to the court's attention all the reasonable arguments that the affected party may have been able to make had he, she or it been present (**Assets Recovery Agency (Ex Parte) Jamaica** [2015] UKPC 1 (Lord Hughes para 21)). This is an onerous obligation. The usual response for this failure is a discharge of the order. This is so because this is the most effective way for courts to ensure that this duty is complied with by all.

**[20]** The fact that freezing orders are commonly granted must not dull our senses to the fact they do cause hardship and significant financial dislocation in a person's life (see Downer JA in **Yap** at page 62).

**[21]** In seeking to strike the balance between the competing interest of the claimant or the defendant the law as stated in **Yap's** case requires that there must be a good arguable case and that there is a risk of dissipation or removal of assets.

**Yap** has also established that at the inter partes hearing the judge must have regard to all the evidence presented in order to determine whether the freezing order should be extended.

**Source of information**

**[22]** One of the complaints made is that the JTA relied on information provided to it by a state investigative agency. In respect of Miss Creary, Mr Doran Dixon, in his first affidavit stated that he received information from the Financial Investigations Division ('FID') and that the FID had searched a number of databases including those held by the tax department and the National Insurance Scheme (see para. 18). The import of the information was that Miss Creary did not have any employment of such a nature that would enable her to purchase the two properties held in her name.

**[23]** The same kind of information came from the FID in respect of Mrs Ennis (para. 22 of Mr Dixon's first affidavit).

**[24]** The FID also provided crucial information in respect of CLIL although the information was of a different nature from that provided by FID in respect of Mesdames Creary and Ennis.

**[25]** Mr Doran Dixon in a further affidavit dated December 12, 2014 corrected his first in this material particular. He said that he was not provided with the information directly from the source he named in the FID but rather that the information he deponed to was passed on to him by the JTA's attorney who in turn received it from the FID.

**[26]** Mr Bishop and Mr Mullings found common cause on this point. They submitted that the court should not allow the JTA to rely on the information disclosed by the FID, whether directly to Mr Dixon or indirectly through JTA's counsel. It is now common ground that the judge who granted the freezing order was not directed to the relevant provisions of the Financial Investigations Divisions Act ('FIDA')

which might have him to exercise his discretion against the grant of the freezing order. Both counsel submitted this was a material non-disclosure by the JTA's counsel. This omission prevented the judge from considering whether there was a breach of the statute in that material uncovered by the FID as part of its investigation was passed to a private citizen. This aspect of the matter will be dealt with in two ways. First, in determining whether the freezing order should be discharged and re-granted and second, in deciding whether JTA can rely on the evidence assuming that it was improperly obtained.

**Principles relating to continuation, discharge and re-granting of freezing orders**

**[27]** The primary case relied on by this court, cited by Mr Bishop, is that of **Behbehani v Salem** [1989] 2 All ER 143. There is a comprehensive discussion of all the relevant legal principles necessary to be applied in this case. In that case the court had to consider whether it was correct for the judge to discharge the injunction for material non-disclosure and then re-impose the injunction. The court held that it would be wrong to re-impose the injunction in light of the material non-disclosure. It is important to point out that the court found that the non-disclosure was not a deliberate effort to mislead the court. Woolf LJ in particular held that he was not happy with 'suggestion that it is appropriate to regard a disclosure as not innocent when the facts not disclosed were not known at the time to be material, albeit that it ought to have been known they were material.'

**[28]** In the **Salem** case, Woolf LJ at pp 151 – 154 analysed the judge's reasoning on the issue of a re-grant of an injunction which was discharged on the basis of material non-disclosure. The learned judge reasoned in this way:

> *Where I cannot agree with [counsel for the defendants] is that the conduct of the defendant is not a relevant consideration for me attempting to decide whether or not I should renew the Mareva. It seems to me that if it is relevant*

*in determining whether the original grant of the injunction should be made it must be relevant in determining what one might call a re-grant. It is noticeable that there has not really been, on the part of the defendants, any convincing attempt in their affidavits, nor in some rather emotional pleadings I have read in the Spanish action, to refute by facts and documents the details of the plaintiffs' case. All that has been done is a mere blanket denial and in those circumstances it seems to me that the prima facie evidence adduced on behalf of the plaintiffs is of such a strength and discloses such a type of conduct that there must be an enormous risk from the very nature of the facts giving rise to the plaintiffs' claim that if the court relaxes its grip for one instant any assets which the defendants may have in this country will melt like snow on the desert's dusty face. This, in my judgment, is a most relevant consideration and although, as I have said, I think that the decision not to disclose was in fact wholly misguided and mistaken I think it is outweighed as a balancing factor by those matters which originally persuaded Roch J to grant the injunction and I propose to re-grant it in precisely the same terms.'*

**[29]** Regarding this approach to the re-grant, Woolf LJ regarded it as fundamentally flawed because on this approach there will always be a re-grant of the injunction. For his Lordship, the inevitable result then would be that the public interest in the court making sure that full disclosure be made on without notice applications would be undermined. His Lordship also considered the very important consideration that a discharge of the injunction and not re-granting it may result in injustice to the claimant. However, as Woolf LJ pointed out, even if the claimant was correct in that case (as the claimant is alleging in this case) that

there was large scale fraud, the allegations are only a prima facie case; strong, yes, but still not proven or admitted.

**[30]** It is only fair to point out that Woolf LJ clearly thought that a powerful case of fraud had been pleaded and the response of the defendants was not encouraging. This led his Lordship to ask that the defendants give notice to the claimants before any property was disposed of. The defendants gave such an undertaking.

**[31]** This undertaking extracted by Woolf LJ may well be a reflection of the extremely high esteem in which he was and is held by the profession and bench in England and Wales. Nourse LJ, for his part, indicated that had he been left to himself he, quite likely, would have allowed the appeal without requiring the undertaking counsel for the defendant offered. This position of Nourse LJ was taken even in the face of his Lordship's conclusion that 'Mr Hughes was guilty of an innocent lack of due care in a material and important respect is not making the inquiries which he could have made' (page 156). This is an indication of how important full disclosure is. Where there is dishonesty and a deliberate attempt to mislead the court then there is no question asked: the order will be discharged and not re-granted (**St Merryn Meat Ltd and others v Hawkins and others** [2001] All ER (D) 355 (Jun)).

**[32]** On the question of whether the freezing order should be re-granted Woolf LJ stated at page 148:

> *In deciding in a case where there has undoubtedly been non-disclosure whether or not there should be a discharge of an existing injunction and a re-grant of fresh injunctions, it is most important that the court assesses the degree and extent of the culpability with regard to the non-disclosure, and the importance and significance to the outcome of the*

*application for an injunction of the matters which were not disclosed to the court.*

**[33]** This court is fully aware of the following passages in **Brink's Mat v Elcombe** [1988] 1 WLR 1350. Balcombe LJ said the following at page 1358:-

> *The rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a two-fold purpose. It will deprive the wrongdoer of an advantage improperly obtained: see Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K. B. 486, 509. But it also serves as a deterrent to ensure that persons who make ex parte applications realise that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless, this judge-made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained: see in general Bank Mellat v. Nikpour [1985] FSR. 87, 90 and Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc., ante, p. 1337, a recent decision of this court in which the authorities are fully reviewed. I make two comments on the exercise of this discretion. (1) Whilst, having regard to the purpose of the rule, the discretion is one to be exercised sparingly, I would not wish to define or limit the circumstances in*

*which it may be exercised (2) I agree with the views of Dillon L.J in the Lloyds Bowmaker case, at p. 130C-D, that, if there is jurisdiction to grant a fresh injunction, then there must also be a discretion to refuse, in an appropriate case, to discharge the original injunction".*

Slade LJ said the following at page 1358 – 1359:

*These appeals raise a number of different questions arising out of the application of what is sometimes known as the principle of Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486. I have had the advantage of reading in draft the judgments of Ralph Gibson and Balcombe L.JJ. I respectfully agree with them, both in their analyses of the principle and in its application to the facts of the present case. The principle is, I think, a thoroughly healthy one. It serves the important purposes of encouraging persons who are making ex parte applications to the court diligently to observe their duty to make full disclosure of all material facts and to deter them from any failure to observe this duly, whether through deliberate lack of candour or innocent lack of due care. Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application the practical realities of any case before the court cannot be overlooked. By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly, in heavy commercial cases, the borderline between material*

> *facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the Rex v- Kensington Income Tax Commissioners [1917] 1 K.B. 486 principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience".*

**[34]** These passages are a refinement of the general principle that material non-disclosure may result in the freezing order being discharged and if discharged, may be re-imposed.

**[35]** Mr Braham QC accepted that the judge's attention should have been alerted to the fact that the evidence may have been acquired from the FID in breach of the FIDA. The court agrees with this concession. It does not appear that the statute was brought to the judge's attention during the without notice hearing. This is a case of innocent non-disclosure of a material fact. Had this been done the judge would have undoubtedly observed that the statute is concerned with giving FID powers to investigate matters with a view to a criminal prosecution. The statute does not readily lean in favour of making available to private citizens the fruits of the FID's investigations. The reasons are obvious. The FID has the power to

unearth and secure all kinds of confidential information during the course of an investigation. The statute makes provision for disclosure in certain circumstances. The Act imposes secrecy obligations on officers of FID. These are matters that the judge would have had to ponder when making his decision to grant the freezing order.

**[36]** As Mr Mullings strongly pointed out, when the legislature sets up an investigative agency by an Act of Parliament then the overriding principle has to be that the entity operates within the powers given to it and if there is a possible breach of the statute and that possibility is not brought to the attention of the judge then any party who benefits from that breach should not be allowed to retain the benefit of the breach. He further submitted that there is no need for any deliberate impropriety on the part of anyone or indeed the agency. An honest mistake will suffice, according to Mr Mullings. This would be consistent with the principle that a statutory functionary cannot lawfully exceed the boundaries of his controlling statute.

**[37]** Mr Bishop submitted that a criminal offence under section 10 of FIDA had been committed when the information was disclosed. This court deliberately refrains from making any decision on whether a crime has been committed. The court cannot properly make that determination in these proceedings. The provision would have to be subjected to close study to see whether it is an offence of strict liability or mens rea is required and if so, the type of mens rea required. All these are not matters for this forum.

**[38]** The court's position is this: In looking at the FIDA, the overall impression formed by the court is that information gathered by the FID is to be used for public law enforcement purposes. This is stated as a tentative conclusion and is not intended to be the final word on the matter. This means that on the face of it, use by private citizens of the information uncovered by the FID is not generally permitted or encouraged unless that sharing takes place within the statutory framework or any other applicable law. From this perspective, what the court can

say is that the claimant should have brought to the attention of the court the possibility that information may have been acquired in breach of the provisions of the statute. This is a significant omission which should attract the consequence of discharging the freezing order.

**[39]** Mr Braham submitted that the court should consider re-granting the freezing order in the event the court concludes that the non-disclosure was material. Unfortunately, the court cannot agree with this submission. The larger principle is that law enforcement agencies must not be seen to be using their statutory powers to aid private citizens in litigation unless their mandate makes that one of their legitimate functions or some other law permits it.

**[40]** This approach is consistent with that taken in **Marcel v Commissioner of Police** [1992] Ch 225. In that case the police had seized documents under a statute. This they did while investigating a case of fraud. In subsequent civil litigation, the defendant caused to be issued a subpoena duces tecum to the police requiring them to produce documents they had seized from the claimants. An issue arose as to the use that could be made of the documents seized by the police. At page 235 Sir Nicolas Browne-Wilkinson VC held:

> *In my judgment, subject to any express statutory provision in other Acts, the police are authorised to seize, retain and use documents only for public purposes related to the investigation and prosecution of crime and the return of stolen property to the true owner. Those investigations and prosecutions will normally be by the police themselves and involve no communication of documents or information to others. However, if communication to others is necessary for the purpose of the police investigation and prosecution, it is authorised. It may also be, though I do not decide, that there are other public authorities to which the documents can*

> *properly be disclosed, for example to City and other regulatory authorities or to the security services. But in my judgment the powers to seize and retain are conferred for the better performance of public functions by public bodies and cannot be used to make information available to private individuals for their private purposes. It follows that in my judgment it was not lawful for the police to make the documents seized available to Mr. Jaggard's solicitors for the private purposes of Mr. Jaggard's litigation against the company.*

**[41]** Had the judge's attention been alerted to these principles then it would be a factor he would have had to take into account when deciding whether to grant the injunction. For all the reasons given above, these freezing orders should be discharged and not re-granted against Miss Creary, Mrs Ennis and CLIL.

**Risk of dissipation**

**[42]** There was further submission made regarding the risk of dissipating of assets. The second to fourth defendants have submitted that this case was well publicised by the media in Jamaica. It was further submitted that given the public nature of the discourse about the case, the second to the fourth defendants would have been able to dispose of or take steps to dispose of the property well before any claim was filed and served on them. They say that there is no evidence that they took any steps to dissipate the assets and that this was not brought to the attention of the judge. The conduct of the defendants, they submitted, points away from any risk of dissipation and should have resulted in the freezing order not being granted.

**[43]** Mr Braham pointed to the allegations against the defendants as one of fraud or at least assisting in fraud. Those allegations, it was said, in and of themselves suggest that there is risk of dissipation. The court does not agree with this approach. The court agrees with the defendants on this point for this reason:

implicit in the submissions for the defendants is a rejection of the idea that if it is the case that on every application for a freezing order in a case alleging fraud or other misappropriation of funds the court's default was that such cases always carried the inherent risk of dissipation, even when the objective evidence does not support the existence of the risk of dissipation, then there cannot be any circumstance in which a freezing order should not be granted. If the attorneys for the claimant are correct, then the power to grant a freezing order would no longer be the exercise of a discretion but a grant as of right once there was an allegation of fraud or misappropriation of property.

**[44]** The court concludes from the material presented that there is no evidence that the second to the fourth defendants in this case, despite the notoriety of the story in the news, took any steps to dissipate the properties in their names. The risk of dissipation has not been established because the defendants who would have had every motivation to distance themselves from the property declined to do so. For this reason also the freezing order should be dissolved.

**[45]** The freezing order against the second to the fourth defendants is therefore discharged on two grounds. The first is that there was a material non-disclosure and the second is that there was no evidence that there was a risk of dissipation. The court now turns to the summary judgment application.

**Application for summary judgment**

**[46]** The JTA has applied for summary judgment against Miss Creary, Miss Ennis and CLIL. The JTA has also asked, in the alternative, that the statements of case of the three defendants be struck out. The basis of both applications is that there is no reasonable prospect of successfully defending the claim.

**[47]** Rule 15.2 (a) of the Civil Procedure Rules ('CPR') permits an application for summary judgment on the ground that the defendant has no real prospect of successfully defending the claim. Under this application evidence is admissible

(**Sutradhar v Natural Environment Research Council** [2006] 4 All ER 490 (Lord Hoffman **[3]**).

**[48]** It is important to notice that the case of **Keesoondoyal v BP Oil UK Ltd** [2004] CP Rep 40 shows that the fact that the case against a defendant alleges fraud is no bar to summary judgment if the defendant's response shows no real prospect of success.

**[49]** While recognising that rule 15.2 (a), (b) in Jamaica does not have the English equivalent of rule 24 (2) (b) the English CPR, nonetheless the court agrees with the summary of principle and approach to summary judgment applications set out by the English Court of Appeal in **Miller v Shires** [2006] EWCA Civ 1386 at **[8] – [11]**. Finally on this, the test is an absence of reality in successfully defending or succeeding in the claim.

**[50]** The court is fully aware that a summary judgment application is to be examined carefully because such an application is seeking to avoid the usual way of resolving disputes which is a trial.

**[51]** The JTA is making a proprietary claim against the second and third defendant. It is saying that the money allegedly taken belongs to it and remained so. The antecedent condition for making the claim is a breach of trust and breach of fiduciary duty. Mr Francis was responsible for making payments to persons. He had the responsibility for using the JTA's property, in this case money, in circumstances that gave rise to a relationship of trust and confidence. In so doing he was under an obligation to act in good faith; he cannot make unauthorised profit for himself; he must not place himself in a positon where his duty to the JTA and interest conflict or he cannot act for his own benefit or the benefit of a third party without the express consent of his principal. These are the hallmarks of a person under a fiduciary obligation either generally (as in a company director or attorney at law in relation to his client) or in a very specific circumstance (**Bristol and West Building Society v Mothew** [1998] Ch 1, 18 (Millett LJ)).

**[52]** The court is not saying that because Mr Francis is alleged to have breached his duty of loyalty to the JTA that the breach without more meant that he committed a breach of his fiduciary duty. It is not every breach of duty by a fiduciary is a breach of a fiduciary duty. It is not the fact of being a fiduciary when the breach is committed that makes the breach on of a breach of fiduciary duty. It is the breach of a duty which attracts fiduciary obligations that amounts to a breach of fiduciary duty. When Mr Francis undertook the job of making payments with JTA's money for goods and services acquired by the JTA and making payments for obligations incurred by the JTA he had a duty of loyalty in those circumstances to see to that the money of the JTA was used only for authorised and licit purposes. Mr Francis had a fiduciary duty in respect of the money belonging to the JTA before it was misappropriated. He cannot use the money for his own purposes unless so authorised and undoubtedly he could not use the money for the benefit of third parties without the JTA's permission. The allegations outlined against him amounts to a breach of his fiduciary duty to use the money only in the way authorised by his employers and not for his own benefit without permission from the employer. The features identified by Millett LJ apply to Mr Francis.

**[53]** For the latest word on this see **FHR European Ventures LLP v Cedar Capital Partners LLC** [2014] 4 All ER 79 **[5]** (Lord Neuberger P). It was emphasised that the rule is very strict. It does not depend on fraud or the absence of bona fides.

**[54]** It seems that the defendants have been led astray by the many references to fraudulent, conspiracy and the like in the claim made by the JTA. They seem to think that the way the JTA has framed its case, that proof of fraud and/conspiracy on their part is essential for the JTA to succeed. This is not so. The case pleaded by the JTA is similar to what is known in Australia as a Black v Freedman trust. The expression comes from the case of **Black v Freedman** 12 CLR 105. In that case Mr Black was employed to Freedman and Company. While in the employ of Freedman and Company, Mr Black stole money and put it in his wife's account. An action was brought to recover the money from Mr Black and his wife who was

accepted not to have known about her husband's theft. O'Connor J held at page 110:

> *Where money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character. If he pays it over to another person, then it may be followed into that other person's hands. If, of course, that other person shows that it has come to him bona fide for valuable consideration, and without notice, it then may lose its character as trust money and cannot be recovered. But if it is handed over merely as a gift, it does not matter whether there is notice or not.*

**[55]** Proof of dishonesty on the part of the second and third defendants is not essential to the JTA's claim once it can establish that Mr Francis misappropriated the funds; such proof makes the allegation more egregious. The JTA's case is based on the concept that it has legal and equitable interest in the misappropriated funds (which can ground a proprietary claim to property bought by such funds) which is not extinguished merely because the money was used to purchase property. The JTA is saying that some of the money taken is now in the real estate in the names of the second and third defendant. What this means is that ignorance of the second and third defendants of the source of Mr Francis' funds is not a bar to them being declared to hold the property on trust for the JTA. The legal foundation for this conclusion is that the misappropriator never acquired good title to the money and once the money can be shown to have purchased the properties in the names of the second and third defendants then JTA can maintain its claim to the properties. It does not matter whether Mr Francis handed the money to each of them directly or whether he made the purchases himself and placed their names on the title. Further, in the case of the property that had the mortgage paid off, if the money used to pay off the mortgage came from the allegedly misappropriated money then the JTA would

have a lien against that property up to the value of the money used to pay off the mortgage. Although more will be said about this later, it can be stated here the pleading by Miss Creary and Mrs Ennis that they did not know or had reason to believe the money was stolen or unlawfully obtained is no answer once the property they hold was purchased by or was acquired by the misappropriated money from the JTA. This case is one of a Black v Freedman trust.

**[56]** The claim of the JTA against the second, third and fourth defendants is based on tracing. Tracing can be based on circumstantial evidence. Circumstantial evidence depends on inferences drawn from facts and that inference itself becomes a fact which may itself lead to other reasonable inferences. There is no legal requirement that only direct evidence will suffice. This is because tracing is a process where the victim demonstrates 'what has happened to his property, identified its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property' (**Foskett v McKeown** [2001] 1 AC 102, 127 (Lord Millett)). The only escape route for the property holder, assuming that the victim can trace his property, is to establish that he is a bona fide purchaser for value without notice of the allegedly misappropriated funds or he gave value without notice for the property he now has, assuming that he does not have the property initially taken. Where the person who now holds the property is a donee or a volunteer, that is, a property holder who has not provided any consideration the victim will have a continuing beneficial interest in the property that was initially misappropriated and once the allegedly misappropriated property can be traced the beneficiary's beneficial interest is not extinguished; it continues and can only be defeated by the defence of a bona fide purchaser for value without notice. These property rights do not depend on notions of fairness. It is the outcome of property law. In **Foskett**, the case involved two innocent parties. The children who received the property that could be traced to the fraud of the deceased father were held liable to give up the portion of the insurance proceeds that represented the stolen money.

**[57]** The case against CLIL is different. It no longer has the allegedly misappropriated property. The pleaded case against CLIL is based on the Barnes v Addy phraseology of knowingly received trust property or knowingly assisted in the breach of trust. This language is now considered inappropriate. The law has evolved to the point where the advice is that it is confusing and imprudent to speak in terms of knowing receipt or knowing assist. It is recommended that one speaks of dishonesty (**Royal Brunei Airlines v Tan** [1995] 2 AC 378). The use of the knowing receipt and knowing assist led the law down a tortuous path to such an extent that one judge (Peter Gibson J in **Baden v Sociétè Général** [1992] 4 All ER 161) began to speak of five types of knowledge.

**[58]** Before looking more closely at the summary judgment application a word must be said Mr Bishop's attack on the JTA's pleadings. Mr Bishop contended that the JTA's claim was not properly pleaded in that it did not have attached to it any document the claimant considers necessary to his or her case (rule 8.9 (1) of the CPR. It was also said that under rule 8.9 (4) where the claimant is seeking to recover property the claimant's estimate of the value of the property must be stated.

**[59]** It is the case that the audit reports were not identified in or annexed to the particulars of claim. It is also the case that the claimant has not set out its estimate of the value of the property it is seeking to recover. It is the view of this court that these defects do not prevent the claimant from seeking summary judgment. The purpose of these rules is to give the defendant additional information about the case he has to meet. In this case the defendants know full well the nature of the case. Mr Doran Dixon has filed several affidavits in the case setting the case as presently understood. Those affidavits have many documents exhibited to them including the two audit reports and registered titles of the properties in question. Having regard to the JTA's case theory, the absence of stating the estimate of value of the claim is neither here nor there in

this claim. The case is based on the theory that misappropriated money was used to purchase the properties in all instances save one where it is alleged the money was used to pay off the mortgage balance. Based on the **Foskett** case, it does not matter what the value of the property is. If it was purchased with misappropriated funds then the property bought with those funds belongs to the JTA. The equitable interest of the JTA would be sufficiently strong to deprive the holder of the legal title of all his equitable interest and is so strong that it would also deprive the legal title holder of that title as well, meaning that he could be ordered to transfer the legal title to the JTA which would have always held the equitable title. In the case of the mortgaged property, if the mortgage was paid off using stolen money then the JTA has the right to have a lien on the property up to at least the value of the stolen money. The natural justice requirements have been met have been met in this case. The purpose of the rules has been met. These objections are not sufficient to prevent a summary judgment application being made in the context of this case.

**[60]** The next objection raised by Mr Bishop was that the application for summary judgment did not identify the issues that the court should deal with at the hearing. The notice of application refers to the generic grounds stated in rule 15.2. The notice did not specify the issues to be raised. It is the view of this court that this failure is not a bar to hearing and granting, if appropriate, summary judgment. The purpose of the rule is to give notice to the defendant and to the court of what is intended to be argued. However, having regard to all the affidavits filed by the JTA the court is not in any doubt about the issues and, the court must say, neither are the defendants. All the defendants except Mr Francis were full participants in the summary judgment application and there is nothing to suggest that their counsel failed to appreciate what the issues were. They have filed defences. They also filed affidavits. This ground of objection fails.

**[61]** The court promised earlier to address the pleading point. It now does so. According to Mr Braham the defences are nothing more than naked denials. He

submitted that on close examination they do not dispute or challenge the core of the JTA's case. What they do is to ask the JTA to prove all its case. This he said is not permitted by the rules.

**[62]** In addressing this submission the court will state what its understanding of rule 10.5 is and what the rule requires. This court takes the view that there must be substantial compliance with rule 10.5. Rule 10.5 requires the defendant to (a) say which allegations are admitted; (b) which allegations are denied; (c) which allegations are neither admitted nor denied **by reason only** of the fact that the defendant does not know whether they are true and therefore requires the claimant to prove those allegations. The rules goes further to say that a naked denial is not sufficient; a reason must be given for the denial and **if the defendant intends to prove a different version of events from that given by the claimant the defendant's own version must be set out in the defence** (my emphasis)**.** The rule goes even further by saying that where a defendant does not admit any allegation and does not '**deny and put forward a different version the defendant must state the reason for resisting the allegation**' (my emphasis) (rule 10.5 (5)). Under the CPR a denial must be accompanied by any of his three companions identified. He no longer travels alone.

**[63]** The rationale of this insistence on pleading in this way is to enhance effective case management. Effective case management requires the court to identify the issues that can be disposed of summarily and those that need to go to trial. This ties in with the overriding objective of dealing with cases justly, at least cost and in a fair manner. Fairness and economy means that resources should only be expended where it is necessary to do so. One of the underlying objectives of rule 10.5 is that the defendant is not to require the claimant to prove any allegation which the defendant knows to be true. To do this would be counter to allocating such resources as are necessary to deal with the case justly and economically. In the normal course of things, the defendant should only require proof where (a) he genuinely does not know whether the allegation is true or false and (b) he

refutes the allegation and puts forward his version of events. This would mean that the courts' resources would not be expended on hearing evidence on matters (a) that are not in dispute; or (b) which the defendant knows to be true or (c) does not have a good reason to require proof of a specific fact.

**[64]** The setting out of reasons for denying an assertion assists the court to determine whether there is any substance to the denial. It prevents defendants, particularly those who have no realistic defence from stalling, from forcing the claimant to expend resources that may exhaust the claimant's resources where that claimant has very limited funding.

**[65]** It is against this background that the defences will be examined. JTA's case against Miss Creary is that all material times she was an unemployed housewife with insufficient financial resources to purchase any of the properties that (a) are in her name alone and (b) are in the joint names of herself and Mr Francis. It is also said that she did not have the resources to pay off the mortgage on one of the properties that was transferred to her alone. The price paid for the properties jointly held by her and Mr Francis was over $30m. The mortgage paid off was $1.1m. The price paid for the property held by her alone was $32m.

**[66]** How does an unemployed housewife without any known financial resources acquire properties costing over $50m? The answer pleaded by JTA is that Mr Francis was the source of this money and that fact was known to Miss Creary. However, as already pleaded it is not necessary for the JTA prove that she knew that the money was misappropriated by Mr Francis because she has not pleaded that she acquired the money or property for value without notice of the alleged misappropriation of funds and also the claim is a proprietary one against the property.

**[67]** How has Miss Creary responded to these allegations? Miss Creary stated in paragraph 2 of her defence that she is unable to respond to either the allegation that Mr Francis worked at JTA or that he worked initially as a junior accounting

clerk and later as an accounts payable clerk because that paragraph and others refer to Mr Francis. To say that an allegation refers to a particular defendant is to state the obvious but that does not mean that one don't know whether it is true or not. The court finds it difficult to accept Miss Creary's response as adequate in the context where she is being told that her son was employed to the JTA for six years. Surely, she either knows or she does not know but the response that it relates to another defendant is not an adequate response under the rules in the circumstances of this case. She needs to take a position one way or the other and if she does not take a position one way or the other under rule 10.5 (5) she must give a reason. The reason is not a good one.

**[68]** In paragraph 3, Miss Creary pleaded that she did not receive any money from Mr Francis or received any money knowing that it was stolen money. She then addressed two specific properties and said that one was gifted to her (the Lecce Close property at volume 1339 folio 588) and in respect of the other (the Queens Hill property at volume 1117 folio 911) she is not aware that Mr Francis used stolen money to purchase the property and that she puts the claimant to strict proof that tainted funds were used to purchase the property. There is material before the court to show that the Lecce Close property had, at the time of the acquisition by Mrs Creary, a $1.1m mortgage balance that was paid off. Miss Creary's defence does not advance a contrary version asserted by the JTA. She does not say that she bought the land or that the money came from a source other than Mr Francis.

**[69]** In respect of land at the Queens Hill property the allegation is that it was paid for by the misappropriated funds. There is no firm denial of this. What she says is that she was not aware that the money used to purchase the property was acquired by fraud and either did she commit any fraud. This pleading seems to be an acceptance of the allegation that it was Mr Francis who paid the purchase price but is seeking to challenge the JTA to prove that the purchase price was tainted money. Respectfully, this is not a reason for not admitting the allegation or even for denying the allegation. To say that a claimant should prove any

allegation is not a reason for asking for that proof; it is simply a statement of desire that it should be proved and nothing more. She has not said that she used her own money or money other than that of Mr Francis to purchase the property. Rule 10.5 required her to engage the claimant's pleadings in a serious way.

**[70]** Miss Creary pleaded that she herself did not receive any money. However, the crux of the JTA's case is that the misappropriated funds was used to purchase the properties in her name alone, the properties held jointly with her son and the property in respect of which the mortgage was paid off. She has not challenged that assertion.

**[71]** At paragraph 4 of her defence, Miss Creary responded to paragraph 15 of the particulars of claim by stating a blanket denial without advancing reasons. She has not advanced any reason for denying that she was an unemployed housewife. She has given no reason for denying that she had inadequate resources to purchase the properties. What she has said is that the JTA must prove that only Mr Francis could have assisted her. This pleading by Miss Creary is not a different version of events. It is more of an argument. Miss Creary is required by the rules to assert facts on which she intends to rely if that is the case and where she does not do this she needs to advance a reason. This she has failed to do.

**[72]** In paragraph 5 of her defence, Miss Creary denies paragraph 16 of the particulars of claim and advances the argument (for that is what it really is and not an allegation of fact) that there is no inevitable inference that the properties in the joint names of her son and herself were purchased with tainted funds. She added that her son had been gainfully employed for some years and had other businesses.

**[73]** Paragraph 16 of the particulars of claim alleged that she, solely or jointly, acquired properties for a sum in excess of $64m without a mortgage and that the money used to do that came from her son's allegedly fraudulent activities. Miss

Creary's response is astonishing in the face of material before the court which shows that between January 2013 and July 2013 Miss Creary and her son acquired property in either her name alone or both their names at a cost of $64.5m. The property that was gifted to her was acquired by the prior owner for $2,312,552.00. For an unemployed woman with no known financial resources to acquire property in her name alone at a cost of $32m and jointly owned property at a cost of $32.5m in a seven-month period would raise eyebrows. She did not plead a contrary account. There is no material suggesting how Mr Francis generated such significant sums of money without leaving a financial trail of some kind other than in the manner suggested by the JTA. All this valuable acquisition jointly with a son who, other than his employment at the JTA appears to be a financial and business ghost; there are no documents, yet, showing what other business he was involved in.

**[74]** For all these reasons, the court finds that Miss Creary has not advanced a defence to the claim. No reasons or contrary version has been asserted. In these circumstances the court has no choice but to grant summary judgment against Miss Creary on that aspect of the claim alleging that the properties in her name alone and those in the joint names of herself and her son were acquired by the use of the misappropriated funds.

**[75]** In respect of Mrs Ennis, her defence followed the same pattern as Miss Creary. Mrs Ennis is being accused of purchasing property from the tainted funds unlawfully taken by Mr Francis. Mrs Ennis is told that she did not have sufficient funds to make the purchase and neither did her earnings enable her to acquire the property without the assistance of Mr Francis. Her response, remarkably, does not actually say that she purchased the property with her own resources or from a source other than Mr Francis. She does not provide any other version of the acquisition of the property. What she has done is to challenge the JTA to prove the case.

**[76]** The court will go through the relevant paragraphs of Mrs Ennis' defence. Paragraph 1 says that paragraph 1 of the particulars of claim is neither denied nor admitted. No reason is given for this. Paragraph 2 states that Mrs Ennis cannot respond to paragraphs 2 to 16 of the particulars because those refer to the first two defendants. This is not in keeping with the rules. Paragraph 3 denies that she is the aunt of Mr Francis and says that he is her cousin. Paragraph 3 denies receiving funds from Mr Francis knowing or having grounds to believe that the funds were fraudulently obtained. This is a denial standing alone. Paragraph 4 says that the JTA is put to strict proof that the property in her name was purchased with tainted funds. Paragraph 5 refers to the employment history of herself, husband and relatives and speaks in the passive voice about the purchase in this way, '*The third defendant will say that at the time the said property was purchased the third defendant was a Quality Systems Manager*' (para 5). Crucially, she does not say in paragraph 5 that Mr Francis did not have anything to do with the purchase of the property. In paragraphs 2 – 5 of her defence Mrs Ennis is saying that she did not receive any money from Mr Francis. That may be true that does not say that he did not purchase the property in her name. The issue raised by the JTA is not just whether she received the money in her hand or account but whether the money allegedly taken by Mr Francis was used to purchase the property in her name.

**[77]** Paragraph 6 denies paragraph 20 of the particulars of claim and then goes on to say that the JTA is put to strict proof that she could not have purchased the property with the assistance to Mr Francis. Paragraph 20 of the particulars of claim alleges that the property was purchased by Mrs Ennis without the benefit of a mortgage and that having regard to her salary she could not have made the purchase without the assistance of Mr Francis using the money he allegedly stole from the JTA. It has already been pointed out that a bare denial is no longer a satisfactory response to an allegation unless it is accompanied by a reason. Mrs Ennis has denied but has not given a reason for the denial. According to rule 10.5 she must deny and give a reason.

**[78]** Taking the analysis further. Mrs Ennis must know whether the purchase was a cash purchase or a purchase with a mortgage. It may be a vendor's mortgage. If she does not know whether it was cash or mortgage purchase she must say that she does not know and therefore wishes JTA to prove its case. Since she has not said that property was gifted to her or that it was inherited or won in the lotto or that it was acquired by way of extinction of title of the previous registered proprietor or that she came by it by some legitimate way, then barring forgery, then it is safe to conclude that it was a purchase. If it was a purchase then she must have some information about the purchase and must know how the property came to be in her name since, at the very least, she would be required to sign the requite documents or authorise someone to sign on her behalf. The other paragraphs need not be analysed since they do not take the analysis any further. What is clear is that Mrs Ennis has not pleaded that she bought the land with her own money or money from others. Mrs Ennis has not put forward a different version regarding the acquisition of the property in her name. Where there are denials she has not given a reason for the denials. Under the rules, had there been a trial, neither Miss Creary nor Mrs Ennis could have advanced a different version because they have not pleaded one. In light of this the court has no choice but to grant summary judgment against her.

**[79]** On the JTA's case theory, Miss Creary and Mrs Ennis can become constructive trustees because Mr Francis never acquired good title to the money and once he took it neither the legal nor equitable title ever left JTA and therefore the money was the subject of a constructive trust. This trust is what is called an institutional constructive trust and not a remedial constructive trust. What this means is that the trust arose as soon as Mr Francis took the money unlawfully. As Lord Millett stated in **Foskett**, 'The claimant claims the new asset because it was acquired in whole or in part with the original asset. What he traces, therefore, is not the physical asset itself but the value inherent in it' (p 120).

**[80]** In seeking to resist the summary judgment application Mr Bishop submitted that the JTA's pleadings do not make a clear and direct link between the money's taken and the properties in the name of Miss Creary and Mrs Ennis. He took the view that the inference the JTA relies on is not sufficient. He even went as far as suggesting that other persons may have committed the alleged fraud. Respectfully, this court disagrees. The claimant has set out its allegations in detail. There is no requirement that only direct evidence will suffice in a case of this nature. Unless the defendant joins issue in the manner prescribed by the rules, then there is no need for the claimant to call evidence on a non-disputed point. A failure to plead in accordance with the rules is a failure to join issue and therefore there is no case to try.

**[81]** Miss Creary and Mrs Ennis do fall within the natural group of persons, who from past experience, are likely to benefit from the largess of the alleged thief. Persons normally do not take money for its own sake. They usually do so because they wish to use it to acquire goods and services. It is not unusual for alleged thieves to place property in the names of persons close to them.

**[82]** When there is a combination of absence of sufficient income to make high price cash purchases, the absence of evidence that the property holder secured a loan from some source, the presence of an alleged large scale fraud, the presence of a familial and friendly connection between the alleged fraudster and the property holder, the acquisition of the property during the period of the alleged fraud and the absence of a countervailing explanation then how can it be said that there is a realistic prospect of successfully defending the claim?

**[83]** The court now comes to CLIL. At first the court was inclined to agree with Mr Mullings and Mr Braham that there was a case to go to trial. However, on closer inspection of the pleadings against the relevant law this court is satisfied that summary judgment should be granted against the company.

**[84]** The pleaded case against CLIL is that it knowingly received money from Mr Francis arising from Mr Francis' alleged misappropriation of funds from JTA. CLIL stated in its defence that it thought that money was from Mr Francis' trade in used cars. This response led court to revisit the Privy Council's decision in **Royal Brunei Airlines v Tan** [1995] 2 AC 378. His Lordship posed the question of 'whether breach of trust which is a requisite to accessory liability must itself be a dishonest and fraudulent breach of trust by the trustee' (page 384). In answering that question Lord Nicholls established a number of propositions which are as follows:

a. where there is an honest trustee and a dishonest third party deceived the honest trustee and either received funds from the trust or assisted in taking money from the trust, then the beneficiaries who have been defrauded would be able to recover from the third party. The honesty of the trustee is no bar to recovery;

b. the true principle is that the liability of the third party does not depend on the state of mind of the trustee;

c. the requisite state of mind of the third party is that of dishonesty. If it were otherwise, namely, that liability of the third party depended on whether the trustee was honest or not, then it would mean that a dishonest third party who induces an honest trustee to commit a breach of trust could escape liability and that position would not be sensible;

d. dishonesty means, not acting as an honest person would in the circumstances of the case under examination. Honesty and its counterpart dishonesty have a subjective element to the extent that the words refer to conduct which is examined in light of what the person actually knew at the time, as distinct from what he or she ought to have known;

e. the presence of the subjective element does not mean that each person sets their own standards of honesty. A person does not escape liability simply because he or she sees nothing wrong with the conduct in question. The party is expected to behave as an honest person would in the circumstances as known to the party whose conduct is called into question;

f. third party liability cannot be restricted to fraudulent breaches of trust;

g. negligence or carelessness is not sufficient for liability

**[85]** Lord Nicholl's proposition that the third party is expected to act as an honest person would is open to the objection that it is imprecise and with that the court agrees. However, his Lordship attempted to give a flavour of what he had in mind in his discussion from pages 389 – 391.

**[86]** A crucial part of his Lordship's reasoning deals with the person who deliberately shuts his eyes and ears to questionable circumstances. His Lordship said at page 389:

> *Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless. However, in the situations now under consideration the position is not always so straightforward.*

**[87]** Another name for this is contrived ignorance.

**[88]** CLICL has pleaded that it permitted Mr Francis to use its accounts because Mr Francis did not have a registered business and inferentially had no business account.

**[89]** Based on the material presented against CLIL there is no doubt that the money came from JTA's accounts. The cheques presented to this court show that the

proceeds of the JTA's cheques were to be used to purchase manager's cheques. It is these manager's cheques that were deposited in CLIL's account. CLIL pleads that it did not know that these cheques came from the JTA's accounts. It thought that they were from Mr Francis' used car business.

**[90]** What did CLIL know? On its case, it 'knew' that Mr Francis was operating an unregistered business. The inference from this is that he was not paying the required general consumption tax ('gct') on his sales since to do this would require him to be registered with the tax authorities which would require him to secure a Tax Registration Number ('TRN'). It also means, in all probability, that he was not paying income tax on the earnings. Mr Francis did not operate an account in his name with a financial institution where he conducted his used car business. The explanation coming from CLIL is that Mr Francis was having problems with his Tax Registration Number ('TRN'). One wonders what problem this could be since the process of applying for and receiving a TRN is uncomplicated. There is no indication that CLIL probed to find out the nature of the problem. Reduced to its simplest, all that is required to secure a TRN is some form of identification. If he had no TRN then it is unlikely that he would have been able to open an account in his name which explains the necessity to have access to an account that would enable him to operate his business in the way it is being suggested that he did. It is now a notorious fact these days, one can hardly do business with any financial institution or the government without a TRN. There is no evidence that he was a signatory on CLIL's account. If this is correct then it would mean that Miss Chambers, as a director of CLIL, was facilitating Mr Francis in conducting his affairs in a manner that concealed (1) the fact that he was earning income and (2) the source of his earnings. In other words, the money taken out of JTA's accounts was used to purchase manager's cheques which were deposited in CLIL's accounts as ostensibly CLIL's collected receivables and then removed from CLIL's account and presented in such a manner that its origins would be disguised. All that has been stated as both direct and circumstantial evidence are what CLIL would have known. This way of

handling the money would give the impression that any money taken from CLIL's accounts was the company's money.

**[91]** There is no pleading that suggests that CLIL made any enquiries about a man who as doing business but did not or would not or could not open an account in his own name and wished to use the company's account for his business It seems to this court that CLIL deliberately refrained from making the enquiries that an honest person would make because it did not want to find out the answers.

**[92]** Having re-examined the matter the court has come to the conclusion that summary judgment should be granted against CLIL to the extent of the $3,944,200.67. This judgment is not a proprietary claim since the money received has already been taken out and consumed, it is said, by Mr Francis. The judgment is a personal claim as distinct from a proprietary one made against the company. The basis of the summary judgment is that CLIL's conduct has met Lord Nicholl's standard. CLIL enabled Mr Francis to take JTA's money and deal with it in such away so as to muddy the trail of the funds.

**Unlawfully obtained evidence**

**[93]** As will be obvious from the decision to grant summary judgment, the court has taken into account the evidence that it was alleged was obtained possibly in breach of the FIDA. The court will adopt the view most favourable to the defendants and say that it was unlawfully obtained. The case of **Jones v University of Warwick** [2003] 3 All ER 760 provides some assistance. The claimant injured her wrist and filed a claim against the defendant. The defendant admitted liability but challenged whether the claimant had any continuing disability as alleged by her. The defendant's insurers secretly filmed her. This was accomplished by having the videographer pose as a market researcher and by this subterfuge gained access to her house where she was filmed twice. The defendant's experts viewed the video and concluded that she did not have any continuing disability. The defendant applied to have the video admitted into

evidence. It was agreed that the videographer was guilty of trespass and agreed that she would not have let him in had he not misled her.

**[94]** The claimant submitted that the evidence should be excluded because there was a breach of her right to privacy under the European Convention of 1950. The District Judge excluded the evidence on the basis that the court could not approve of the methods of the insurers in securing the video. The defendant appealed and the judge on appeal allowed the appeal on the basis that the evidence was admissible and the primary question for the court was not how the evidence was obtained but where justice and fairness required its admission. The claimant appealed to the Court of Appeal and lost on the issue.

**[95]** Lord Woolf CJ, the architect of the English CPR on which the Jamaican CPR is based, had this to say about the approach that should now be taken to this issue in light of the CPR and the Human Rights Act at paragraphs **[21]** – **[25]**:

> *It is not possible to reconcile in a totally satisfactory manner, the conflicting public policies which District Judge Wartnaby and Judge Harris had to try and balance in this case. The approach of Judge Harris was consistent with the approach which would have been adopted in both criminal and civil proceedings prior to the coming into force of the CPR and the 1998 Act. The achieving of justice in the particular case which was before the court was then the paramount consideration for the judge trying the case. If evidence was available, the court did not concern itself with how it was obtained.*
>
> ***[22]*** *While this approach will help to achieve justice in a particular case, it will do nothing to promote the observance of the law by those engaged or about to be*

*engaged in legal proceedings. This is also a matter of real public concern.*

***[23]*** *If the conduct of the insurers in this case goes uncensured there would be a significant risk that practices of this type would be encouraged. This would be highly undesirable, particularly as there will be cases in which a claimant's privacy will be infringed and the evidence obtained will confirm that the claimant has not exaggerated the claim in any way. This could still be the result in this case.*

***[24]*** *Fortunately, in both criminal and civil proceedings, courts can now adopt a less rigid approach to that adopted hitherto which gives recognition to the fact that there are conflicting public interests which have to be reconciled as far as this is possible. The approach adopted in Kuruma Son of Kaniu v R [1955] 1 All ER 236, [1955] AC 197, R v Sang [1979] 2 All ER 1222, [1980] AC 402 and R v Khan (Sultan) [1996] 3 All ER 289, [1997] AC 558 which was applied by Judge Harris has to be modified as a result of the changes that have taken place in the law. The position in criminal proceedings is that now when evidence is wrongly obtained the court will consider whether it adversely affects the fairness of the proceedings and, if it does, may exclude the evidence (see s 78 of the Police and Criminal Evidence Act 1984). In an extreme case, the court will even consider whether there has been an abuse of process of a gravity which requires the prosecution to be brought to a halt (see R v Loveridge [2001] EWCA Crim 973, [2001] 2 Cr App R 591 and R v Mason [2002] EWCA Crim 385 at [50], [68]*

*and [76], [2002] 2 Cr App R 628 at [50], [68] and [76]). In civil proceedings, Potter LJ recognised this in Rall v Hume [2001] EWCA Civ 146 at [19], [2001] 3 All ER 248 at [19]. He commenced by saying:*

*'In principle ... the starting point on any application of this kind must be that, where video evidence is available which, according to the defendant, undermines the case of the claimant to an extent that would substantially reduce the award of damages to which she is entitled, it will usually be in the overall interests of justice to require that the defendant should be permitted to cross-examine the claimant and her medical advisors upon it ...' (My emphasis.)*

***[25]*** *But Potter LJ then added that this does not apply if the conduct of the defendant amounts 'to trial by ambush'. The discretion on the court is not, however, confined to cases where the defendants have failed to make proper disclosure. A judge's responsibility today in the course of properly managing litigation requires him, when exercising his discretion in accordance with the overriding objective contained in CPR Pt 1, to consider the effect of his decision upon litigation generally. An example of the wider approach is that the judges are required to ensure that a case only uses its appropriate share of the resources of the court (see CPR 1.1(2) (e)). Proactive management of civil proceedings, which is at the heart of the CPR, is not only concerned with an individual piece of litigation which is before the court, it is also concerned with litigation as a whole. So the fact that in this case the defendant's insurers, as was accepted by*

> *Mr Owen, have been responsible for the trespass involved in entering the claimant's house and infringing her privacy contrary to art 8(1) of the convention is a relevant circumstance for the court to weigh in the balance when coming to a decision as to how it should properly exercise its discretion in making orders as to the management of the proceedings.*

**[96]** The fact that the defendant's insurers procured the video by unlawful means was a factor to be taken into account but was not decisive. There was no automatic rule that unlawfully obtained evidence was inadmissible. There are two public interest principles that need to be reconciled as much as possible. The first is discouraging conduct that obtains evidence wrongly and the second is having all relevant evidence placed before the court. The point being made by Lord Woolf is that the courts have to be mindful that it does not encourage possibly unlawful conduct in the gathering of evidence while at the same time seeing that it does deprive itself of evidence that is relevant to the issues in the case.

**[97]** The issue arose again in **Serious Organised Crime Agency v Olden** [2010] CP Rep 29. In that case the defendant having been acquitted in the Court of Appeal found himself the subject of civil recovery proceedings under the Proceeds of Crimes Act. The defendant appealed the decision made against him in the criminal trial on the basis that the trial judge had erred in admitting the illegally obtained evidence. The evidence that had been found to be inadmissible at the criminal trial was used in the civil proceedings. The submission was that it would be an abuse of process to permit the use of evidence in civil proceedings which had been found inadmissible in the criminal trial. The Court of Appeal held that the fact that evidence was inadmissible in the criminal trial did not mean that it could not be used in civil proceedings involving the same factual circumstances. Sir Scott Baker held that the power to exclude evidence given to the court under the CPR must be exercised in accordance with the overriding

objective. His Lordship held that the primary consideration was whether the proceedings were fair and that the case should be treated justly. He took this position even though he accepted the proposition that in all proceedings the court has a discretion to exclude evidence 'if its admission would dishonour the administration of justice or compromise the integrity of the judicial process.' In the end, the court upheld the judge's decision to admit the evidence at the civil recovery proceedings.

**[98]** The court accepts that it has a discretion to exclude evidence in civil trials. Applying all this to instant case, the circumstances of the acquisition of the evidence were not egregious. It did not rise to the level kind where it could be said that administration of justice has been brought into disrepute. The JTA fully disclosed how it came by the evidence but what was not disclosed was the possibility that it might have been done in breach of FIDA. In this present hearing, Mr Braham indicated that he had not fully adverted to the provisions of the FIDA at the ex parte stage because he had not appreciated the import of the statutory provisions. In all the circumstances court concludes that this was not a deliberate effort to secure evidence by possibly unlawful means and then taking steps to cover up that fact. In other words, if the statute was breached it was not the result of deliberate and reckless disregard for the provisions of the statute. The court considers that in these circumstances, it can rely on the evidence complained about.

**Summary**

**[99]** The court is quite aware of the exceptional step of granting summary judgment in the circumstances of this case but when the court examined the allegations, the cheques placed before the court, the relatively low salary of Mr Francis, the absence of income of Miss Creary, the insufficient income of Mrs Ennis and her lack of explanation in her defence for the property being in her name, the way in which CLIL allowed its accounts to be used to conceal and disguise the source of money taken from the JTA, the familial connection between Mr Francis and the Miss Creary and Mrs Ennis and the intimate connection (either past or present)

with Miss Chambers case, the absence of any realistic challenge to the JTA's case and the relevant law, the court took the view that summary judgment should be granted on the ground that Miss Creary, Mrs Ennis and CLIL did not have any real prospect of successfully defending the claim.

**Disposition**

**[100]** Freezing orders discharged. Cost of freezing order application to the second, third and fourth defendants. Leave to appeal granted. Summary judgment granted against the second, third and fourth defendants. Costs to the claimant on the summary judgment application. Leave to appeal granted. Costs in both applications to be agreed or taxed. Execution of summary judgment stayed until determination of the appeal or further order. Freezing order extended against the first defendant. Freezing order re-imposed against second and third defendant in support of the summary judgment and not as a pre-judgment remedy. Freezing order re-imposed on property of the fourth defendant up to the value of $3,944,200.67. Counsel for the claimant to draft the order and any consequential orders. Counsel for the parties to agree the terms of the draft order if possible and in the event of disagreement counsel for claimant to submit draft to court.