[2023] JMCC COMM. 19

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISON

CLAIM NO. SU 2023CD00036

IN THE MATTER of the Financial Services Commission Act

AND

IN THE MATTER of the Companies Act

BETWEEN	**FINANCIAL SERVICES COMMISSION**	**CLAIMANT**
AND	**STOCKS AND SECURITIES LIMITED**	**1ST DEFENDANT**
AND	**CAYDION CAMPBELL**	**2ND DEFENDANT**
AND	**HUGH CROSKERY**	**3RD DEFENDANT**

Ms. Lisa White, Ms. Faith Hall and Ms. Nicola Richards instructed by Director of State Proceedings for the Claimant

Mrs Caroline P. Hay KC, Mrs. Kimberley McDowell, Mrs Tereece K. Campbell Wong and Mr. Zurie Johnson instructed by Caroline P. Hay, Attorneys-at-law for the 1st and 2nd Defendants

Mr. Peter Champagnie KC and Mr. Neco Pagan for the 3rd Defendant

IN CHAMBERS VIA VIDEO CONFERENCE

HEARD: 28th February, 10th March and 20th April, 2023

APPLICATION FOR INTERIM INJUNCTION PURSUANT TO SECTION 49(h) JUDICATURE (SUPREME COURT) ACT – RULE 17.1(a), 17.1(4) and 17.2 OF THE

CIVIL PROCEDURE RULES, 2002 – FINANCIAL SERVICES COMMISSION ACT – THE COMPANIES ACT- WHETHER DEFENDANTS AT LIBERTY TO WIND UP COMPANY AND DISSIPATE FUNDS – WHETHER TEMPORARY MANAGER REDUNDANT – WHETHER CLAIMANT VESTED WITH FULL AND EXCLUSIVE MANAGEMENT OVER 1ST DEFENDANT – WHETHER CAUSE OF ACTION MUST BE ESTABLISHED – WHETHER THERE IS A SERIOUS ISSUE TO BE TRIED- WHETHER THERE HAS BEEN MATERIAL NON-DISCLOSURE – WHETHER UNDERTAKING AS TO DAMAGES REQUIRED BY THE CROWN – BALANCE OF CONVENIENCE

STEPHANE JACKSON-HAISLEY J.

INTRODUCTION

[1] The Claimant, the Financial Services Commission (hereafter "FSC") a body corporate and the regulatory body of the Government of Jamaica was created for the purpose of *inter alia* supervising and regulating financial institutions. In response to the reports of fraud involving Billions of Jamaican Dollars at Stocks and Securities Limited (hereafter "SSL") the FSC issued Directions to SSL on January 12, 2023 restraining the company from conducting transactions on its behalf or on behalf of clients without the FSC's approval. On January 17, 2023, the FSC exercised powers under Section 8(5) of the Financial Services Commission Act (hereafter "the FSC Act") and assumed temporary management of SSL on that same date.

[2] According to the Claimant, the 1st, 3rd and the then 4th and 5th Defendants instead of working with it in its capacity as Temporary Manager, they appointed the 2nd Defendant as Trustee and made attempts to wind up the company thereby frustrating the FSC's temporary management. By taking this action, the 1st, 3rd and the then 4th and 5th Defendants purported to vest all assets of the company in the 2nd Defendant which has caused the FSC to harbour the fear of the dissipation of the funds of investors when investigation concerning the fraud is extant.

[3] This led the FSC to take action in the form of filing an Ex-parte Notice of Application for Interim Injunction on January 25, 2023 seeking the following injunctive reliefs:

(a) The Defendants be restrained whether by themselves, their servants and/or agents including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise from disposing of and/or dealing with its assets and liabilities, or with assets and liabilities in its name, or its clients' name, wheresoever situate, or from withdrawing or transferring or otherwise dissipating any funds from its accounts or its clients' account or from accounts in its name wheresoever held for the entire portfolio of the company.

(b) The Defendants be retrained whether by themselves, their servants and/or agent including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise from interfering with the acts of the servants and/or agents of the FSC – Temporary Manager of SSL in accordance with the FSC Act.

(c) The Defendants be restrained whether by themselves, their servants and/or agent including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise from winding up or dissolving the company and liquidating the 1st Defendant's assets and liabilities.

(d) The Defendants be restrained whether by themselves, their servants and/or agents including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise from removing its name from the records and/or engaging with the Companies Office of Jamaica in any manner without the intervention and/or consent of the Claimant.

(e) The Defendants be restrained whether by themselves, their servants and/or agents including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise from reorganizing the company or its operations whether it be in any document form or organization of its members, or the assets and liabilities.

(f) The Defendants be compelled whether by themselves, their servants and/or agents including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise to hand over the control of the company to the Claimant.

(g) The Defendants be compelled whether by themselves, their servants and/or agents including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise to grant full and unrestrained access to the Claimant to (including but not limited to) all documentation, information books, records, assets and liabilities, computers, software and hardware

and reserves in the possession and/or control of the 1st Defendant so the Claimant can carry out its functions under the FSC Act.

(h) The Defendants, be compelled whether by themselves, their servants and/or agents including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise to comply or otherwise cooperate with the directions of the Claimant and the Temporary Manager and any servant and/or agent of the Temporary Manager.

(i) The Defendants be compelled whether by themselves, their servants and/or agents including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise to comply with any cease and desist order of the Claimant issued pursuant to the FSC Act.

3. On the said day they appeared before me and secured an interim injunction. What is now before the Court is in the inter-partes hearing of the Notice of Application for Court Orders wherein the Claimant seeks an extension of the interim injunction.

[4] The Ex-parte injunction was granted on January 25, 2023 in terms of the orders sought. What is now before me is the Inter-partes hearing for the extension of the interim injunction.

THE CLAIMANT'S CASE

[5] The application is supported by Affidavit of Urgency of Donia Fuller-Barrett (hereafter "Mrs. Fuller-Barrett") in support of Injunctive Relief also filed on January 25, 2023 and her Second Affidavit filed on February 24, 2003. In addition, there is also her Affidavit in support of the Amended Fixed Date Claim Form filed on February 27, 2013. Mrs. Fuller-Barrett deponed in her Affidavit evidence that on or about Tuesday, January 10, 2023 the FSC received a letter from SSL providing notice of an incident of fraud at the company. The letter did not specify the extent and nature of the fraudulent activities however the letter prompted the FSC to put mechanisms in place to carry out further investigations. On January 11, 2023, the FSC received independent and credible reports of the alleged fraudulent activities and the FSC took steps to contact Jamaican Law enforcement agents and to manage and control the 1st Defendant.

[6] On the 12th January, 2023 the FSC dispatched an examination team to the 1st Defendant and was advised by the 1st Defendant's Senior Director Mr. David Wong-Ken that the company would be going into receivership. Immediately the FSC wrote to the SSL issuing directions to restrain the company from conducting transactions on its own behalf or on behalf of its clients without the FSC's approval. Mrs. Fuller-Barrett further deponed that by email dated January 15, 2023, the Chief Financial Officer of the 1st Defendant, Mrs. Allison Hemmings requested an introductory meeting to be had with (i) the FSC, (ii) Caydion Campbell (hereafter "Mr. Campbell") who was stated to be the receiver and (iii) members of the 1st Defendant's staff. Despite discussions regarding receivership, the 1st Defendant filed or caused to be filed at the Companies Office of Jamaica a Special Resolution dated January 16, 2023 along with a Notice of Appointment stating that the affairs of the company will be placed into a Members' Voluntary Winding-up and that Mr. Campbell was purportedly appointed as Trustee.

[7] Upon learning of the steps taken by the 1st Defendant, the FSC, pursuant to its powers under Section 8(5) and Parts A and C of the Third Schedule of the Act exercised its powers to assume temporary management of the 1st Defendant on January 17, 2023. The FSC further (i) served SSL with Notice under Part C of the Third Schedule of the Act, (ii) posted the Notice at SSL's offices, (iii) furnished the Registrar of the Supreme Court with the said Notice and (iv) published the Notice in the Sunday Gleaner on January 22, 2023 and in the Daily Gleaner on January 23, 2023.

[8] Mrs. Fuller-Barrett indicated that by letter dated January 18, 2023, the FSC received a letter from Frater, Ennis & Gordon, Attorneys-at-law for the Honourable Usain Bolt, OJ, CD in relation to the sums. he deposited with SSL. Based on the alleged fraud it is anticipated that there will be similar claims. by other investors.

[9] She expressed that by letter dated January 19, 2023, the FSC wrote to SSL to register its concern regarding the purported appointment of a Trustee and by letter dated January 20, 2023, the FSC received a letter from SSL's purported Trustee in relation to the Member's Voluntary Winding-Up of the company and the purported appointment of the Trustee. By letter dated January 23, 2023, Mr. Campbell wrote to SSL outlining certain actions he proposed to take in relation to the company including liquidating the company

and indicating that FSC's position as temporary manager is redundant in circumstances of restoration and winding up where a Trustee has been appointed.

[10] Mrs. Fuller-Barrett asserted that if SSL is permitted to take steps to wind up the company and liquidate its assets and liabilities, there will be serious repercussions for SSL's clients as there is the anticipation that the clients will not be able to recover their funds and/or assets if the company is dissolved.

THE DEFENDANTS' CLAIM

The 1st and 2nd Defendants

[11] The Defendants rely heavily on the Affidavit of Caydion Campbell in response filed on February 14, 2023 and his second Affidavit filed on February 27, 2023. Mr. Campbell in his affidavit opposing the application for injunctive relief and in response to affidavit of Donna Fuller-Barrett, alleged that the FSC's allegations are misleading as there is a serious instance of non-disclosure. In his first Affidavit filed February 14, 2023 he alleged that an Extraordinary General Meeting was held on January 16, 2023 where a Special Resolution was unanimously passed by SSL's members to reorganise its affairs and place it into Members Voluntary Winding-up. Mr. Campbell further alleged that the FSC is fully aware of SSL's decision to appoint him as a Trustee and that there had been a plethora of communication between the representatives of both the FSC and SSL regarding his appointment as a Trustee. He deponed that the FSC painted a picture of flagrant disregard of its directions and that he acted in ways contrary to the position of temporary management which implied fraudulent conduct on the part of all the Defendants.

[12] Mr. Campbell indicated that the implication of the possibility of dissipation of funds is impossible as the FSC has put in place certain control over SSL from January 12, 2023 and a subsequent appointment of a temporary manager on January 17, 2023 who has been the person authorizing transactions on SSL's accounts. He further deponed that from the outset of his appointment as Trustee he made it clear to SSL's shareholders, directors, management representatives and Attorneys-at-law of the need to establish a joint communication policy with the FSC to enable collaboration to agree the narrative to

the stakeholders and public, including the banks, financial institutions and other entities that SSL would normally interface with.

[13] Mr. Campbell's version of the story is that on the morning of January 12, 2023, he was contacted by Messrs. Ramsey and Partners, SSL's attorneys-at-law who indicated certain things to him which led him to believe that SSL wanted to wind-up the company and reorganise the business as there was uncertainty that their current structure was the best that could obtain in the circumstances. He deponed that a letter dated January 13, 2023 was sent for the attention of Karene Blair, Senior Director, Securities of the FSC captioned "SSL Action Plan: To address impact of Former Employee Suspected Fraud reported January 10, 2023". This letter was not disclosed by the FSC to the Court. This detailed letter followed a meeting between SSL and FSC on January 12, 2012 to review the Directions issued by the FSC.

[14] Mr. Campbell alleged that the directions issued by the FSC revealed no concern with the reorganization of the company or sought to prevent the Directors from meeting to determine next steps and though the word receivership was used in early discussions between FSC and the SSL, the position was always trusteeship for reorganization. He alleged that it is misleading for the FSC to imply that the only discussions were around receivership and in fact his retainer was not for receivership. He indicated that there was no change to the Business Plan that was submitted to the FSC on January 13, 2023 and the scope of services was geared towards facilitating the investigations into the alleged fraud, ascertaining the financial state of affairs of SSL, exploring restructuring and reorganising options and to develop and agree with a Resolution Plan which would be implemented. Mr. Campbell further indicated that the then Executive Director of FSC, Mr. Everton McFarlane was present at the meeting held on January 16, 2023 and expressed an understanding that a Members' Winding Up was being done. At that meeting he indicated that his role was clarified as well as the fact that his retainer was not for receivership.

[15] Mr. Campbell indicated that it is misleading for the FSC to assert that "Notwithstanding the discussions in relation to receivership, SSL filed or caused to be filed at the Companies Office of Jamaica a Special Resolution dated the 16th January

2023 along with Notice of Appointment stating that the affairs of the company be placed into Members' Voluntary Winding Up. Also that Caydion Campbell was purportedly appointed as Trustee". He further asserts that this statement gives the impression that the meeting was primarily about receivership and that the FSC was unaware of what was done. He further indicated that Mrs. Fuller-Barrett was present at the meeting, asked questions about winding-up and reorganization and that it was confirmed that he was appointed as a Trustee before the temporary manager, Ken Tomlinson (hereafter "Mr. Tomlinson") was appointed.

[16] He also asserted that there was a series of exchange between the FSC and the SSL which confirmed that SSL had approached him to act and that it would be in place by January 16, 2023. Mr. Campbell indicated that the FSC actively encouraged his engagement and that he was aware of discussions to appoint an independent person to coordinate and oversee SSL's operations under the enhanced governance protocols. He averred that the FSC was well aware that he was in place as a Trustee before the temporary manager was appointed and it is grossly misleading to suggest that his 'purportedly' appointment as Trustee and Notice of Appointment were unknown.

[17] Mr. Campbell further expressed that his appointment as Trustee was gazetted effective January 17, 2023 in confirmation with the Special Resolution passed on January 16, 2023. He indicated that he along with Mr. Tomlinson attended a meeting on January 18, 2023 in their respective capacity as Trustee and Temporary Manager where it was made clear that he expected to cooperate with the temporary manager and his team and both parties agreed they would work cooperatively to discharge their respective duties. Mr. Campbell further asserts that a second meeting was held in the afternoon of January 18, 2023 between himself as Trustee, Mr. Tomlinson as the Temporary Manager and several other representatives of the FSC and at that meeting the unusual circumstance of a temporary manager being appointed after a Trustee was ventilated. Mr. Campbell indicated that he pointed out that the office of temporary manager was redundant however suggested that both offices should work together.

[18] Mr. Campbell averred that he informed the team that a faster and more transparent solution would be to transition from Members Voluntary Winding-up to a Court supervised

one with Mr. Tomlinson as an additional trustee. He stated that once that position was settled, he wrote an email to Mr. Tomlinson on January 24, 2023 inviting him to support an urgent application to the Court for Winding-up and for Mr. Tomlinson to be added as a Joint Trustee for the purpose of wind-up. Mr. Campbell asserts that there is a view that the reorganization of the company was both practical and reasonable and saw potential for additional capital of approximately Two Million Nine Hundred Thousand United States Dollars (USD$2,900,000). Those options based on his discussions were real and continued to be available to SSL however, he is unable to carry out his duties to establish whether SSL is still solvent. He went on to say that as Trustee he needs to continue the task of the independent business review to determine the estimated realizable value of the assets and importantly, the quantum of claims on balance sheet, off balance sheet and contingent. He stated he is being prevented from exercising his duties as prescribed under the Law.

[19] In his second affidavit filed on February 27, 2023, Mr. Campbell deponed that it is not correct to assert that the statutory circumstances of taking into custody or control *"all the property and things in action to which the company is or appears to be entitled"* is the same as *"disposing of or otherwise transferring or substituting any of the [company's] assets*". He further stated that there was no transfer or dissipation of assets to him, in fact any company property transferred to him would be in his custody or control to protect them until the next step is taken.

[20] Mr. Campbell averred that part of the ethos of trusteeship is a restructuring and rehabilitation exercise rather than merely facilitating the realisation of assets and the distribution of the proceeds of creditors. He further averred that studies across the world reveal that reorganization leads to a better outcome for creditors than the traditional receivership and/or liquidation routes and it is best to reorganise/rehabilitate the company or the business when practicable. He further pointed out that a receiver is appointed over an insolvent or bankrupt entity usually at the instigation of a creditor or of the company or by the petition to the court for an unsecured creditor or claimant.

[21] Mr. Campbell stated in his affidavit that there was a possible capital injection into SSL of Four Million United States Dollars (US$4,000,000) of which the sum of One Million

One Hundred Thousand United States Dollars (US$1,100,000) was already injected and a further sum of Nine Hundred Thousand United States Dollars (US$900,000) was being held in escrow. He further averred that a further sum of Two Million United States Dollars (US$2,000,000) was payable by March 2023. He further claimed that the unnecessary litigation, the confusion that follows and the continuing delays have likely caused the investors to reconsider moving forward with the opportunity.

[22] Mr. Campbell also admitted that the nature and extent of the alleged fraud were not picked up in the regular statutory audit of SSL, that the alleged perpetrator of the fraud was keeping a separate set of books and providing unsuspecting clients and customers with falsified statements and that it is reasonable to conclude that SSL's accounting records did not capture significant transactions that were purportedly related to its clients and customers who had been defrauded. He further stated that if one of the alleged victims of the fraud had not provided a purported statement of account which differed significantly from the accounting records the matter would not come under investigation.

THE 3RD DEFENDANT'S CASE

[23] Mr. Hugh Croskery (hereafter "Mr. Croskery") in his Affidavits filed February 16 and 28, 2023 stated that he tendered his resignation from the board of directors of SSL by letter dated January 24, 2023 and this was brought to the attention of Mr. Tomlinson and Mr. Campbell. He asserted that any Injunction imposed against him in these proceedings is an exercise in futility.

[24] Mr. Croskery in his Affidavit filed February 28, 2023 averred that he has always discharged his duties to SSL and its stakeholders with reasonable care, skill and diligence and has always acted in good faith in the best interest of SSL and its stakeholders. He further averred that since the alleged fraud, he has cooperated with the directives of the FSC and will continue to do so in so far as the law permits. He stated that he was made aware of the alleged fraud on or about January 7, 2023 concerning Jean Panton and at that time, SSL sought and obtained legal advice from its then attorneys-at-law Messrs. Ramsay Smith and Partners Attorneys-at-law. He also stated that the FSC was made aware of the alleged fraud on January 10, 2023 and by letter dated January 13, 2023 the

FSC was notified of SSL's intention to immediately appoint a receiver effective January 16, 2023 and Caydion Campbell was the proposed licenced trustee and receiver. He stated that by email dated January 13, 2023 with time stamp 7:50pm, Karene Blair confirmed FSC's knowledge and consent for the appointment of Caydion Campbell as the trustee/receiver and by January 16, 2023, the board of directors made the decision to appoint Mr. Campbell as trustee as advised by the then legal counsel.

[25] Mr. Croskery averred that he took no steps to remove any assets or to deal with any account at or maintained by SSL neither did he trespass upon any powers of the FSC or Mr. Campbell. He further averred that at the time the board of directors were notified of the intention to appoint Mr. Tomlinson as receiver, the board of directors' powers were already vested in Mr. Campbell in keeping with full knowledge and acquiescence of the FSC. The board of directors have nevertheless cooperated with Mr. Tomlinson and the directives of the FSC.

[26] Mr. Croskery denies acting in bad faith or breach of any duty owed to SSL or the FSC. He contended that the conduct of the FSC has caused confusion, served to unjustifiably sully his reputation and caused the unreasonable need to incur legal fees.

THE 4TH AND 5TH DEFENDANT

[27] On March 3, 2023 a Notice of Discontinuance was filed against the then 4th and 5th Defendants.

THE GUIDING PRINCIPLES AND LAW

[28] Section 49(h) of the Judicature (Supreme Court) Act sets out the jurisdiction of the Court to grant an injunction if it considers it just and equitable so to do. The section provides as follows:

> *49. With respect to the law to be administered by the Supreme Court, the following provisions shall apply, that is to say –*
>
> *(a)…….*

……

(h) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court, in all cases in which it appears to the Court to be just and convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just, and if an injunction is asked either before or at, or after the hearing of any cause or matter, to prevent any threatened of apprehended waste or trespass, such injunction may be granted if the Court thinks fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estate claimed by both or by either of the parties are legal or equitable."

[29] **Rules 17.1** and **17.2 Civil Procedure Rules 2002** (CPR) provide that the Court may grant interim remedies to include an interim injunction and a freezing order at any time after the issue of the Claim Form or even before issue if the matter is urgent. **Rule 17.4** makes provision *inter alia* for the interim injunction to be granted without notice if notice would defeat the purpose of the application. The essence of an interim injunction is that it should be issued only in cases of real urgency and so the affidavit evidence in support must show the facts which warrant urgency.

[30] It is accepted that the Court has the jurisdiction to issue ex parte orders on without notice application where the circumstances warrant and this is set out in **National Commercial Bank v Olint Corporation Ltd.** [2009] 1 WLR 1405 at paragraph 13:

"First, there appears to have been no reason why the application for an injunction should have been made ex parte, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge audi alteram partem is a satisfactory and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anthon Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Supreme Court of Jamaica Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period

> *of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none". **(Emphasis added)***

[31] The House of Lords in **American Cyanamid Co. v Ethicon Ltd [1975] 1 All ER 504** also outlined the considerations that the Court must take into account before it grants an interlocutory injunction:

> *Whether there is a serious question to be tried.*
>
> *Whether damages would be an adequate remedy for the Claimant.*
>
> *Whether the undertaking in damages is adequate protection for the Defendant.*
>
> *The balance of convenience.*

[32] At the inter partes hearing a mountain of material was presented before me in the form of affidavit evidence, submissions, case law and other material. In the interest of time, not every averment that has been made can be referred to, nor can every point raised be mentioned but suffice it to say I have perused it all and considered all of it. Having done so, several issues stand out as requiring resolution and this is what I will attempt to do in the pages that follow. Those issues have been set out here below:

ISSUES

1. Whether there is need for a cause of action whether one has been identified?
2. Whether there is a serious issue to be tried?
3. Whether there has been material non-disclosure on the part of the Applicant?
4. Whether Damages is an adequate remedy and whether the Claimant being a government agency is required to give the usual undertaking as to damages.
5. Where does the balance of convenience lie?
6. Whether the injunction should remain in place against the 3rd Defendant?

Whether there is need for a cause of action and whether one has been identified?

[33] Counsel Ms. Lisa White on behalf of the Claimant submitted that the Court should find that there is a cause of action grounded in the FSC Act and that they have satisfactorily set it out in the Fixed Date Claim Form. She further submitted that even if the court were to find that this is not so the Court's power to grant an injunction was not limited to whether or not there was an established cause of action. She relied on the Privy Council case of **Convoy Collateral Limited v Broad Idea International Limited et al** [2022] 1 All ER 289 as authority for the proposition that an injunction could be granted where there is no cause of action. In **Convoy** the Lords opined that:

> *"It is necessary to dispel the residual uncertainty emanating from The Siskina and to make it clear that the constraints on the power and exercise of the power, to grant freezing and other interim injunctions which were articulated in that case are not merely undesirable in the modern day international commerce but legally unsound. The shades of The Siskina have haunted this area of the law for far too long and they should now finally be laid to rest."*

[34] Counsel commended to the Court the words of Lord Leggatt that 'such flexibility is essential if the law and its procedures are to keep abreast of changes in society' and the approach he adopted which allows the court to modify existing practice where this accords with principle and is necessary to provide an effective remedy. He thereafter opined that there is no principle of practice which prevents an injunction from being granted in appropriate circumstances without a substantial cause of action.

[35] Counsel asked the Court to find that a freezing order can be obtained before a cause of action has even arisen provided that the applicant can establish with a sufficient degree of certainty that proceedings will be brought and will result in an enforceable judgment. Further that, the enforcement principle grounds the basis and scope of power to grant freezing injunctions against third parties against whom there is no claim for substantive relief.

[36] Kings Counsel Mrs Caroline Hay in response contended that the Claimant has failed to plead a cause of action and so has demonstrated no basis to bring the claim. Further that there is no right in the Claimant to sue the company or any director for breach

of directions or at all. Breach of directions is a criminal matter and not a civil wrong. If a statute tells you the effect of a breach it doesn't convert it to a cause of action. The entire basis of the claim is on spurious grounds and based on the provision of the Companies Act there is no ability to challenge an appointment of the Trustee.

[37] She contended that they still need to establish a good arguable case and sought to distinguish **Convoy**. She pointed out that **Convoy** does not assist the Claimant and that on the facts of **Convoy** there was in fact a cause of action

[38] Having considered these submissions, the task is mine to determine whether or not the existence of a cause of action is essential for the grant of an injunction. It is a fact that for many years the principles emanating from **Siskina (Cargo Owners) v Distos Compania Naviera SA** [1977] 3 All ER 803 have restricted the basis on which injunctions can be granted where there is no cause of action. This emanated from Lord Diplock's expression that the right to obtain an interlocutory injunction is not a cause of action and that it cannot stand on its own but is dependent upon there being a pre-existing cause of action against the defendant. He went on to say that the right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.

[39] In the **Convoy** case the company Convoy Collateral Limited applied to the Court in the British Virgin Islands for an ex parte freezing injunction. The Court granted the injunction however the Court of Appeal reversed the decision on the basis that the Court in reliance on **The Siskina** decided that the Court had no power to grant a freezing order where there was no cause of action, specifically, there was no proceedings in the BVI claiming substantive reliefs.

[40] I find the words used by Lord Legatt that "the shades of **The Siskina** have haunted this area of the law for far too long and they should now finally be laid to rest' to be quite instructive. He went further to demonstrate that the law has indeed developed in recent decisions and stated that the common law develops dramatically to meet new cultural and commercial situations. The Lord Justice stated that "*whilst caution was required, an injunction could be granted against a party properly before the court, where it was appropriate to avoid injustice*." His emphasis on the need for flexibility in dealing with

injunctive reliefs in order to provide an effective remedy is a principle that this Court has no reservations in embracing. His conclusion that a freezing order is not ancillary to a cause of action in the sense of a claim for a substantive relief appears unassailable.

[41] This decision has revolutionized the former position. Even if it were to be found that there is no cause of action, that is no bar to the grant of an injunction. However, I do not agree with the Defendants' argument that there is no cause of action. On an examination of the Fixed Date Claim Form, the Claimant has alleged that the actions of the Defendants are in breach of the FSC. They have clearly identified circumstances in which they are of the view that the actions of the Defendants are likely to frustrate the mandate of the FSC.

[42] The Claimant is a public body and has sought declarations and substantive reliefs which is provided for in Rule 56.1. The Claimant herein has sought in addition to two Declarations, Orders restraining and/or compelling the Defendants to do certain things. In the Amended Fixed Claim Form they also seek an order that the Temporary Management be allowed to be completed in accordance with the FSC Act. It would therefore not be expected that the cause of action would be spelt out in the same way as in a matter for breach of contract or breach of tort for example. The Claim herein is premised on the fact of the alleged breaches of statutory duties under the FSC Act made by the 1st and 3rd Defendants. They content that the 1st Defendant had an obligation to conduct its operations in accordance with the law, including observing and upholding the Securities Act and the FSC Act and had a fiduciary duty to its customers including but not limited to a duty to (i) act in the best interest of its clients, (ii) act in good faith and (iii) not to secret or otherwise facilitate fraudulent transactions and/or dealings in its operation.

[43] The further breaches identified included a breach of Directions given by the FSC, where the 1st and 3rd Defendants caused a Special Resolution to be filed at the Companies Office of Jamaica on January 16, 2023 and appointed the 2nd Defendant as Trustee and purported to conduct a Members Voluntary Winding up in respect of the 1st Defendant. By carrying out these actions, the 1st and 3rd Defendants acted in contravention of the FSC's Directions and the FSC Act. They are also alleged to have

declared solvency when they ought to have known that the 1st Defendant was insolvent or were reckless as to whether or not the 1st Defendant was solvent.

[44] The question for me is whether the essential elements of a cause of action have been satisfied. When the entire Claim is scrutinized, I am of the view that the (i) the Claimant has prima facie established that by statute they have the right to regulate and supervise the 1st Defendants and its agents; (ii) that the Defendants owe a duty to act in accordance with the law; (iii) that they are seized with information that the Defendants have acted in breach of their duty; (iv) that the Court has the power to declare rights in accordance with the provisions of the FSC Act and (v) if they prove their case the Court has the power to grant them relief/reliefs. In these circumstances, I would be hard pressed to say that there is no sufficient cause of action pleaded.

Is there a serious issue to be tried?

[45] Ms. White on behalf of the Claimant submitted that the application for injunctive relief discloses a serious question to be tried, as such it would be just and convenient for the Court in the exercise of its discretion to maintain the interim injunctive relief. She submitted that it is clear that if the Defendants' actions were allowed to proceed, the injunctive relief and Temporary Management instituted by the FSC would become redundant. SSL's assets would then become vested in the purported trustee who would then investigate, take control of whatever assets are left and produce report for the creditors. This, Ms. White submits, would defeat the provisions of the FSC Act that give rise to the Temporary Management and eclipse the FSC's statutory function.

[46] Ms. White further submitted that the injunctive relief has been put in place to protect whatever assets remain and to allow the Temporary Management to be completed and for the FSC to submit its findings within the 60-day period. She argued that the continuation of the order for injunctive relief until the hearing will not affect the Defendants' positions one way or the other as it does not affect the liability of SSL's creditors. She added that the appointment of the Trustee cannot seek to circumvent the statutory role of the FSC as a regulator.

[47] She expressed that these are serious issues to be tried due to the great prejudice which will be sustained if the Defendant were to be allowed to wind up the company, liquidate its assets and liabilities and dissipate the funds before a thorough investigation has been completed.

[48] Kings Counsel Mrs Hay on behalf of the 1st and 2nd Defendants contended that on the face of the claim, there is no serious issue to be tried and that the Claimant's claim has no real prospect of success and there are no triable issues between the Claimants and the Defendants. She relied on **Re Lord Cable (deceased) Garratt and others v Waters and others** [1976] 3 All ER

> *"On any claim for an interlocutory injunction the court must still, as a first step, consider whether the evidence available to the court discloses or fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial; if the available evidence fails to disclose this, the motion must fail in limine and questions of balance of convenience will not fall to be considered at all".*

[49] She further submitted that the entire basis of the claim is on spurious grounds as there is no statutory right to bring the Claim and nothing to sue for. The Companies Act allows for the appointment of a Trustee and for declarations to be made speaking to solvency. The directors had a reason to act in the way they did. The way in which the Trustee was appointed is recognised by the Companies Act which also recognises the appointment and the acts of the Trustee to be valid. She submitted that the actions of the Defendants are in accordance with the provisions of the Companies Act.

[50] Mrs Hay argued that the effect of this injunctive relief grants the whole claim as it prevents the Trustee from carrying out his statutory duties and so if granted would permanently neutralize him and so the court should examine more closely the merits of the matter. She relied on the decision of **Television Jamaica Limited v CVM Television Jamaica Limited** [2015] JMCC COMM 18.

[51] Kings Counsel Mr. Peter Champagnie on behalf of the 3rd Defendant also argued that there is no serious issue to be tried and no material before the court to demonstrate that the claim is one with a real prospect of success. He pointed out that the affidavit

evidence of the Claimant is “inventing hypotheses of fact” and notional risks only. He relied on the authority of **Brian Morgan (Executor of the Estate of Rose I Barrett) v Kirk Holgate** [2022] JMCA Civ 5 where Brooks JA emphasized the need for the applicant to adduce sufficiently precise factual evidence to satisfy the court that he has a real prospect of succeeding in his claim for a permanent injunction at the trial.

[52] I thank both Kings Counsel and Counsel for the Claimant for directing my attention to the very useful authorities that they have relied on. The task is now mine to decide whether taking into account the established law and the material presented there is a serious issue to be tried and the approach that I will employ in making this determination. The principles outlined by President Brooks in the **Brian Morgan** case is consistent with that outlined in the **American Cyanamid** case which emphasizes that in order to succeed in an application such as this the applicant must first establish that there is a serious issue to be tried which simply means that the claim is not frivolous or vexatious and that the applicant has some prospect of succeeding. Lord Diplock also provided guidance on the approach to be employed at this stage in these terms:

> *“It is no part of the Court’s function at this stage of the litigation to resolve conflict of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide questions of law which call for detailed argument or mature considerations. These matters are to be dealt with at the trial.”*

[53] The Privy Council in the **Olint** (supra) decision explained further how to go about deciding this question Their Lordships decided that an application for an interlocutory injunction must satisfy the Court as to whether there is a serious issue to be tried and whether the balance of convenience favours the grant, and that if the applicant fails on either, the injunction should be refused.

[54] The court has expressed that in cases where the injunctive reliefs satisfy the entire claim the court should examine far more closely the merits of the case. The orders sought at this stage could be categorized as including freezing orders, restraining and compelling orders whereas the claim seeks Declarations and other reliefs in addition. I would therefore not venture to say that the order if granted would satisfy the entire claim however it is a counsel of prudence here to adopt the position of examining closely the merits of

the case. This position suggested by Mrs Hay was endorsed by my brother Batts J in the **Television Jamaica Limited** case (supra) where at paragraph 4 and 7 of the judgment he opined as follows:

> *In a nutshell in this case injunctive relief at this stage, or its refusal, will give to one side or the other the substantive relied that party requires. There will be only one 2015 IAAF World Games….[5] In a case such as this, where the injunctive relied will, for all practical purposes, give the entire remedy, a court at this interlocutory stage has to examine far more closely the merits of the matter. Findings of facts, without witnesses being tested in cross-examination, are to be eschewed, however the court has to form a view as to the likelihood or otherwise of success at trial of one party over the other. In other words a determination as to the relative strengths of each party's case on the facts and on the law becomes of cardinal import when deciding, in these circumstances, whether or not to grant interlocutory relief.*

[55] In determining the question as to whether or not there is a serious question to be tried, it is essential to have a grasp of what the Claimant's case is about and what the Defendants' response to it is. There are certain matters not in dispute such as that the FSC is a creature of Statute and that section 3 of the FSC Act provides for the establishment of the FSC which shall be a body corporate. Section 6 (1) of the Act sets out the functions of the FSC and provides that for the purpose of protecting customers of financial institutions, the Commission shall among other functions supervise and regulate prescribed financial institutions. Section 6 (2) provides that for the purpose of the discharge of its duty under subsection (1), the Commission shall take such step as are necessary to ensure that appropriate standards of conduct and performance are maintained in prescribed financial institutions in accordance with this Act, any rules or regulations made hereunder or any relevant Act.

[56] It is not being contested that the Claimant acted in accordance with the FSC Act when on January 17, 2023 it assumed temporary management of the 1st Defendant. The Defendants have not disputed this however, they are opposed to these orders as they contend that they have been cooperative with the Temporary Manager. They have also

argued that their actions are consistent with the provisions of the Companies Act which is the law which governs the SSL in its capacity as a corporate body. They maintain throughout that they have been cooperative and although they suggest that both entities can work together towards resolution, they expressed that in light of the appointment of the 2nd Defendant as Trustee the role of the FSC as Temporary Manager is redundant.

[57] It is not for me to attempt to resolve all the conflicts that have been raised. These conflicts would have to be addressed during the trial process and could not be decided here. What I have sought to do is to extract what seems to me to be some of the issues that would arise if the matter were to go to trial. Some of the issues a court would have to determine are as follows:

1. *Whether the actions of the 1st and 3rd Defendants in appointing the 2nd Defendant as trustee was in breach of the Financial Services Commission Act and the directions of the Claimant issued on January 12, 2023?*

2. *Whether the actions of the 3rd Defendants and others in applying for a members' voluntary winding up of the 1st Defendant was in contravention of the Financial Services Commission Act?*

3. *Whether the actions of the 1st and 3rd Defendant in facilitating the making and in making a declaration of insolvency when they knew or ought to have known that the 1st Defendant was insolvent were reckless and contrary to the law?*

4. *Whether if the 2nd Defendant is allowed to carry out his functions as trustee, this would frustrate or defeat the Claimants appointment as temporary manager?*

5. *Whether the actions of the 2nd Defendant are in direct contravention with an opposition to the role of the Claimant as temporary manager?*

6. *Whether the Court in any of those circumstances can order the actions of the Defendants null and void?*

7. *Whether the office of Trustee 'trumps' that of a Temporary Manager*

8. *Whether the Trustee and the Temporary Manager can word in tandem with each other*

9. *Whether a collaborative approach would be contrary to the mandate of the FSC Act.*

10. *Whether the actions taken by the Defendants are in accordance with the provisions of the Companies Act and therefore permissible?*

[58] On examination of the material before me it is clear to me that the Claimant's case is neither spurious nor fanciful. The Claimant's position finds support in the FSC Act which sets out its powers and the obligations towards the organisation that is being managed. They have alleged breaches on the part of the Defendants of their statutory duties and obligations under the FSC Act. Their claim could not be said to be entirely unfounded given the responses of the Defendant in seeking to justify their actions. This is a matter involving what has been described as a massive fraud, the law has provided for mechanisms under which this can be investigated, and this is simply what the FSC is trying to do.

[59] It is not for the Court at this stage to arrive at any findings of facts as that would be a matter to be dealt with at trial. However, even if the Claimants were to establish the facts as they have pleaded them there is a high probability that at trial they would be found to be entitled to the reliefs sought. I therefore conclude that there is a serious issue to be tried and that the Claimant has a real prospect of success in the claim.

Whether there has been material non-disclosure on the part of the Claimant?

[60] Kings Counsel Mrs. Hay submitted that there has been non-disclosure by the Claimant in law and in facts. With respect to the law, she advanced that counsel for the Claimant had an obligation on the Without Notice Application to bring to the Court's attention the applicable law. She continued that had the provisions of the Companies Act been brought to the Court's attention it would have been clear that the 1st Defendant had simply done what it is entitled to do under Law and the Court would have found the matter to be misconceived.

[61] She argued that there was blatant misleading of facts by the Claimant and that the Claimant's assertions that the 2nd Defendant has not been cooperative is untrue. Further, that the Claimant's assertion in the Fixed Date Claim Form that the Defendants are

impeding the Claimant in applying to wind up and appoint a Trustee and purporting to defeat the Claimant as temporary Manager is not accurate. She drew the Court's attention to paragraph 15 of the Fixed Date Claim Form which gives the impression that the steps taken by the Defendants were reactive although the Trustee was in place before the appointment of the Claimant as Temporary Manager.

[62] She went on to highlight several other instances of non-disclosure, most of which were taken from the affidavit evidence of the 2nd Defendant. Further that the 2nd Defendant has refuted the contention of his lack of cooperation and pointed out that there was no mention of the meeting that took place on January 16, 2023 with Mrs Barrett present and asking questions and that the issues concerning receivership, trusteeship and plans going forward were discussed and nothing was said about temporary management. Mrs Fuller-Barrett according to him did not mention a meeting with the Temporary Manager at SSL where the 2nd Defendant told the staff of the 1st Defendant to cooperate with the FSC. Kings Counsel went on to highlight that there was no mention that the Special Resolution appointing Mr. Campbell as trustee had been send to the FSC prior to the meeting on January 16, 2023 and no mention of multiple communication between January 12 and January 16, 2023 between the trustee and the FSC regarding Mr. Campbell's appointment going formal. As indicative of his level of cooperation and collaborative approach, he has also expressed that the assertions in the Affidavit in Support of the Fixed Date Claim Form are untrue as he was working with them and even refrained from advertising when they warned him not to.

[63] Kings Counsel also identified instances of non-disclosure emanating from Mrs. Fuller-Barret who failed to disclose to the court the fact of other proceedings filed by another creditor in which Mrs Fuller Barrett appears as counsel. She also does not mention that on January 24, 2023 Mr. Campbell sent an email proposing a way forward jointly under the supervision of the Court followed by a letter on January 25, 2023. They have essentially sought to exclude everything that shows conversation.

[64] Kings Counsel submitted that the law has been clear as to the treatment of material non-disclosure in respect of ex parte applications. She cited Warrington LJ in **Rex v**

Kensington Income Tax Commissioners ex-parte Princess Edmond de Polignac [1917] 1 KB 486 at page 509:

> *"It is perfectly well settled that a person who makes an ex parte application to the court – that it is to say, in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosures of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain an advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and required no authority to adjust it."*

[65] She went on to cite several other authorities to support her position that an application for injunctive relief places upon an applicant an extremely heavy duty of candour so that there can be a proper exercise of discretion. This included **Brink's Mat Ltd v Elcombe** [1988] 1 WLR 1350 where the dicta of Gibson LJ at pages 1356-1357 was:

> *"(3) The applicant must make proper inquiries before making the application: see **Bank Mellat v Nikpour** [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (4) The extent of the inquiries which will be held to be proper; and therefore necessary must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant….and (c) the degree of legitimate urgency and the time available for the making if inquiries…*
>
> *If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure…is deprived of any advantage he may have derived by that breach of duty" see per Donaldson L.J. in **Bank Mellat v Nikpour**, at p 91 citing Warrington L.J. in the Kensington income Tax Commissioners', case [1917] 1 K.B. 486, 509".*

[66] She relied heavily on the decision of Sykes J. at paragraph 4 in the case of **Assets Recovery Agency v Upert Smith and others** [2015] JMSC Civ 168 who opined:

> *"The ex parte applicant is not only under a duty to state all the material facts known to him but he must make all reasonable enquiries that may be relevant to the application before the application is actually made to the judge so that he has all necessary information to assist the judge who is called upon to exercise the discretion to grant a without notice order."*

[67] Kings Counsel further submitted that the Court is to receive all information both for and against the grant of the relief sought and where the information not disclosed is material, the order must be discharged, for that reason, without even considering the merits of the order. Even innocent non-disclosure from a statutory body may justify the discharge of the injunctive order and on that point she relied on **Assets Recovery Agency v Michael Brown et ors** [2015] JMSC Civ 248 at paragraph 24 which states:

> *"So the duty is high and onerous and must not be lightly taken. What is pellucid is that for over one hundred years in none of the leading cases both in Jamaica, England and elsewhere has the strength-of-the-case submissions overridden the duty of full, frank and fair disclosure. Where there is material non-disclosure then an examination of all facts and circumstances takes place with a view to deciding how best to treat with the situation. Where the injunction has been continued or re-granted in many of those cases the court was able to find that the non-disclosure was innocent, or the circumstances had a significant impact on the ability to meet the full, frank and fair disclosure standard such as acting under significant time constraints."*

[68] According to Kings Counsel there is no apparent reason why the application for injunctive relief was made without notice to the parties and that in order to justify that the circumstances must involve some risk of dissipation or harm which is absent from the case at bar. She also referred to paragraphs 24 and 26 of **Karibukai Limited v Sky High Holdings Limited et *ors*** [2022] JMCC Comm 38 where Batts J discussed the effects of non-disclosure on ex parte applications. The duty is a high one, breach of which leads to peremptory discharge of the orders.

[69] Kings Counsel Mr. Champagnie adopted the submissions made by Mrs Hay on the point of disclosure but also commended to the court the case of **Rogachev v Groyainov** [2019] EWHC 1529 (QB), which summarized the principles of full and frank disclosure and the heightened obligations where the application is made without notice.

[70] Counsel Ms. White sought to distinguish the authorities relied on by Kings Counsel and argued that the **Upert Smith** case is distinguishable as the applicants therein had three months to consider the information whereas the change of position in the instant case occurred within days. She relied on the authority of **Les Ambassadeurs Club Limited v Mr. Salah Hamdan Albluewi (also known as Sheikh Salah Hamdam Albuewi and Mr. Salah Hamdan Albelwi** [2020] EWHC 1313 QB where the court said the following:

> *"...that there was a distinction between …a case where there was plainly no basis for making an application for a freezing order and,…a case where there was an argument to put but the result was that, when the evidence was seen as a whole, there was not sufficient evidence to establish a real risk of dissipation, the present case falling into the latter category; that it was relevant to take into account the non-disclosure and inter relationship with whether risk of dissipation was established; that a factor was the importance of the duty of disclosure (in without notice applications) being upheld by its breach having consequences, often including indemnity costs; that, however while all of that was highly relevant it was not decisive, the law and practice being summarised accurately in Gee on Commercial Injunctions ….para 24-044 as follows:*
>
> *"Although material non-disclosure on the ex parte application is a breach of the claimant's duty to the court, there is no general practice of the court that where there has been non – disclosure, and costs are to be awarded, they ought to be an indemnity basis. However, the fact that there has been material non-disclosure is plainly a relevant factor to be taken into account on the question of costs and is capable of justifying an award on this basis, and such an order will usually be made if the non-disclosure was deliberate or culpable; and that weighing the relevant factors, taking full cognisance of the importance of full and frank disclosure as a relevant factor while recognising that the claimant's non-disclosure had not been deliberate, the present case was not out of the norm or something outside the ordinary and reasonable conduct of proceedings so as to merit an indemnity costs order."*

[71] Counsel highlighted the response of Mrs Fuller Barrett wherein she asserted that that there was no material non-disclosure on the part of the Claimant. She directed the Court's attention to the letter dated January 13, 2023 which made it clear that it was between January 15 and 16 everything changed when the 1st Defendant proceeded to appoint a trustee which means that all the property of the 1st Defendant would vest in the

2nd Defendant. Based on the powers of a trustee it is important that the trustee has to be restrained if the Claimant is to be able to carry out its statutory mandate. She contended that the FSC maintains and seeks to communicate to the Court that the only discussions it had with SSL was in terms of a receiver. Contrary to discussions, SSL appointed a trustee which was not in keeping with discussions surrounding Temporary Management.

[72] Counsel Ms. White went on to say that if the court finds that there was in fact non–disclosure, it was neither deliberate nor culpable and the evidence supports the Claimant's contention concerning the 1st and 3rd Defendants' dishonesty, the contravention of the Claimant's Directions and the threat of dissipation, which has not been denied by the 1st and 3rd Defendants and cannot be seriously and/or credibly challenged by the 2nd Defendant. She further submitted that where the injunctive relief is discharged, costs should be assessed and ought not to be granted on an indemnity basis.

[73] The concerns raised by both Kings Counsel require thorough examination of both the facts presented and the law. Kings Counsel is correct in that a material non-disclosure in an ex parte application is a serious matter and ought to be treated with the serious consequence of a discharge of the injunction and in some cases without regranting it. When an ex parte application is made the applicant must make the fullest possible disclosure of all material facts and must act with a spirit of candour. I am of the view that the bar is even higher in the case of a government entity and where the law is concerned, in the case of counsel for the crown who is always a minister of justice.

[74] The authorities relied on by both Kings Counsel in the matter and counsel for the Crown have greatly assisted the court in determining how to treat with this issue. In the **Karibukai** case Batts J at paragraph 24 of the judgment clearly pointed out that the duty of full disclosure applies to ex parte applications generally and is not limited to applications for an injunction. This case has to do with a sale that was being impugned and the applicant complained that one of the respondents bid more than once but failed to disclose the fact that it has also bid more than once. Batts J found that this was a material non-disclosure and justified the setting aside of the order whilst pointing out that this did not mean that an injunction until trial will not be granted after the inter partes hearing. In this case it was plain to see that the nature of the non-disclosure was on a material issue.

[75] In the **Kensington** case the court condemned an instance of non-disclosure of material facts. The applicant in an Income Tax Application where the question of residence was important, swore to an affidavit in which she indicated not having been in the United Kingdom since the year 1887 with the view or intention of establishing residence therein, nor having resided there for a period equalling six months in one year. It was later found that this was not true and the court described this as a deception on the court referring to what the applicant had done as the suppression of material and endorsed the general rule at on an ex parte application uberrima fides is required and unless that can be established the court ought not to go into the merits of the case but simply say "We will not listen to your application because of what you have done".

[76] These strict principles of non-tolerance to material non-disclosure were also demonstrated in the **Upert Smith** case where Sykes J (as he then was) exalted the principle and stipulated that "it protects the courts' powers from misuse and abuse and reminds ex parte applicants of the high duty of candour placed on them. The principle does not depend on whether the applicant is deliberately deceiving the court however if there is evidence of deliberate deception, it makes the case for discharge irresistible. He added the following at page 4 if the judgment:

> *"the ex parte applicant is not only under a duty to state all the material facts known to him but he must make all reasonable enquiries that may be relevant to the application before the application is actually made to the judge so that he has all necessary information to assist the judge who is called upon to exercise the discretion to grant a without-notice order. "*

[77] In **Upert Smith** information was received in September 2014 that he was arrested and charged in August 2014, however the actual fact was that the criminal charges against him were terminated in August 2014 which meant that at the time the information was received he was no longer on a criminal charge. Sykes J (as he then was) found that the disclosures were fundamental and discharged the restraint order without re-imposing it.

[78] Sykes J (as he then was) alluded to the then recent statement from the Court of Appeal in the judgment of Morrison JA in **Venus Investments Ltd v Wayne Ann Holdings Ltd.** [2015] JMCA App 24 at paragraph 25:

> *"There is therefore an unbroken line of authority in support of the proposition that, on a without notice application, the applicant is obliged to act in good faith by disclosing all material facts to the court, including those prejudicial to its case, and that failure to do so may lead to an injunction being discharged. The duty extends not only to material facts known to the applicant, but also any additional facts which he would have known had he made proper enquiries. Material facts are those which it is material for the judge hearing the without notice application to know and the issue of materiality is to be decided by the court, and not by the assessment of the applicant or his legal advisers. Nevertheless, there is a discretion reserved to the court to make a fresh order on terms, notwithstanding proof of material non-disclosure."*

[79] Sykes J (as he then was) went on to caution that the court must be alive to all the circumstances of the case and that matters such as whether counsel received instructions very late not only in terms of time of day but in relation to the harm that the applicant is trying to forestall. He took into account that the applicant had three months between the receipt of relevant information and the application and found that the degree of urgency that may lead a court to take a benign view of the non-disclosure did not arise in that case.

[80] The **Michael Brown** case was also similar to the **Upert Smith** matter in that there were assertions that the defendant was charged with offences when the true position was that the charges were dropped but this was not known to the applicant. This too was not a case where the facts were still unfolding at a rapid pace and not all material facts were known but not a case where the facts were difficult to unearth and so the restraint order was discharged.

[81] So important is this point that there seems to be no shortage of authorities on the issue. They present a good point for me to delve into the issues here of firstly whether there has been non-disclosure on the part of the Claimant and whether the non-disclosure was material.

[82] An examination of the Fixed Date Claim Form is necessary. The Fixed Date Claim Form did not appear to be setting out a chronology of events but rather presenting allegations under specific headings. When paragraph 15 is examined, at first it does give the impression that the Claimant is saying that the Defendants acted to frustrate an already established Temporary Manager, however that paragraph comes under the heading 1st Defendant's breaches and should not be read in a vacuum, but rather in tandem with the other paragraphs. In the paragraphs that follow 16 and 17 under the heading 'The Claimant's Temporary Management', it is pointed out that the Claimant assumed temporary management on the 17th January. In the paragraphs following, under the heading 'Frustration of the Claimant's Temporary Management', the impression is given that the steps taken by the Defendants were in fact reactive and but although the impression may be given on first glance, when the affidavits are carefully examined this was not expressly stated so this makes it ambiguous. I could not equate that to the category of misleading information or deception.

[83] What is really critical is what was set out in the affidavit in support that is where evidence is found. It is there that a sort of chronology is provided. Para 14 suggests without any details being given, that there were discussions in relation to receivership and that despite that the 1st Defendant took the steps it did on January 16 and 17, 2023. It is after that that Mrs. Fuller-Barret indicated that the Claimant exercised its powers to assume temporary management on January 17, 2023. Her affidavit does not reflect the kind of details relating to meetings and conversations had when compared to the details provided by the 2nd Defendant. This lack of detail has to be considered in light of the time period the Claimant has to prepare the matter to come before the Court for their application for the ex-parte injunction.

[84] To say that there was material non-disclosure is a serious allegation and must be strictly and clearly proven. I have found the cases referred to me to be distinguishable. Firstly, in most if not all of them the matters complained of could be more aptly described as "untruths". They were untruths that were of great relevance to the main issues before the court and would have been determinative of the issue raised. One of the other distinguishing features with at least the **Upert Smith** and the **Michael Brown** cases is

that the events had occurred over a longer period of time. In the case at bar the events were unfolding quickly. It would have been virtually impossible to bring every act, correspondence and conversation to the attention of the court. The urgency of the matter is a factor when contending with how to deal with the issue of non-disclosure.

[85] Firstly, I do not agree that there has been material non-disclosure of the relevant law however I am of the view that there is some non-disclosure as to the facts. In the affidavit evidence presented, in particular that of Mr. Campbell, there have been some instances of disclosure pointed out which have not been refuted by the Claimant. It is clear to me that when the entire case is considered there were several omissions and many things not said and on that basis I agree there has been some non-disclosure. However, it does not stop there as I must determine whether the non-disclosures were material in the context of all that was taking place as the test of materiality is for the court to decide.

[86] It is therefore important to fully appreciate the meaning of "material" in the context of non-disclosure. Material means having real importance or great consequences. The test of materiality would be a circumstance that would have had an effect on my mind in the context of the issues raised. I found the case of **Paraskevaides v Citco Trust Corporation and ors**. VG 2020 CA 6 from the British Virgin Islands Court of Appeal to be instructive on the question of materiality. This case concerned the discharge of an interim injunction on the grounds of material non-disclosure. On appeal the Court of Appeal allowed the appeal and ordered that the injunction should be re-granted. I found the court's guidance at paragraph 35 on how to treat with the question of materiality to be quite useful:

> [35]… Further, the materiality of evidence should not be confused with the volume of evidence and should instead be elided with relevance. The emphasis must be on the overall picture given to the court which as a result of presentation of the evidence and argument in a fair and even-handed manner in all material respects. In that connection, a party seeking an urgent temporary solution to a genuine and pressing problem may not need to overwhelm

> the court with evidence to show the need for such relief. There is still some scope for discretion as to what is needed to present the fair overall picture to the court.

[87] Having considered all the evidence presented and the submissions advanced I do not find there to be a blatant misleading of facts found but rather omissions and some non-disclosure. I am however not convinced that the non-disclosure was with respect to facts that were material to the issues. Despite what Mr. Campbell has suggested that the fact that there was co-operation on his part was material, I am not in agreement as I am of the view that based on the mandate of the FSC there is very limited scope for his co-operation. He is of the belief that he can continue with his appointment in the face of the Temporary Manager however, I agree with the Claimant's contention that the role of the trustee and the Temporary Manager are incompatible. From the tone of the affidavit of Mr. Campbell he seems to be convinced that he can fulfil his appointment even in the face of the Temporary Management and that the Members Voluntary Winding Up could have the effect of defeating the Temporary Management. I find his position to be misconceived.

[88] I agree with the Claimant that it would be inappropriate for the 2nd Defendant to be operating simultaneously with the Claimant. There is no provision in the FSC Act for there to be any act interfering with the Temporary Management as the FSC should be allowed to conduct their mandate in an unfettered way. Therefore, any matters or letters or conversations demonstrating the 2nd Defendant's level of co-operation would not have been material to the main issue.

[89] I also agree with the Claimant's position that this is not about the 2nd Defendant's mandate and whether his scope of work is appropriate in normal circumstances or whether he is in a better position than the receiver to manage the company. It is not a contest between the receiver and trustee, nor whether the Trustee is in a better position than the receiver or whether the 2nd Defendant is the appropriate candidate for receivership. It is not about him or his business prospects. There seems to also be some misconception on the part of the Defendants about a collaborative approach. If this was a situation requiring collaboration, then the Defendants' contentions may have had some

merit but as far as the Claimant is concerned there is no foreseeable collaboration between them and the Defendants.

[90] Based on the mandate of the FSC, it is not their intention to work with the Trustee as they view the appointment of the trustee as being inimical to the Claimant's position. The very statement of the 2nd Defendant to the Claimant that their appointment was redundant would no doubt have been a matter of great concern and was a catalyst to the application for the injunction. The Claimant has satisfactorily explained the non-disclosures in the context of what was important for my consideration. It is because of the powers of a trustee why he has to be restrained if the Claimant is to carry out its mandate.

[91] I have also found there to be no non-disclosure of the applicable law and I am not of the view that the provisions of the Companies Act provide an atmosphere where the parties can work together or that when read together with the FSC Act there is room for collaboration. When I consider the overall picture given to the court, I was not of the view in a matter of seeking an urgent solution that they would have been required to overwhelm the court with evidence, but rather it was their duty to present the facts accurately and present a fair overall picture to the Court. I therefore find that the non-disclosures alleged in this case were not material enough to warrant setting aside the original interim injunction nor to prevent the Court from considering an extension.

Whether Damages would be an adequate remedy and whether the FSC being a government agency is required to give the usual undertaking as to damages.

[92] Ms. White submitted that damages would not be an appropriate remedy for the Claimant given the statutory role of the FSC to supervise and regulate prescribed financial institutions, promote stability and public confidence in the operations of such institutions. In order to do so the FSC must take such steps as are necessary to ensure that the appropriate standards of conduct and performance are maintained in prescribed financial institutions in accordance with the FSC Act. She submitted that the Claimant is seeking to enforce the law by the only means available under the governing statute and that the 1st and 2nd Defendants by their actions threaten to breach the valid exercise of the FSC's powers under the FSC Act.

[93] It has not been seriously contested that damages would be an adequate remedy. The FSC is a statutory body with a mandate to fulfil. Its role is to supervise and regulate prescribed financial institutions and promote stability and public confidence in their operations. There is no issue of any damages that would be adequate to compensate the Claimant if it were hindered from carrying out its functions and duties under the FSC Act.

[94] Most of the submissions were addressed to the issue of whether or not the Claimant should be required to give an undertaking as to damages. On that issue counsel for the Claimant sought to rely on the principle in **Hoffman-La Roche & Co. AG and others v Secretary of State for Trade and Industry** [1974] 2 ALL ER 1128 concerning undertaking as to damages. s

> *Where the Crown was engaged in litigation for the purpose of ascertaining a proprietary or contractual right, the ordinary rule applied and on a motion by the Crown the court would not grant an interlocutory injunction unless the Crown chose to give the usual undertaking as to damages. Where however the Crown has commenced proceedings for an injunction for the purpose of enforcing the law in the manner prescribed by statute, it was for the person against whom an interlocutory injunction was sought to show special reason why justice required that it should not be granted or should only be granted on terms. Unless and until a statutory instrument had been declared to be ultra vires by a final judgment in an action in the courts, the instrument was to be treated as part of the law and enforced accordingly.*

Ms. White further averred that aspects of Lord Diplock's judgment are useful for consideration (see page 1155 of the House of Lord's judgment)

> *"Even where a strong prima facie case of invalidity has been shown on the application for an interim injunction it may still be inappropriate for the court to impose as a condition of the grant of the injunction a requirement that the Crown should enter into the usual undertaking as to damages. For if the undertaking falls to be implemented, the cost of implementing it will be met from public funds raised by taxation and the interest of the members of the public who are not parties to the action may be affected by it. The instant case has the exceptional feature that the greater part of the drug supplied by the Roche Group that are the subject of the order are supplied through the National Health Service and paid for ultimately out of public funds. To the effect of this on the Crown's claim for an interim injunction I shall revert later; but the balance that it bought by patients*

out of their own pockets affords an example of how the interest of members of the public who are not parties to the action could be affected by an undertaking as to damages if it fell to be implemented.

…Accordingly, I agree with the majority of your Lordships that the Secretary of state is entitled to the interim injunction that he claimed without giving any undertaking as to damages unless the Roche Group have succeeded in showing a strong prima facie case that the order sought to be enforced by the injunction is ultra vires. It is not for the Secretary of State to show that the Roche Group's case cannot possibly succeed, as Walton J thought it was. It is for the Roche Group to show that their defence of ultra vires is likely to be successful.

I agree with the majority of your Lordships that they have signally failed to do this."

[95] Counsel further pointed out that **Hoffman - La Roche** (supra) was followed in **Financial Services Authority v Sinola Gold plc and others (Barclays Bank *plc* intervening** [2013] Bus LR 303. In that matter, the Financial Services Authority alleged that the defendants were involved in a fraudulent share scheme and obtained a freezing injunction against them. The injunction contained cross - undertaking as to damages to any third party affected by the freezing order. On its application to continue the injunction the authority sought a variation of the order so that it only undertook to pay the reasonable costs, and not any other losses, incurred by third parties in complying with the order. The defendants' bank, which had been served with the order, intervened to oppose the variation. The Judge accepted the bank's contentions and continued the freezing order with the undertaking in favour of third parties as originally framed. The Court of Appeal removed the undertaking and the UK Supreme Court dismissed the bank's appeal holding:

"...there was a general distinction between private litigation and public law enforcement action; that in private litigation, a claimant acted on its own interests and had a choice whether to commit its assets and energies to doing so and if it sought interim relief which might, if unjustified, cause loss or expense to the defendant, it was usually fair to require the Claimant to be ready to accept responsibility for that loss and expense; that different considerations arose where a public authority was seeking to enforce the law in the interest of the public generally, often in pursuance of a public duty to do so, and enjoyed only the resources which had been assigned to

> *it for its functions; that it remained the case that English Law did not confer a general remedy for loss suffered by administrative law action; that the fact that an injunction might later be discharged did not signify that there had been any breach of duty on the public authority's part in originally seeking it; that there was no significant distinction between the protection of a defendant and a third party, as in either case what was covered by the cross – undertaking was loss caused by the grant of an injunction where the persons incurring the loss was essentially innocent; that accordingly, there was no general rule that an authority like the Financial Services Authority acting pursuant to a public duty should be required to give such an undertaking whether at the without notice or the notice stage of proceedings, unless circumstances appeared which justified a different position: and that, in the present case, there were no particular circumstances which did justify such a change of position…"*

[96] Counsel submitted that the injunction should continue without the Claimant giving an undertaking as to damages because if the undertaking falls to be implemented, the costs of implementing it will be met from the public funds raised by taxation and the interest of members of the public who are not parties to the action or to the fraud will be affected by it.

[97] Kings Counsel Mrs. Hay argued that it is just and convenient for the Claimant to give the usual undertaking as to damages in accordance with the provisions of CPR Rule 17.4(2) which provide that "Unless the court otherwise directs, a party applying for an interim order under this rule must undertake to abide by any order as to damages caused by the granting or extension of the order". She also contended that the 2nd Defendant is in a peculiar position based on his appointment where if he fails to perform his duties he could be subject to pecuniary penalties.

[98] The main contention here has been whether as a government agency the Claimant is required to give the usual undertaking as to damages. Although the Claimant is now opposing any undertaking as to Damages in their application they gave the usual undertaking as to damages.

[99] In **Hoffman-La Roche** Lord Diplock provided guidance as to how this issue was to be approached. No where does he state any general prohibition against the crown being required to give an undertaking as to damages but rather he makes it clear that the

court has a discretion. In the Notice of Application for the injunction at paragraph 11 the Claimant gave the usual undertaking as to damages. When this was stated the Crown would have been aware of the guidance of Lord Diplock in the Hoffman case but proceeded to give their undertaking nonetheless. It suggests to me that there is no absolute rule that the crown is not required to give an undertaking as to damages and that it must depend on all the circumstances of the case.

[100] The Claimant having given its undertaking as to damages in a bid to secure the ex parte injunction has failed to satisfy me that at this point they should be allowed to withdraw it. The Claimant is therefore required to give the usual undertaking as to damages.

Where does the balance of convenience lie?

[101] Counsel for the Claimant reminded the Court that the **American Cyanamid** case establishes that unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

[102] Counsel also emphasized that Lord Diplock in **American Cyanamid** case explained that where the various factors appear to be at least evenly balanced, *"it is a counsel of prudence to take such measures as are calculated to preserve the status quo". S*he continued to argue that the balance of convenience favours maintaining the injunctive relief. Given the seriousness of the allegations of fraud which were revealed to the Claimant which led to the issuance of Directions on January 12, 2023 and also the issuance of the Notice to assume Temporary Management of the 1st Defendant, it is necessary for the Claimant to determine whether or not the extent of the fraud has in fact affected the financial viability of the company and its ability to pay creditors/investors and uncover whether false statements were made regarding the affairs of the company. This, she submits, is the path which will do justice to all the parties. Moreover, the interests of the public is seriously at risk should the injunctive relief not be maintained and this far

outweighs any prejudice the Defendants may experience in awaiting the determination of the Court of the significant issues raised in respect of this matter.

[103] Counsel on behalf of the Claimant submitted that there is an abundance of evidence on the FSC's statement of case which supports the contention that it would be just and convenient for the Court to grant the injunction.

[104] On behalf of the Defendants, it was argued that the balance of convenience weighs against the grant of the interim injunction and pointed out that the reorganization of the 1st Defendant via the winding-up mechanism under the Companies act is not a variance with the public interest.

[105] It is always the aim of the court to do justice between the parties and so as has been up expressed in the **Olint** case by Lord Hoffman the Court should take a course of action that results in least prejudice to the parties on either side and to consider the prejudice the Claimant may suffer if no injunction is granted or the Defendant if it is in fact granted. If no injunction is granted it would mean that the 2nd Defendant could continue with his trusteeship and the process of winding up. If he completes that this may impact the nature of the assets the Company has. The Court would have to consider whether a reorganization under a trusteeship will better enable the investors to receive their investment. On the part of the Defendants, they would have to contend with the fact that potential capital injection may no longer be accessible in light of the restrictions and it may be that investors may withdraw their investments and so it may be prudent to stop the gap as soon as possible and try to save what's left from the damage.

[106] This is a matter in which allegations have been made concerning what has been described as a "massive fraud". The interest of the public and investors is priority. Given the seriousness of the allegations of fraud which were revealed to the Claimant and which led to the appointment as Temporary Manager of the 1st Defendant, it is necessary for the Claimant to be provided with the full opportunity to determine whether the extent of any fraud had or will affect the financial viability of the company and its ability to pay creditors or investors. It would not be in the interest of any of the investors that the winding

up of the company take place without a full investigation into all the affairs of the company nor is it in keeping with the spirit of the FSC Act.

[107] If the injunction were granted this would restrict the Defendants from continuing during the life of the injunction but it does not mean that they would never be able to do this in the future. The law has stipulated that the FSC has a duty to provide a report the Court within sixty days and so it is clear that the steps to be taken by the FSC would be subject to time limitations and not an indefinite exercise. This outweighs any prejudice the Defendants may suffer in having to await the determination of the matter. The balance of convenience weighs heavily in favour or the grant of the injunction.

[108] Based on the merits of the case it is prudent that the matter be ventilated at trial. The purpose of an injunction is to preserve the status quo and the current status quo should remain such that the temporary management of the Claimant can proceed unhindered and the Claimant can fulfil its statutory mandate.

Whether the Injunction should remain in place against the 3rd Defendant?

[109] In relation to the 3rd Defendant, Counsel for the Claimant stated that as a shareholder, Mr. Croskery stands to benefit from assets against any judgment which could be enforced as he is a beneficial owner and essentially the shareholders are the owners of the company. Generally, shareholders exercise their powers in general meetings through passing of resolutions. They have the ultimate decision making-power of the company. The number of shares held by the shareholder represents the size of his stake in the company and therefore dictates not only his voting rights, but also the proportion of any distribution made by the company. It then would be prudent to determine Mr. Croskery's equity in SSL from its Articles of Association to determine his voting powers. This determination would come from disclosure at the trial stage of the proceedings.

[110] Kings Counsel for the 3rd Defendant, Mr. Peter Champagnie grounded his submissions on firstly, a jurisdictional point that the Claimant failed to file an affidavit in support of its Fixed Date Claim Form filed on January 25, 2023 contrary to **Rules 8.2** and

8.8 CPR and secondly, that the 3rd Defendant ought to be released from the proceedings in circumstances where the Claimant, a government entity, discontinued the proceedings against other directors on the basis that they resigned as directors of SSL.

[111] Mr. Champagnie argued that since the matter was discontinued against the 4th and 5th Defendants, the matter should similarly be discontinued against the 3rd Defendant since he is no longer a director of SSL. Counsel emphasized that Mr. Croskery has no right and can exercise no control over the assets of SSL, therefore the injunction should be discharged against him. He further stated that Mr. Croskery's right is limited to that of a shareholder.

[112] Counsel relied on the authority **Earle Lewis & Anor v Valley Slurry Seal Co. & Anor** [2012] JMCA Civ App 39 which states:

> *"[6] It is clear to me that the applicants have no basis to retain possession of the pavers. As directors of the company, they have no claim of right which they can properly assert over the pavers. In addition to that, even if they are correct in asserting that VSS Caribbean has acquired an interest in the pavers, Mr. Earle Lewis, as a shareholder of that company, which is a separate legal entity, has no entitlement to possession of the company's property. Nor does he have any entitlement to assert any right on behalf of the company (see **Foss v Harbottle** (1843) 2 Hare 461)."*

[113] I have considered the submissions advanced on this point. With respect to the point made regarding jurisdiction, I do not find that that is relevant to the issues that I have to determine at this stage. Mr. Champagnie has suggested that the Claimant ought to discontinue the matter against the 3rd Defendant and that is also not an issue for the Court to contend with. That is within the purview of the Claimant. The issue is whether, in his new capacity as shareholder only, the injunction should be extended against him.

[114] As shareholder, the 3rd Defendant would have certain rights however the extent of this powers would depend on his standing as a shareholder. The 3rd Defendant relied on the case of **Earle Lewis and Carol Lewis v Valley Slurry Seal Co and Valley Slurry Seal (Caribbean) Limited** to substantiate his position that a shareholder has limited rights. In that case the court found that Mr. Earl Lewis as a shareholder of that company, which is a separate legal entity, has no entitlement to possession of the company's

property nor does he have any entitlement to assert any right on behalf of the company. This case put the position of a shareholder in a position where he is not able to act for the company. This case is distinguishable on the facts but it does provide some guidance.

[115] Under the provisions of the Companies Act, shareholders have certain rights to include (i) voting rights, (section 131) (ii) suing for misdeeds of the directors (section 212(3)a and (iii) receiving dividends (section 158) and sharing in the financial success of the company.

[116] The decision of **Salomon v Salomon and Co Ltd** [1897] AC 22 has long evinced the principle of a company being a different owner from its members and created what is often referred to as the legal fiction of the corporate veil, which is the recognition that a company has a legal personality separate and independent from the identity of its shareholders. The obligations of a company are therefore different from those of its shareholders, and shareholders are responsible only to the extent of their capital contributions, known as "limited liability". Shareholders are not responsible for the company's debt since the company is a separate legal entity. Similarly, the company's assets do not belong to the shareholders. A shareholder's entitlement would be determined by the size of his shares.

[117] Shareholders are to be distinguished from directors. Directors have different roles from shareholders. Directors are usually referred to as the directing mind and will of the company and they control the affairs of a company and carry out the company's various obligations. They oversee the company's daily management and have the legal power to act on behalf of a company. Section 174 of the Companies Act indicates that a director has a duty to act honestly and in good faith in the best interest of the company. When a company is being formed Articles of Incorporation must be submitted which will set out the rules governing the company. Other documents submitted would include, in the case of a company registered in Jamaica a document identifying the beneficial owners. A lot of what a director can do is governed by The Articles of Incorporation of the company. Shareholders are not usually involved in the daily decision-making on behalf of the company as this is usually the role of the director. Although shareholders are viewed as the owners of the company, the level of ownership depends on the number of shares

owned by the shareholder. It would therefore be important to examine company documents to ascertain who is the beneficial owner as this is not necessarily synonymous the shareholder. It would be important to bring prima facie evidence to show that the 3rd Defendant is the beneficial owner. It would be important to know his position as shareholder as the power of the shareholder would be determined by the number of shares owned.

[118] The ex parte injunction was granted against the 3rd Defendant on the basis that as Director he signed the Special Resolution for SSL to be placed into Members' Voluntary Winding-up and for Mr Caydion Campbell to be appointed Trustee. In addition, he along with three other persons, two of whom were previously Defendants, were named as signatories to the Declaration of Solvency. This was done in his capacity as Director, a position he resigned from on February 24, 2023. The Claimant has set a precedent wherein it did not oppose the discharge of the injunction against other directors who resigned and in fact discontinued proceedings against them. However, the position regarding the 3rd Defendant is different in that he remains a shareholder. He still remains as a Defendant in this matter.

[119] It is the Claimant who is seeking the extension of the injunction and so it is their duty to prove the basis on which they claim to be entitled to it. Counsel for the Claimant argued that the 3rd Defendant has a major beneficial and controlling interest in the 1st Defendant however, although this was said in the submissions, they have provided no evidence of this to the Court but rather suggested that the process of discovery would unearth this. They have not demonstrated the extent of his holding in the company so as to distinguish him from any other shareholder nor have they demonstrated that he is a beneficial owner. In those circumstances, the Claimant has failed to prove that the interim injunction should be extended against him.

[120] The Orders sought on the Notice of Application for Court Orders are granted in relation to the 1st and 2nd Defendants. The Orders are in remain in place until the determination of this matter.

[121] The Orders sought on the Notice of Application for Court Orders are refused in relation to the 3rd Defendant.

……
S. Jackson-Haisley
Puisne Judge