IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 6797

BETWEEN	FIRST GLOBAL BANK LIMITED	CLAIMANT
AND	ROHAN ROSE	1st DEFENDANT
AND	ANTHONY LEWIS	2nd DEFENDANT
AND	THEODORE LEVY	3rd DEFENDANT
AND	MOBIL IMPORT EXPORT COMPANY LIMITED	4th DEFENDANT

Appearances: B. St. M. Hylton Q.C., Ms. Carlene Larmond and Mr. Kevin Powell instructed by Michael Hylton and Associates for the Claimant; Mr. Walter Scott and Ms. Anna Gracie instructed by Rattray Patterson Rattray for the First Defendant.

Heard January 27, February 1, and April 8, 2010

Freezing Order – Inter partes hearing – Application to set aside Freezing Order for Non- Disclosure – Material non-disclosure - Application to set aside search order – extent of the privilege against self-incrimination – whether U.K. precedents can assist Jamaican Courts.

ANDERSON J.

1. Three days after Christmas Day last, on December 28, 2009, in this Court, Her Ladyship Marjorie Cole-Smith J. granted an ex parte application for a freezing order under Part 17 of the Civil Procedure Rules 2002, against the first defendant herein. At the same hearing, her ladyship also granted an order for search to be made of the first defendant's premises and for

documents to be searched and copies of his computers cloned by the Search Party. The order named Kathryn Denbow, Attorney-at-law as the "Supervising Attorney: for the purposes of the search". On the 8th January 2010, the first defendant filed an application to set aside the Freezing Order and the Search Order and on the 11th January 2010 the Inter Partes hearing came before the court. On that day the hearing was re-scheduled for January 27, 2010 and the Freezing Order extended to the adjourned date.

2. The Freezing Order had been granted pursuant to the filing of a claim in the Supreme Court by First Global Bank Limited (the "Claimant") against Rohan Rose the first defendant ("Rose"), Anthony Lewis the second Defendant ("Lewis"), Theodore Levy, the third defendant ("Levy") and Mobil Import Export Company Limited, the fourth defendant ("Mobil"). The claim is primarily against Rose for breach of contract and breach of fiduciary duty, negligence, fraud and unjust enrichment, and claims inter alia, the sum of US$7,643,131.43. The Freezing Order prohibits Rose from dealing with his assets below the value of the sum of US$ 7,643,131.43. The claims against the other three defendants are for varying sums and are based upon a claim for money had and received and for unjust enrichment purportedly arising out of the actions of Rose.

3. The specific claims against the respective defendants arise out of certain transactions which, according to the allegations of the Claimant, were carried out by Rose while serving as a senior officer of the bank. While it is not the role of this court to determine the truth of those allegations, for completeness I shall very briefly summarize the allegations, bearing in mind always that Rose has denied them in his affidavits.

4. The first set of transactions relate to the role played by Rose as a trader in United States of America treasury securities, on behalf of the bank and

are referred to by the Claimant as the "US Treasury Bond Transactions". According to the Claimant, Rose had specifically limited authority to trade in this area on the bank's behalf. There were set limits on the bank's level of exposure as well as pre-set limits on potential losses arising from trades in those securities. However, according to the Claimant, Rose exceeded his authority thereby causing the Claimant losses in excess of Three Million United States Dollars (US$3,000,000.00). Subsequently, in order to cover up these losses, he undertook further transactions which gave rise to even further losses of over Four Million United States Dollars (US$4,000,000.00)

5. The second set of transactions is referred to as the "Stocks and Securities Transactions". These involved profits of over One Hundred and Thirty Seven Thousand United States dollars (US$137,000.00) made by Rose as a trader in securities between April and May 2008. The Claimant alleges that instead of crediting the bank with these profits, Rose caused them to be incorrectly documented and transferred from the bank. Documents were prepared describing the various amounts as the proceeds of transactions by which the Bank purchased US currency from Standard Bank, but there were in fact, no such transactions. Rose then caused the Bank to draw four separate cheques, all payable to Stocks & Securities Limited for the Jamaican dollar equivalent of the US$ trading profits. The four cheques were then negotiated by Lewis, within a day of their being drawn. Lewis was not entitled to these funds.

6. The third set of transactions is described as the Levy/Mobil transactions. These transactions took place between April 2007 and March 2008 and involved trading profits being used by Rose to replace sums taken from the bank and credited to Levy and Mobil or, in one case, used as part payment for property acquired by Mobil.

7. The matters before me at this time are an application by the Claimant for the extension of the Freezing Order until trial and the further consideration of the Search Order as well as applications by Rose, by way of a Notice of Application for Court Orders, to set aside both orders. To provide for a coherent consideration of the issues which have to be determined, it may be convenient at this stage to set out the grounds upon which Rose relies in his challenges to the freezing and the search orders. These are set out in the Notice of Application.

8. The grounds on which the Applicant is seeking the orders are as follows:

1) The Claimant having made a complaint to the Jamaica Constabulary Force (JCF) in the person of Senior Superintendent Fitz Bailey of the Organised Crime Division; and the JCF having launched an investigation into the complaint, and having had a first interview with the Defendant in the presence of his then Attorney-at-Law Mr. Christopher Townsend, and where it is likely that criminal charges will be laid against the Defendant, this Honourable Court cannot make a Search Order against the Defendant compelling him to disclose documents and information since that would infringe his privilege against self incrimination.

2) The Claimant failed and/or neglected to ascertain and if they had, to state that the Supervising Attorney being proposed by it had recent material experience of the execution of search Orders conducted under the supervision of a Supervising Attorney.

3) There was no undertaking by the Claimant not to inform anyone else of the proceedings except for the purpose of the proceedings.

4) The search team did not include a partner from the Claimant's Attorneys-at-Law.

5) Material non disclosure by the Claimant in that:

   a) It failed to disclose that it made a complaint to the Jamaica Constabulary Force (JCF) in the person of Superintendent Fitz Bailey of the Organised Crime Division; and that an investigation had been launched by the JCF; and that the JCF had done a preliminary interview of the Defendant; and had searched his computer; and that the said investigations were continuing.
   b) It failed to disclose that the Vice President of Finance of the

Claimant Mrs. Clover Moodie was dismissed by the Claimant arising out of her conduct relating to the losses sustained by the Claimant the subject of this action.

c) That the Claimant commissioned a forensic audit by GORDON MOORE of Sepia Associates of 17 Highview Drive, Sewickly PA 15143 U.S.A and that this report is to hand and reveals inter alia that in regards to the trading losses, electronic mail correspondence exists between Wayne Wray the then President of the Claimant and Andrew Messado who is a Senior Financial Officer of Grace Kennedy & Co, the parent company of the Claimant and Gavin Jordan the Assistant Vice President of Finance of the Claimant which speaks to the fact of adverse trading positions and the best way to treat with them.

d) That the position limit of US$10 Million referred to in the Affidavit of Joseph Taffe was not a cumulative position limited but a position limit per trade.

e) That the position limit referred to in the Affidavit of Joseph Taffe aforesaid was only approved by the Board of the Claimant in July 2009 well after the trades the subject of this action were completed.

f) That there is an internal audit report done in January by David Hall the Chief Internal Auditor of Grace Kennedy & Co which was not disclosed.

g) That the said audit by David Hall the Chief Internal Auditor of Grace Kennedy & Co Limited the parent company of the Claimant revealed that:

   i) There was no approved documented policy and procedure outlining the controls that should surround the sales and purchases of securities.

   ii) The Audit did not identify breach of trading positions limits.

6) That the Affidavit of Joseph Taffe does not disclose any probative material to support any allegation of any attempt by the Defendant to dissipate his assets.

7) That there is a real danger that the Claimant will use the documents the fruit of the Search Order in the Criminal proceedings which are likely to be instituted against the 1st Defendant.

8) These proceedings will have an adverse impact on the 1st Defendant's employment and may lead to a termination of his employment; and

9) The Defendant and a third party will be unduly prejudiced and suffer hardship as a result of the grant of the injunction.

9. The applications to set aside the respective orders of Cole-Smith J are strongly resisted by the Claimant and it in turn argues that the freezing

order should be extended to the date of trial and that the search order also ought not to be disturbed.

10. In support of its application to extend the freezing order until trial and in opposition to Rose's application to discharge the freezing order, counsel for the Claimant submits that in order for an applicant for a freezing order to succeed in such an application, two things must be shown. Firstly, the applicant must show that it has a "good arguable case", although not necessarily one with a better than 50% chance of success, and secondly, that there is a risk of dissipation of the assets by the respondent which could deprive the successful applicant of the fruits of any judgment won by the applicant in the substantive action. It was submitted that based upon the allegations, as set out above, the Claimant had, at the very least, a good arguable case. The court must determine the issue of whether there is a "good arguable case".

Good Arguable Case

11. What is a good arguable case? This has been the subject of numerous authorities. Incidentally, it should be borne in mind when looking at some of the English authorities, that the question of "good arguable case" may be considered both in terms of the issue of jurisdiction of the particular forum, (for example for determining whether permission for a writ to be served out of the jurisdiction should be given) as well as the issue of the merit of the substantive claim. While the issue of jurisdiction does not arise on the face of the pleadings herein, if I may be permitted a slight digression, I would mention a decision of the House of Lords in **Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran** [1994] 1 AC 438; [1993] 4 All ER 456, where the House had to consider the test to be applied in granting leave to serve a writ on a party out of the jurisdiction under Order 11 r 1 of the UK Rules of the Supreme Court, in relation to an

action founded on breach of contract, namely, failure to pay on a letter of credit.

12. Lord Goff, who delivered the only substantive judgment of the court, first traced the development of O 11 r 1 and the relevant case law on it, and then said that there were two separate issues to the point. First, it must be shown in accordance with the test of a good arguable case that the case falls within one of the circumstances mentioned in r 1(1). This is the jurisdiction issue. Second, assuming the jurisdiction issue is satisfied, the court must consider the merits of the claim and *on this no more is required than that the evidence should disclose that there is a serious issue to be tried*.

13. It was submitted that given Rose's position within the Claimant bank, the regulatory framework articulated by the Bank of Jamaica Act, the good faith duties imposed upon the said first defendant by the Companies Act and the nature of the allegations which were being made by the Claimant, that the Claimant had easily established the threshold of a "good arguable case". It is not necessary for this court to make findings of fact to the civil standard, nor is it this court's role to seek to determine which of the alternative stories put forward by the applicant and the respondent is more credible.

14. In a Singapore case which I came across, **Bradley Lomas Electrolok Ltd and Another v Colt Ventilation East Asia Pte Ltd and Others** [2000] 1 SLR 673; [1999] SGCA 89, in the Singapore Court of Appeal, Chao Hick Tim JA, in considering the meaning of "good arguable case" said:

> What would amount to a "good arguable case" is put as follows in the **Supreme Court Practice** *1999* (Vol 1, 1998) para 11/1/11, citing from **The Brabo; Tyne Improvement Commissioners v Armement Anversois S/A** [1949] AC 326 and **Vitkovice Horni a Hutni Tezirstvo v Korner** [1951] AC 869:

It indicates that though the court will not at this stage require proof to its satisfaction, it will require something better than a mere prima facie case. The practice, where questions of fact are concerned, is to look primarily at the plaintiff's case and not to attempt to try disputes of fact on affidavit; it is of course open to the defendant to show that the evidence of the plaintiff is incomplete or plainly wrong.

14. In the Notice of Application seeking the setting aside of the freezing order/opposing its extension to the date of trial of the action and seeking discharge of the search order, counsel for Rose sets out the grounds listed above. There is no suggestion among the grounds relied upon, of there being a lack of a good arguable case and indeed, it seems that Rose's counsel seems to accept that that threshold is easily met. I am prepared to hold that the first test of a "good arguable case" has been met and to proceed to consider the other issues raised by Mr. Rose's attorneys-at-law.

Risk of Dissipation

15. I shall now turn to deal with the issue of the real risk of dissipation of assets since the establishment of that fact is a sine qua non of the grant of a freezing order.

16. One of the substantive submissions articulated by counsel for Rose in relation to the application to set aside of the freezing order/opposing its extension, is that the Claimant has not provided any evidence ("*in the affidavit of Joseph Taffe*") of any attempt on the part of Rose to dissipate his assets. In the supporting submissions, it was stated less definitively that there was "no evidence before this court that the 1st defendant will place any sums out of the reach of this Honourable Court".

17. Since it is a condition of the grant of such an order that the applicant must show such a risk of dissipation, in the absence of such evidence, the freezing order should be discharged. In support of this submission,

counsel for Rose cited the decision of the Jamaican Supreme Court in **Half Moon Bay Limited v Earl Levy** Suit No: C.L. H 012 of 1996 and the judgment of Wolfe C.J. delivered May 7, 1997. There his lordship had stated that it is the court which must decide whether the plaintiff's fear of dissipation is justifiable. A bare assertion as such would not suffice. Merely because it would be easy for a defendant to remove the proceeds of sale of his assets from the jurisdiction, is not sufficient to give rise to a finding that there was a real risk of dissipation. Counsel further cited another decision of the Jamaican Court of Appeal, **Wheelabrator Air Pollution Control v F.C. Reynolds** SCCA 91 of 1994 where Carey J.A. stated that

> "with respect to the information as to the risk factor, the plaintiff must state the nature and extent of the defendant's business and location of assets within the jurisdiction."

18. Based on these dicta, counsel asserted that the freezing order should be discharged.

19. For the Claimant it was submitted in response that this was an incorrect reading of the requirement re the risk of dissipation. There was no requirement to show that there was any attempt on the part of Rose, to dissipate. Clearly evidence of such an attempt would be overwhelming. But it was not necessary. Counsel for the Claimant submitted that the nature of the test had been clearly laid down in a ruling in the English Court of Appeal by Stuart-Smith L.J. in **Ketchum International Plc v Group Public Relations Holdings Ltd. and Others** [1997]1 W.L.R. 4. There, his lordship had un-ambiguously stated:

> "In my judgment the judge misdirected himself by relying on the passage already quoted from **Derby & Co. Ltd. v Weldon (Nos. 3 and 4)** [1990] Ch. 65, 76 for the proposition that the plaintiff must show that the defendant intends to deal with his assets for the purpose of ensuring that a judgment will not be met. *It is sufficient if there is a real risk that the judgment in favour of the plaintiff will remain unsatisfied if injunctive relief is refused...*" (Emphasis Mine)

20. It was submitted that the test in Jamaica is that laid down in the Court of Appeal in **Jamaica Citizen's Bank Limited v Dalton Yap** SCCA 121/97. The test articulated by Forte J.A. in the Dalton Yap case has subsequently been cited with approval in this Court by my learned brother Sykes J in a judgment cited by the Claimant's attorney, **Rudolph Shoucair v Kevin Tucker-Brown and Carmen Tucker-Brown**, HCV 01032 of 2004, judgment delivered May 4, 2004. There his lordship stated:

> "As Forte JA said in *Yap's case* (supra) there must be solid evidence that there is a real risk that the assets of the defendant will be dissipated...Solid evidence means that there must be something more than the assertion by the claimant that his judgment may not be satisfied. The evidence adduced by anyone applying for a freezing order must be such that when examined by an impartial, informed and reasonable person he would conclude that there is a real risk of dissipation or removal of assets from the jurisdiction."

21. It seems to me that the existence of the risk does not have to be proven to a very high standard. Thus in **Customs & Excise v Anchor Foods Ltd.** 1990 1 W.L.R. 1139 Neuberger J, (as he then was) said what is required is a "good and arguable case for a risk of dissipation". However, the risk of dissipation must involve a risk of impairing the claimant's ability to enforce a judgment or award. It is not *necessary* for the claimant to prove that the purpose of the defendant's actual or feared conduct is to frustrate the enforcement of any judgment which is obtained, provided that, objectively, that would be its effect.

22. An article by Richard Ashcroft and Hugh Sims of Guildhall in September 2008 (**"Urgent Injunction Applications: Best Practices and Pitfalls to avoid"**) provides a useful summary on the issue of "dissipation of assets" which I respectfully adopt.

> 29. In **Thane Investments Ltd v Tomlinson & Ors** [2003] EWCA Civ 1272 Peter Gibson LJ emphasised (at paragraph 21) the need

for any application for a freezing injunction to be supported by "*solid evidence...of the likelihood of dissipation*".

30. Pointing to some dishonesty on the part of the intended respondent to the injunction is insufficient: **Thane** at para 28. The court will scrutinize with care whether what is alleged to have been the dishonesty of the person against whom the order is sought, in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted (*ibid*).

31. The court will be particularly interested in evidence of such things as a poor credit history, a record of defaulting on other debts or any threat to remove or otherwise deal with the relevant assets: *ibid* at para 26. The defendant's proven links with another country to which he may decamp will also be highly relevant, as will any lack of openness on the part of the defendant in response to enquiries about his intentions in relation to assets being realised.

32. Plainly, the more easily realised or moved the assets identified in the evidence may be, the easier it is to justify a risk of dissipation. Where there is evidence as to the form which the assets take which in itself indicates there has been no attempt to dissipate in the past and, by the nature of those assets, any such dissipation in the future is unlikely, then the court may take a different view. Moreover, the mere fact of asset realization by a defendant is insufficient (at least where the application is not for a "proprietary" freezing order in which the claimant asserts that an asset held by the defendant is really his); there must, as noted above, be some basis for believing that the disposal of assets is unjustifiable: see, for example, **Renewable Power & Light plc v Renewable Power & Light Services Inc & Ors** [2008] EWHC 1058 (Ch).

33. Ultimately the test is not one of probability of dissipation, but of real risk: **Caring Together Ltd v Bauso and Ors** [2006] EWHC 2345 (Ch) at para 64.

34. **Thane** is not a judgment to the effect that allegations of dishonesty are insufficient to found the necessary inference of a real risk of dissipation, but a reminder that in order to draw the inference it is necessary to have regard to the particular allegations of dishonesty and to consider them with some care: **Jarvis Field Press Ltd v Chelton** [2003] EWHC 2674 (Ch) at para 10.

35. There is or may be an appreciable risk in the case of somebody who appears to be guilty not merely of dishonesty, but dishonesty in financial dealings in relation to the use or misuse of assets, that he will take steps to put such assets outside the reach of the people claiming an entitlement thereto: **Jarvis Field** at para 17.

36. The importance of cogent, relevant evidence on this aspect of any application cannot be overstated.

23. I respectfully adopt the foregoing. There clearly is more than passing similarity between the bases on which the Court of Appeal in Dalton Yap held that there was a risk of dissipation. In Yap, the bases upon which it was held that there was a real risk of dissipation were that, (1)the case was based upon allegations of fraud and the probity of the defendant's conduct was in question; and (2) the appellant was experienced in moving funds from one country to another. Both of those factors are pellucidly present here. In the instant case against Rose, there are allegations of fraud, conversion of funds and dishonesty, with the result that his probity is also in question. Secondly, it appears from the evidence that Rose has significant expertise and experience in manipulating financial transactions by way of the internet. He is obviously experienced in moving funds around the world with some dexterity and has the ability to place funds in countries where they would be difficult to trace.

24. For these reasons, I hold that the on an objective test by a disinterested reasonable bystander, the risk of dissipation has been made out. I respectfully adopt as an overarching concern of this Court, the following dictum from Stuart-Smith LJ in **Ketchum International Plc v Group Public Relations Holdings** [1997] 1 W.L.R. 4 at 10f:

> "Justice requires that the court should be able to take steps to ensure that its judgments are not rendered valueless by an unjustifiable disposal of assets".

The First Defendant's other Arguments for setting side the orders.

25. Rose's other submissions in support of his applications may be usefully characterized as partially suggested by the Claimant's attorney. I set these out below and include the challenge to the grant of the ex parte freezing order on the basis of non-disclosure of material fact before Cole-Smith J.

1. Non-disclosure of material facts at the time of the application for the ex parte freezing order. Among those facts allegedly not disclosed by the applicant were:
    a. That a complaint had been made to the police;

b. That the first defendant had offered a computer;
c. That Mrs. Clover Moodie had been dismissed
d. The Moore Report;
e. That the position limit was a per transaction and not a cumulative limit;
f. The approval of the position limit was only ratified in July 2009 after the trades were complete;
g. That there was a report by David Hall which showed that
    i. there was no documented policy and procedure outlining the controls surrounding the sales and purchases of securities; and
    ii. did not identify breach of trading positions;

2. The privilege against self-incrimination – Grounds 1 and 7

3. Experience of the Supervising Attorney-at-Law – Ground 3

4. Absence of an undertaking by the Claimant not to inform anyone else of the proceedings – Ground 4

5. Absence of a partner from the Claimant's Attorneys-at-Law from the Search Party – Ground 5

26. As submitted by Rose's counsel, the lack of full and frank disclosure "is the most powerful and cogent reason for discharging (this) injunction" per Sharma J. (as he then was) in **Coosals Quarry Limited v Trinidad (Teamwork) Limited** [1985] 37 WIR 417. In these circumstances I think it is important to deal with this aspect first.

Non-Disclosure

27. Counsel for Rose cited the above specific instances of purported non-disclosure as providing the basis for setting aside the freezing order. The first is in relation to a complaint made by the Claimant to Senior Superintendent Fitz Bailey of the Organised Crime Division of the Jamaica Constabulary Force. Rose's counsel submitted that the Claimant must have been aware that Rose would have raised the spectre of possible prosecution as an argument against the grant of the search order, and so this was non-disclosure. But I agree with the Claimant's counsel's submission, that there had been no charge laid by any prosecutor against

Rose and it was accordingly not material to the grant of the freezing order, even if it were relevant to the grant of the search order. In that regard, and in any event, given the recognition of the possibility of criminal proceedings, the search order given by the court did provide protection for the respondent. I shall mention this again below. Further, the institution of a prosecution on a criminal charge would have been a decision, at least initially, for the state authorities. I certainly do not believe that it is material and so does not constitute non-disclosure, and I so hold.

28. Rose's counsel submitted that there was material non-disclosure in that the position limit referred to in the Affidavit of Joseph Taffe was only approved by the Board of the Claimant in July 2009 after the trades were completed and in that the position limit of $10,000,000.00 referred to in the Affidavit of Joseph Taffe was not a cumulative position but a position limit per trade". The Claimant denies that there is any material non-disclosure here as this is really a question of the interpretation which Rose is advancing and which will be decided by the Court in the substantive hearing. It was further submitted that full and frank disclosure does not require the applicant for a freezing order to anticipate every creative argument that a respondent may make at the time of the application. As was stated in a case from the Isle of Man High Court, Chancery Division,**KYRGYZ MOBIL TEL LIMITED and FLAXENDALE LIMITED and GEORGE RESOURCES LIMITED and BITEL LLC** (Judgment delivered by His Honour Deemster Doyle the 8th day of December 2006):

The duty (to disclose) does not require speculation or the identification of spurious defences. Although the applicant must identify any defences which would be available to the defendant the defence must be one which can reasonably be expected to be raised in due course by the defendant (**Lloyd's Bowmaker Ltd v Britannia Arrow** [1988] 1 WLR 1337 at 1341 and 1343; **The Electric Furnace Co v Selas Corpn of America** [1987] RFC 23). The applicant's duty is to disclose any defence he has reason to anticipate may be advanced. The applicant does not have to anticipate all the arguments or all the points which might be raised

against his case but he must fairly disclose any points adverse to his case that he could reasonably anticipate being available to the other side.

29. But I also agree with the submission by the Claimant's counsel that Rose, from his own communications, seemed to have accepted the existence of limits before the ratification in July 2009. As such this cannot amount to non-disclosure.

30. For Rose it was also submitted that: "The Claimant did not disclose that it commissioned a forensic audit by GORDON MOORE of Sepia Associates of 17 Highview Drive, Sewickly, PA 15143 in the United States of America. Further the Gordon Moore Report, which the Claimant also has in its possession but has failed to disclose to this Honourable Court, in dealing with the trading losses has referred to electronic mail correspondence between Mr. Wayne Wray, the then President of the Claimant; Mr. Andrew Messado, a Senior Financial Officer of Grace Kennedy & Co. Limited; and Mr. Gavin Jordan, Assistant Vice President of Finance of the Claimant which speaks to the fact of adverse trading positions and the best way to treat them".

31. The Claimant submitted in response that the Moore Report was a forensic audit report which had been prepared for the Claimant in relation to the perceived conduct of Rose. Rose's counsel averred that the report spoke to adverse trading positions and the best way to treat them. In that regard, it was submitted that this report was clearly the subject of legal professional privilege and so was not subject to disclosure requirements. In support of this proposition, counsel for the Claimant cited **Three Rivers District Council v Governor and Company of the Bank of England (No 5)** [2005] 4 All ER 948. As Lord Scott said in that case:

"...............if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be

overridden by some supposedly greater public interest...There is no balancing exercise that has to be carried out."

32. It was submitted that this provided a complete answer to allegations of non-disclosure in relation to the Moore Report. It seems to me that Rose cannot complain about non-disclosure in relation to this Report. It may be possible to raise a question whether the need to disclose the report related to the contents, (which on my view were clearly not subject to disclosure requirements), or disclosure of the very existence of the report. In either event, I would be prepared to hold that there was no obligation to disclose.

33. Rose also cited another report mentioned in the second affidavit of Joseph Taffe, (the "Hall Report") and says that that had not been disclosed. In the affidavit in question, the affiant says that a David Hall had in May 2009 prepared a report in May 2009 as a result of an audit done early in 2009. However, he did not think then, nor at the time of swearing his affidavit, that there was any materiality in the report. It is trite that the question of materiality is for the court and not for a party to speculate. However, Claimant's counsel submits, and I accept, that the Hall Report had been prepared *before* the discovery of the transactions of which complaints are now being made. I am of the view that the alleged non-disclosure is not a material one for the purposes of setting aside the freezing order. Indeed, Rose's own submission that "the Claimant has failed to put before the court the *two reports* which it had commissioned in respect of the alleged impropriety", although factually incorrect, may seem to reinforce the submissions of the Claimant's attorney. In any event, the Hall Report having now been provided for the court, it cannot in my view, still form the subject of non-disclosure.

34. In response to further allegations of non-disclosure on the part of the Claimant, counsel sought to respond to the specific allegations of which there had been an accusation. Further, there were some allegations of

"non-disclosure of facts" of which the Claimant was unaware or which were not factual. Thus, for example, the Claimant was unaware of Rose having offered his computer to the police and so could not have disclosed it at the hearing. With respect to the allegation that the dismissal of an employee of the Claimant, Mrs. Clover Moodie, had not been disclosed, the Claimant avers that this is not correct as Mrs. Moodie has not, in fact, been dismissed.

Has there been a failure by the Claimant to make full and frank disclosure?

35. While immaterial non-disclosure is not a means of escaping from a freezing injunction which would otherwise have been justified, the courts have consistently stressed the heavy burden of full and frank disclosure of material facts known to the applicant and also any additional facts which he would have known if he had made such enquiries. Failure to do so carries with it the risk of being denied relief whether or not the applicant had a good arguable case or even a strong prima facie case, although the court retains a discretion. (See **Brink's Mat** cited below. See also **Coosals** above) In this regard, I can do no better than cite and respectfully adopt the summary of the applicable principles in **R (Lawer) v Restormel Borough Council** [2007] EWHC 2299 (Admin) where Mumby J at para 62-69 said:

"62. In the first place, "to grant an injunction without notice is to grant an exceptional remedy": **Moat Housing Group South Ltd v Harris** [2005] EWCA Civ 287, [2006] QB 606, at para [71]. "As a matter of principle no order should be made in civil or family proceedings without notice to the other side unless there is a very good reason for departing from the general rule that notice must be given": **Moat Housing** at para [63].
63. Unless the case is one where to give notice might itself defeat the ends of justice – I have in mind, for example, applications for *Anton Pillar* or *Mareva* injunctions and cases where there are compelling reasons to believe that a child's welfare will be compromised if parents or carers are alerted in advance to what is going on – an ex parte application will normally be appropriate only if the case is genuinely one of emergency or other great urgency,

and even then it should normally be possible to give some kind of albeit informal notice: **X Council v B (Emergency Protection Orders)** [2004] EWHC 2015 (Fam), [2005] 1 FLR 341, at para [53].

64. Secondly, those who seek relief ex parte are under a duty to make full and frank disclosure. There is a heavy burden on anyone who seeks ex parte relief. As I said in **In re S (A Child) (Family Division: Without Notice Orders)** [2001] 1 WLR 211 at page 216:

"The burden on those who apply for ex parte relief is, as indicated in **Memory Corpn plc v Sidhu (No 2)** [2000] 1 WLR 1443, a heavy one. And, as the same case shows, the duty of full and frank disclosure is not confined to the material facts: it extends to all relevant matters, whether matters of fact or of law. As Lord Donaldson of Lymington MR said in **In re M and N (Minors) (Wardship: Publication of Information)** [1990] Fam 211, 229, it cannot be too strongly emphasised that those who seek ex parte injunctions are under an obligation to make the fullest and most candid disclosure of all relevant circumstances known to them."

65. Moreover, as Mr Holbrook points out, referring for this purpose to **Brink's Mat Ltd v Elcombe** [1988] 1 WLR 1350 at page 1356, the applicant must make proper inquiries before making the application. 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.

66. Those who fail in the duty of disclosure, and those who misrepresent matters to the court, expose themselves to the very real risk of being denied interlocutory relief, whether or not they have a good arguable case or even (see **Behbehani v Salem** [1989] 1 WLR 723 at page 726) a strong prima facie case. On the other hand, as Balcombe LJ pointed out in **Brink's Mat Ltd v Elcombe** [1988] 1 WLR 1350 at page 1358, this rule must not be allowed itself to become an instrument of injustice. Nor, as Slade LJ pointed out in the same case at page 1359, must the application of the principle be carried to extreme lengths. In every case the court retains a discretion to continue or to grant interlocutory relief even if there has been non-disclosure or worse. In deciding how that discretion should be exercised the court will have regard to all the circumstances of the case, including the degree and extent of the culpability with regard to the non-disclosure or misrepresentation: see **Brink's Mat Ltd v Elcombe** [1988] 1 WLR 1350 at pages 1357, 1358, and **Behbehani v Salem** [1989] 1 WLR 723 at pages 727, 728, 729.

67. In **B Borough Council v S (By the Official Solicitor)** [2006] EWHC 2584 (Fam), [2007] 1 FLR 1600, at para [41], Charles J recorded his own observations that practitioners (a) too regularly do

not follow and implement the principles laid down in the cases I have referred to and (b) by such failure show an insufficient appreciation of the exceptional nature of without notice relief and the impact it has (or potentially has) on the rights, life and emotions of the persons against whom it is granted. He had earlier observed at para [37]:

> "There is a natural temptation for applicants to seek, and courts to grant, relief to protect vulnerable persons whether they are children or vulnerable adults. In my view this can lead (and experience as the applications judge confirms that it does lead) to practitioners making without notice applications which are not necessary or appropriate, or which are not properly supported by appropriate evidence. Also there is in my view a general practice of asking the court to grant without notice orders over a fairly extended period with express permission to apply to vary or discharge on an inappropriately long period of notice (often 48 hours). It seems to me that on occasions this practice pays insufficient regard to the interests of both the persons in respect of whom and against whom the orders are made, and that therefore on every occasion without notice relief is sought and granted the choice of the return date and the provisions as to permission to apply should be addressed with care by both the applicants and the court. Factors in that consideration will be an estimation of the effect on the person against whom the order is made of service of the order and how that is to be carried out."

68. I respectfully agree with everything said by Charles J. His experiences, I have to say, exactly mirror my own experiences both in the Family Division and in the Administrative Court. 69. To all this I would add three further observations. In the first place, the duty to make proper disclosure requires more than merely including relevant documents in the court bundle. Proper disclosure for this purpose means specifically identifying all relevant documents for the judge, taking the judge to the particular passages in the documents which are material and taking appropriate steps to ensure that the judge correctly appreciates the significance of what he is being asked to read. Secondly, the burden and the duty on counsel is all the more onerous where, as in this case, a telephone application is being made to a judge who has none of the papers in front of him and knows nothing at all about the case. Thirdly, the applicant is not exonerated from any of these obligations merely because some kind of informal notice of the application may have been given to the respondent. It matters not that the respondent may have been alerted; what matters is that the respondent is not before the court when the application is being made."

38. It is therefore clear that where an ex parte injunction is applied for, the applicant is under a duty to disclose to the court any material fact which may have been raised by the absent respondent in opposition to the grant of the injunction, and upon failure to do so, a court *may* set aside the injunction. The duty to disclose is a continuing one and so where material facts become available to the applicant for a freezing order, it must be disclosed to the court. (See **Al-Rawas v Pegasus Energy Ltd** [2007] EWCA Civ 268 in which search and seizure orders and a freezing order obtained by the applicant were discharged on a variety of grounds, including non-disclosure).

How does the Claimant respond to the allegations of non-disclosure?

39. It was submitted on behalf of the Claimant that there had been no non-disclosure and certainly no material non-disclosure. It was, however, further submitted that even where there has been non-disclosure, a court may still extend the injunction or grant a fresh injunction with conditions. In that regard, it is useful to recall the dictum of Mumby J cited above in **Restormel** and for ease of reference I again set out that dictum.

> Those who fail in the duty of disclosure, and those who misrepresent matters to the court, expose themselves to the very real risk of being denied interlocutory relief, whether or not they have a good arguable case or even (see **Behbehani v Salem** [1989] 1 WLR 723 at page 726) a strong prima facie case. On the other hand, as Balcombe LJ pointed out in **Brink's Mat Ltd v Elcombe** [1988] 1 WLR 1350 at page 1358, this rule must not be allowed itself to become an instrument of injustice. Nor, as Slade LJ pointed out in the same case at page 1359, must the application of the principle be carried to extreme lengths. In every case the court retains a discretion to continue or to grant interlocutory relief even if there has been non-disclosure or worse. In deciding how that discretion should be exercised the court will have regard to all the circumstances of the case, including the degree and extent of the culpability with regard to the non-disclosure or misrepresentation: see **Brink's Mat Ltd v Elcombe** [1988] 1 WLR 1350 at pages 1357, 1358, and **Behbehani v Salem** [1989] 1 WLR 723 at pages 727, 728, 729.

40. In **Brink's Mat** itself, both of the other Court of Appeal judges, Slade L.J. and Gibson L. J. agreed that the failure to disclose did not give rise to an inviolable rule that a freezing order, given in such circumstances, would be discharged. The following citation from the judgment of Slade L.J. is particularly apposite.

"The principle is, I think, a thoroughly healthy one. It serves the important purposes of encouraging persons who are making ex parte applications to the court diligently to observe their duty to make full disclosure of all material facts and to deter them from any failure to observe this duty, whether through deliberate lack of candour or innocent lack of due care.

Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application to the practical realities of any case before the court cannot be overlooked. By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the *R v Kensington Income Tax Comrs* principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.

Though in the present case I agree that there was some material, albeit innocent, non-disclosure on the application to Roch J, I am quite satisfied that the punishment would be out of all proportion to the offence, and indeed would cause a serious potential injustice if this court were, on account of such non-disclosure, to refuse to continue the injunction granted by Roch J on 9 December 1986."

41. In addition, our own Court of Appeal in the unreported case of **San Souci v VRL** SCCA #108 of 2004 (decision given November 18, 2005), Harrison

JA suggested that the basis upon which a freezing order would be set aside for non-disclosure would be that the respondent had, as a consequence of that non-disclosure, suffered some "injustice". Given the view of the Court of Appeal expressed in **San Souci** above, I am of the view that, even if there was non-disclosure, which I hold there was not, it was not material and no injustice has been suffered by Rose. There is no basis to refuse to extend the freezing order to the date of trial on the basis of non-disclosure.

The Search Order

42. In the Notice of Application for Court Orders, Rose's counsel advances as a ground (Ground 2 of the Notice) for setting aside the search order, the averment that in seeking that order, the Claimant had failed to ascertain whether the supervising attorney-at-law Kathryn Denbow, named in the order, had any experience in the execution of search orders. If it had so ascertained, it had failed to provide any such evidence to the court. It was also put forward that the failure to have a partner of the firm representing the Claimant at the search, compromised the integrity of the search and so it should be set aside (Ground 4 of the Notice).

43. With respect to the question of the Supervising Attorney's experience as well as the need for a partner of the firm of the Claimant's solicitors to be present at the search, Rose's counsel appears to rely upon the case of **Gadget Shop Limited v The Bug.Com Limited** [2001] FSR 383. In that case, the supervising attorneys had had no recent experience in the execution. It is clear from the dicta in that case that where the experience of the supervising attorney was "modest and historic", the court may be reticent to appoint them as such. However, it is clear that the court there did not rule out the possibility of someone who had never acted in that capacity being appointed. As pointed out by counsel for the Claimant, there is evidence before the Court that the Supervising Attorney has had

recent experience in executing search orders of this kind. I note that here we are dealing not just with a search order concerning paper documents but with some modern computer technology involving the cloning of hard drives. I would venture to guess that there are not an over-abundance of attorneys who would be competent to carry out the activities contemplated by the search order.

44. The other point canvassed by the counsel for Rose in regards to the search party, is that no "partner" from the Claimant's "firm of solicitors" had attended the search. While the dictum in **Gadget Shop** does appear to speak to that requirement, it is also clear that it is not an invariable rule. Counsel for the Claimant makes the point that the requirement, such as it is, is based upon a Practice Direction in the United Kingdom which of course, has no relevance to our Courts here. But I do believe that it is instructive that the learned judge in the passage cited by counsel for the Claimant, does clearly contemplate the appropriateness of an "experienced solicitor" being present in the absence of a partner.

> "No doubt this requirement in the standard form of order is not set in stone, and in many cases a judge may well be satisfied that a supervising solicitor need not be accompanied by a partner in the claimant's solicitors, but that it will be sufficient if a particular, and adequately experienced, assistant solicitor is in attendance"

45. There are two other observations I should make in relation to this question of the attendance of a partner of the Claimant's firm of solicitors at the time of the search. The first is that in the present case the Claimant's attorney is not a "firm". Indeed, given the fact of a unified profession in this jurisdiction it must be clear that in many cases that will be the case and there would be no "partners" who would thereby be available. I would be prepared to hold in these circumstances that the presence of a suitably qualified attorney-at-law would be adequate for the purposes of a search order in this jurisdiction. In that regard, an affidavit setting out Ms.

Larmond's qualifications and attaching a copy of the Order of this Court by which she was appointed a supervising attorney may have been a useful though not indispensable piece of evidence to be placed before this court.

46. Before going on to deal with the privilege against self incrimination (PSI) which Rose has set up as a ground for the setting aside of the search order, I want to mention briefly the averment by Rose's counsel that Rose and "a Third Party would be unduly prejudiced and would suffer hardship as a result of the grant of the freezing order" and "the proceedings may have an adverse impact on the first defendant and may lead to termination of his employment".

47. I am satisfied that a complete answer to these grounds, which were not fully developed in Rose's written submissions, is provided by the judgment of Rattray P. in **Jamaica Citizens Bank Limited v Dalton Yap,** [1994] 32 JLR 42, where he says:

"If the grant of the Injunction inflicts hardship on the defendant, his legitimate interest must prevail over the interest of the plaintiff. *However, these legitimate interests must be established by the defendant, not just as an allegation, but by an identification of these interests and the hardship which he is suffering, or is likely to suffer, since these are most likely within the peculiar knowledge of the defendant himself."* (Emphasis Mine)

48. Nothing by way of any evidence of specific potentially negative consequences of the imposition of the freezing order is provided by Rose. Further, I also agree with the submission of the Claimant's attorney-at-law that the specific provisions of the freezing order as it was granted ex parte and would continue to operate if extended, provide the necessary protection to Rose and third parties likely to be affected. These include the provisions which limit the amount of assets frozen; protecting the right of set-off in any third party; allowing Rose to pay his normal domestic expenses and protecting any third party in costs that it may incur in complying with the freezing order. In any event, Rose may always apply

to the Court to vary the order if it is shown that it is working specific hardship upon him.

49. I will also now briefly deal with the submission that the Claimant, in securing the ex parte search order, failed to provide an undertaking not to share the information gleaned with anyone else. While Rose made this submission, it was not further developed in the written submissions provided and no authority was cited which suggested that the absence of such an undertaking was a basis for setting aside the search order. I do not accept that the absence of the undertaking in the terms complained of by Rose compromises the validity of the search order and I would decline to set it aside on that basis. However, I do believe that this argument is subsumed in those about the beach of the privilege against self incrimination with which I deal more fully below.

<u>The Privilege against Self Incrimination</u>

50. Mr. Scott, in his submissions on this ground, essentially argues that since it is likely that Rose could face criminal charges, a court order allowing search could breach his Privilege against Self Incrimination (PSI). Further, there was a danger that the information gleaned by virtue of the order, could be used as evidence against Rose. He started by submitting that section 20(5) of the Constitution of Jamaica guarantees to each person, the presumption of innocence. He submitted further that this right is inextricably bound up with the privilege against self incrimination (PSI). It was his position, that the search order breached that privilege because it did not protect against self incrimination.

51. His starting point is the dictum of Goddard LJ in **<u>Blunt v Park Lane Hotel Limited and Anor</u>** [1942] 2 KB 253. There, his lordship stated, at page 257:

"*the rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency*

to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for... A party can also claim privilege against discovery of documents on the like grounds."

52. He reinforced the previous submission by reference to the case of **Tate Access Inc. and Anor v Boswell and Ors.** [1991] 1 WLR 304. At page 316 of the report, Sir Nicolas Browne- Wilkinson V. C. advanced the proposition that "*the basis of the privilege against self incrimination is that a man is not bound to provide evidence against himself by being forced to answer questions or produce documents*". Further at page 317 he said:

   "Therefore, in my judgment I am bound to hold that where the defendant's privilege against self-incrimination may arise the making of an ex parte order for the seizure of documents from that defendant's premises is improper. That accords with my own sense of justice: *if a man is entitled to refuse to produce documents, it would be strange if the law permitted an order to be made which forced him to admit others to his house for the purpose of seizing those documents*".

53. It was counsel for Rose's submission that in light of the propositions aforesaid, "the learned judge set aside the Anton Piller part of the order against the individual defendants".

54. Rose's submission on this aspect continues:

   "In the instant case, the Claimant sought first to report this matter to the police which is currently being investigated and then to institute legal proceedings. In the instant case the 1st Defendant will in all probability be charged with an offence.
   Accordingly, the Court is being asked to preserve the 1st Defendant's right, in circumstances where there is no statue to the contrary, and set aside the Search Order and direct that the Supervising Attorney do return all clones, images, copies, disks and other storage devices containing the documents extracted from the 1st Defendant's lap top, family computer, zip drive, black berry or other device".

55. The application to set aside the search order or to make the consequential orders sought as outlined in the previous paragraph is strongly resisted by

Claimant's counsel on the basis that it is not sound in law. The response is premised upon the submission that the law has moved along from the broad swath of protection afforded by this privilege as outlined in **Tate** has been re-defined, and that the more recently formulated search or Anton Piller Orders, have been re-designed to give effect to these new limits. This new paradigm is reflected in the order made by Cole Smith J and the order ought to be upheld. The Claimant's counsel made broad submissions and cited several authorities in opposing the application. However, before I consider them in more detail, I would wish to bring to the attention of the parties, the case of **O Ltd. v Z** [2005] EWHC 238 (Ch.) which I find instructive.

The Theory of the Implied Undertaking

56. In **O Ltd. v Z** [2005] EWHC 238 (Ch), an interesting matter came before the High Court, Lindsay J presiding. The circumstances as outlined by the judge were wholly exceptional and were briefly as follows.

> "The Claimant, an employer, believing (rightly, as it transpired) that its former employee, the Defendant, had taken with him computer and other recorded material that belonged to it and which could be used by him to its disadvantage in its business, obtained a Search Order ex parte authorising a search to be made of the Defendant's home and of the computers and other recorded material at his home. In the course of the search, material was handed by the Defendant to the Computer Expert engaged in the search. When, later, the material was examined by the Expert, it was found (as no one except, if anyone, the Defendant, had any reason to expect) to include material completely irrelevant to the Claimant's claim, paedophile pornography of a serious nature. So serious is it that its mere possession can be a crime. The Expert invited the Court to give permission for that material to be handed to the relevant Prosecuting Authority. But the Defendant had never been told of the privilege against self incrimination neither by the words of the Search Order or by the Supervising Solicitor or how to exercise it and, in that the only privilege that was explained to him was a quite different one, he might well have thought that the privilege against self incrimination was not open to him even had he otherwise been aware of it as a possibility. Moreover, to permit the use of the offensive material against the Defendant would be to allow the fruits of a Search Order made for one purpose – the fair protection of the Claimant's intellectual property rights – to be used for a quite

different purpose, the incrimination of the Defendant. I have no reason to think this is the case here but what a weapon the Search Order could become in the hands of, say, a vindictive employer, even in cases where the crime was far less serious than here. In a sense, too, the Search Order could be said to have been excessive because, as it turned out, it required the disclosure of material that had nothing whatsoever to do with the Claimant's claims. In such circumstances what directions should the Court give to the Computer Expert, who wishes to give the offensive material to the Police"?

57. While the latter was the essential question which the judge had to answer in this case, he gave a comprehensive analysis of the law as it affected the privilege. For the purposes of this judgment, I wish to advert to a section of his lordship's judgment headed "Implied Undertakings". It seems to me that, if his analysis is correct, and I accept that it is, it may provide the answer not only to the submission of Rose on the absence of any undertaking by the Claimant not to disclose the information it secured to anyone, but may provide the complete answer to issue as to whether the search order issued herein tends to breach the privilege claimed. Lindsay J formed the view that based upon the authorities that if the privilege is not claimed prior to giving the answers sought in the search order, or handing over the material in respect of which the privilege was claimable, the privilege would have been lost. At paragraph 64 of his decision, he delivers himself thus:

The better view of the authorities, taken as a whole and, again, as can be harsh on some facts, is that whether he knows of the privilege and whether or not it is mentioned or explained to him, he will be taken to have lost the privilege if he is not heard to claim it before (as the case might be) he answers the questions or produces the documents in issue.

58. Nevertheless, it was his view that all was not lost because of what he characterized as the "Implied Undertaking". Thus at paragraph 72-73, he said this:

72. The speech of Lord Oliver in **Crest Homes plc –v- Marks** [1987] 1 A.C. 829 illustrates both the implied undertaking which I must now consider and its susceptibility to being released. At *pp. 853-854* he said:-

> "It is clearly established and has recently been affirmed in this House that a solicitor who, in the course of discovery in an action, obtains possession of copies of documents belonging to his client's adversary gives an implied undertaking to the court not to use that material nor to allow it to be used for any purpose other than the proper conduct of that action on behalf of his client: see **Home Office –v- Harman** *[1983] 1 A.C. 280.* It must not be used for any "collateral or ulterior" purpose, to use the words of Jenkins J. in **Alterskye –v- Scott** [1948] 1 All ER 469, approved and adopted by Lord Diplock in **Harman's case**, p. 302. Thus, for instance, to use a document obtained on discovery in one action as the foundation for a claim in a different and wholly unrelated proceeding would be a clear breach of the implied undertaking: see **Riddick –v- Thames Board Mills Ltd** [1977] QB 881. It has recently been held by Scott J. in **Sybron Corporation –v- Barclays Bank Plc** [1985] Ch 299 – and this must, in my judgment, clearly be right – that the implied undertaking applies not merely to the documents discovered themselves but also to information derived from those documents whether it be embodied in a copy or stored in the mind. But the implied undertaking is one which is given to the court ordering discovery and it is clear and is not disputed by the appellants that it can, in appropriate circumstances, be released or modified by the court."

73. At *p. 860* he made the further point that whereas, in disclosure cases generally, a function of the implied undertaking is to encourage full and candid disclosure, that factor played little part in relation to the Search Orders:-

> "..... the whole purpose of which is to gain possession of material evidence without giving the defendant the opportunity of considering whether or not he shall make any disclosure at all."

Lord Oliver summed up the cases cited to their Lordships' House as to the use of material gained by Search Orders in proceedings other than those in which the order was made by saying:-

> ".... they are no more than examples and they illustrate no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery."

He added that each case turned on its own individual facts – *p. 860 b-c.*

59. If this is a correct summary of the law on search orders and the PSI and I am prepared to hold that the authorities support this view, then it would appear that while Rose would have lost the privilege by handing over of the information on the computer hard drives which have been cloned, it would not be open to the Claimant without more, to turn over that information to the police for the purposes of a prosecution. The statements on the Implied Undertaking by Lindsay J were subsequently approved by Justice Evans-Lombe in **Otl v P** (2006) EWHC 1226 (Ch).

60. It may be that this takes care of the issue of PSI altogether but in the event that I am wrong in accepting this as an accurate statement of the law, I will explore the submissions made by the Claimant in response to those of Rose.

The Submissions on behalf of the Claimant

61. Claimant's counsel accepts that **Tate Access** cited by Rose's counsel represented the law as it had been laid down by the House of Lords in **Rank Film Distribution Limited v Video Information Centre** [1982] AC 380. Those cases had upheld the claim of the PSI. It was submitted that while the legislature in the United Kingdom had acted to reverse the effect of the decision in **Rank** by amending several pieces of legislation, no similar legislative changes have occurred in Jamaica. However, it was submitted that the approach of the Courts to the Common Law position has changed over time.

62. It was the submission of Claimant's counsel that the modern approach to the Common Law position was now reflected in the recent case of **A. T. & T. Istel and Anor v Tully & Anor** [1993] AC 45. In that case, the judge at first instance (Buckley J.) had made an order that the 1st and 2nd defendants who had been accused of fraud and breach of trust, disclose certain information and produce copies of certain documents in respect of their dealings with certain assets. By paragraph 33 of the order, the use of any matter so disclosed pursuant to the order was prohibited in the event of the prosecution of either of the defendants. The Crown Prosecution Service was advised of Buckley J's order and confirmed by letter that it took the view that it only applied to matters disclosed pursuant to the order but did not apply to material which they had previously obtained or which they acquired independently.

63. It was held unanimously by the House of Lords that the privilege against self incrimination still subsisted. It could only be removed by legislative intervention. However, there was no reason to allow a defendant in civil proceedings to rely on it, thus depriving the plaintiff of his rights, where the defendant's own protection was adequately secured by other means. The House considered the order of the judge and the letter from the Crown Prosecution Service's letter provided enough protection. Lord Templeman said:

> "I regard the privilege against self incrimination exercisable in civil proceedings as an archaic and unjustifiable survival from the past when the court directs the production of relevant documents and requires the defendant to specify his dealings with the plaintiff's property or money".

64. It is instructive at least to note that Lord Templeman had been a member of the Court of Appeal in Rank years earlier which had fully defended the continuing subsistence of the privilege. As Lord Ackner was to point out in his ruling in **A.T. & T. Istel**, there was no retreat from the recognition of the privilege. What had evolved over time was a recognition that the

courts had developed methodologies to deal with the abuses which the privilege was intended to protect against. Thus, his lordship Lord Ackner, at pages 62-63 of the report, stated:

> "Your Lordships are not invited to abolish or abridge the privilege. It remains wholly intact. Its invocation is merely rendered superfluous. The terms of paragraph 33 of the order, coupled with the written response of the Crown Prosecution Service, prevents the material provided in compliance with paragraphs 18 to 32 inclusive of the order being used as evidence in the prosecution of any offence alleged to have been committed by the defendants. As Templeman L.J. pointed out in his judgment in the Court of Appeal in Rank Film Distributors Ltd. v. Video Information Centre [1982] A.C. 380, 423:
>
> > 'Where a defendant in a civil action relies on the doctrine against self-incrimination and insists on remaining silent and on concealing documents and other evidence relevant to the action, he is relying on his own wrongdoing or on his own apparent or possible wrongdoing to hamper the plaintiff in proof of his just claims in the suit. That is the inevitable result of the doctrine which can only afford protection of the defendant at the risk or price of causing an injustice to the plaintiff.'
>
> It is, I believe, in the public interest that your Lordships should remedy that injustice if this can be achieved while ensuring that the defendant shall not be subject to an order, compliance with which might tend to incriminate him.

65. What his lordship was saying was that there had to be what I would characterize as a "re-balancing of the equities" so that the protection of the privilege should be recognized while ensuring that it did not foster injustice and assist the wrongdoer. Another of the law lords, Lord Griffiths, was even more strident in deprecating the apparent advantage which accrued to persons who, in defending a civil suit, could claim the benefit of the privilege. At page 57, paragraphs G-H, he said:

> "In civil actions, as this appeal demonstrates, the privilege can be claimed to thwart the claims of victims of fraud. I can for myself see no argument in favour of the privilege against producing a document the contents of which may go to show that the holder has committed a criminal offence. The contents of the document will speak for itself and there is no risk of the false confession which underlies the privilege against having to answer questions that may

> incriminate the speaker. The rule may once have been justified by the fear that without it an accused might be tortured into production of documents but those days are surely past and this consideration cannot apply in the context of a civil action.

66. It was submitted by the Claimant's counsel that a similar approach had been adopted in the Judicial Committee of the Privy Council in the Jamaican case of **Donald Panton v Financial Institutions Services** [2003] UKPC 86, involving a claim against former officers of a bank for fraud and breach of duty, in circumstances in which the appellants also faced criminal charges arising out of the same facts. It was argued that, based upon the rule in **Smith v Selwyn** and the privilege against self incrimination, the civil trial should await the determination of the criminal proceedings. The Privy Council held that the rule in **Smith v Selwyn** was no longer good law in Jamaica. Further, it was held that while the accused was entitled to his right to silence, this could not be used to deprive the plaintiff of his right to proceed with his action, unless it could be shown that the continuance of the proceedings would *cause undue prejudice*. It was the submission of the Claimant's attorney that although the Supervising Attorney has completed her work and filed two reports, there has been no claim of any wrongdoing on her part or any allegation of any conduct which would cause prejudice to the first defendant.

67. In light of this modern approach to the application of the privilege, the courts have seen the development of orders which seek to protect the defendant/prospective accused's right to the privilege without shackling the legitimate demands for justice on behalf of persons who claim to have been wronged and who seek redress in the civil court. In support of this proposition, counsel for the Claimant commended to the court the prescient comments of Lord Wilberforce in **Rank** to the following effect:

> "The difficulty is, however, that the orders are intended to take effect immediately upon the arrival of the plaintiff's representatives (including, under existing practice, a solicitor) at the defendant's premises, and if the defendant were to refuse to comply, even in reliance on the privilege, he might, at least technically, be liable in

contempt. I do not think that this problem is for this House to resolve. Attention can merely be drawn to it, and in due course, no doubt, forms of order will be worked out which will enable the orders to be as effective as practicable while preserving the defendant's essential rights."

68. The essence of the Claimant's counsel's submissions in this regard is that there has been an evolution in the terms of search orders made over the years fulfilling the hope that Lord Wilberforce had expressed in Rank. In fact, it is claimed that paragraphs 11A, 11B and 11C are examples of the types of protection in search orders contemplated by Lord Wilberforce and now being used. The effect of these types of provisions in the search orders is that it allows the defendant to claim the privilege before the execution of the Order without the risk of being in contempt of the order. (For ease of reference the cited paragraphs of the Order are set out hereunder).

A. Before permitting entry to the premises by any person other than the Supervising Attorney-at-Law, the 1st Defendant may, for a short time not to exceed 2 hours:

   a. Gather together any documents he believes may be incriminating or privileged; and

   b. Hand them to the Supervising Attorney-at-Law for her to assess whether they are incriminating or privileged as claimed.

B. If the Supervising Attorney-at-Law decides that the 1st Defendant is entitled to withhold production of any of the documents on the ground that they are privileged or incriminating, she will exclude them from the reach, record then in a list for inclusion in her report, and return them to the 1st Defendant.

C. If the Supervising Attorney believes that the 1st Defendant may be entitled to withhold production of the whole or any part of a document on the ground that part of it may be privileged or incriminating, or if the 1st Defendant claims to be entitled to withhold production of those grounds, the Supervising Attorney-at-Law will exclude it from the

search and retain it in her possession pending further order of the Court.

69. It was further submitted that even after the execution of the search order and the taking of clones, Rose had a chance to review the information for the purposes of claiming the PSI, before it was handed over to the Claimant, and did in fact so exercise his right to review them. He had had a chance to speak not only with the Supervising Attorney but also, with one exception, had his own attorney present at the relevant searches. Any challenge in relation to the PSI was, therefore, in any event too late.

70. The case of **United Norwest Cooperatives Limited v Johnstone** was cited by Rose's counsel. In **Norwest** the plaintiff claimed damages against the defendants, alleging they were engaged in a fraudulent conspiracy. The plaintiff obtained an order that the defendants serve an affidavit exhibiting statements disclosing information about bank accounts, assets and documents relating to the ninth defendant. The order contained a provision designed to provide a safeguard against self-incrimination, namely an injunction restraining the plaintiff and its solicitors from disclosing any information obtained to any person not a party to the action, and in particular to any police force or prosecuting authority without leave of the court. The Court of Appeal (Lord Justice Stuart-Smith dissenting) allowed an appeal by the second, seventh and eighth defendants from parts of an order that the defendants disclose certain information. It seems that the approach of the Court in that case was that in the absence of statutory provisions, parties in civil proceedings alleged to have committed a criminal offence such as fraudulent conspiracy are not to be deprived of the traditional privilege against self-incrimination.

71. For the Claimant it was also submitted that apart from being a decision before **AT&T Istel**, it does not appear to derogate from the principle laid down in **Istel** that any search orders made by the court to be upheld must protect the

defendant against undue prejudice and in that case, the Court of Appeal felt it did not. In any event, the **Norwest** case could be distinguished because it spoke of a situation involving a "criminal offence" of fraudulent conspiracy. In the instant case, the claim does not allege any "criminal offence". The claim for fraud is in relation to a breach of fiduciary duty, being a specie of "equitable fraud", which is distinguishable from a criminal offence. {See **Donovan Crawford and Others v Financial Institutions Services** (Privy Council Appeal No 34 of 2004)}. Finally, it was submitted for the Claimant that, in any event, the search has been completed and no privilege has been claimed. It is now too late to do so. It will be apparent from my citation of the views expressed by Lindsay J in **O Ltd v Z**, with which I concur, is consistent with this view.

CONCLUSION ON THE PRIVILEGE AGAINST SELF-INCRIMINATION

72. In an article, "**Before the High Court – A Witness's Civil Immunity from Criminal Prosecution**", (1994 Sydney Law Review Vol 16 page 25) the author Lee Aitken commenting upon a number of decisions in this area of the law before **AT&T Istel**, including **United Norwest,** had this to say.

> "The suppression or control of information which comes adventitiously into the hands of an opposing party who may make inappropriate use of it arises frequently and the courts unfortunately have no unified way of dealing with it".
>
> He suggested that a solution to the problem could possibly be found by restricting the scope for claiming that information disclosed pursuant to search orders could be self incriminatory".

73. The increasing impatience with which the courts have approached the issue of the privilege against self-incrimination as highlighted in the article of Mr. Aiken published in 1994 has to some extent been mitigated by the more assertive approach of the courts towards limiting the exercise of the privilege through orders of the kind made by Cole-Smith J. While it is useful to recognize that the law in England and Wales in this area has been

affected by statutory intervention (for example, section 13 of the UK Fraud Act 2006 has largely removed the defendant's ability to rely on the privilege against self-incrimination in fraud cases and "related offences") and the influence of the European Human Rights Convention within the European Community, it is still helpful to look at the approach in that jurisdiction. In **Otl v P** referred to above, Evans-Lombe stated:

27. The application of Domestic PSI to disclosure of documents and other material evidence in civil proceedings has been much criticised in decisions of the courts up to and including the House of Lords; see, inter alia, the passage from the judgment of Lord Wilberforce in the **Rank Film Distributors** case which I have quoted above. Those criticisms are well summarised by Mr Adrian Zuckerman in his textbook on Civil Procedure (2003) starting at paragraph 17.8 as follows:-

"17.8 Although the law concerning intellectual property claims has been changed, as we shall presently see, the fact remains that the privilege against self-incrimination applies to documents and that it therefore tends to impede access to documents where the infringement of rights is of the most serious kind. Since the application of the privilege to civil litigation makes it difficult for victims of fraud and other crimes to obtain vindication, it is not surprising to find that the courts have expressed reservations about its operation in civil proceedings.

17.9 There are several reasons for suggesting that the application of the privilege to the disclosure procedure is anachronistic and should be revised. First, production and disclosure are testimonial obligations only in a technical sense, because the evidential significance of pre-existing documents does not turn on what the person producing or disclosing them now says but on what they say for themselves. Indeed, where documents incriminating a defendant can, for example, be obtained without the defendant's assistance, they are perfectly admissible. Second, the privilege's rationale has no application to disclosure proceedings. Lord Templeman placed the contemporary justification for the PSI in AT&T Istel Ltd v Tully on the basis that 'it discourages ill-treatment of a suspect and second that it discourages the production of dubious confessions'." He

observed that these considerations are of no relevance to civil proceedings. In the same case Lord Griffiths said:

> "I can for myself see no argument in favour of the privilege against producing a document the contents of which may go to show that the holder has committed a criminal offence. The contents of the document will speak for itself and there is no risk of the false confession which underlies the privilege against having to answer, questions that may incriminate the speaker."

17.11 The application of the privilege to civil search orders is even more difficult to justify because it verges on the absurd. Suppose that the defendant has been running a fraudulent business using fraudulent invoices and accounts. The documents would be immune from disclosure and from seizure under a civil search order because they may assist the defendant's conviction for fraud. Yet, in criminal proceedings, a criminal search order can be obtained to seize evidence of fraudulent practice. Against a criminal search order the defendant has no privilege against self-incrimination because the execution of a criminal search order authorises the police to enter, search and seize without the suspect's consent and, therefore, imposes no testimonial obligation on the suspect. It would therefore appear that while the defendant is immune from a civil search order; lest incriminating documents be found which could later be used in criminal proceedings, he has no immunity in criminal proceedings from the forcible seizure of the same documents which, once in the hands of the police, would be admissible in evidence at the defendant's criminal trial."

74. The growing unease with the privilege being claimed in civil cases, is exemplified by the recent decision of the Court of Appeal in **JSC BTA Bank v Ablyazov & Others** (2009) EWCA Civ 1125 (a matter heard in September 2009). There the search order limited disclosure of the information provided to the Claimant's solicitors and the Managing Director of the Claimant. It should be recognized that in the United Kingdom, there is a difference between the risk of self-incrimination arising in England and such risk arising elsewhere; as to the latter there is no automatic right to the privilege. Here the prospect of incrimination would have been before a foreign jurisdiction.

75. The claimant, a major Kazakh bank obtained a freezing injunction against several former senior officers and an English company and individuals associated with them. The injunction contained an order for disclosure about the extent and location of certain assets. The former bank employees, now residing in London, appealed the order, submitting that the High Court was wrong to require that they provide disclosure pending their application to discharge the injunction. The defendants sought to rely on the privilege against self-incrimination, asserting that the information provided would be used against them in Kazakhstan. Their argument found no favour with the Court of Appeal which made interesting observations on the privilege.

76. In this case, the judges of the Court of Appeal, Pill, Sedley and Moses, LL.J, re-emphasized that the foundation of the privilege was the need to protect the citizen against the oppressive conduct of the prosecuting arm of the State. To the extent that search orders themselves provide for such protection, the privilege becomes superfluous. Indeed, Lord Justice Sedley, L.J. seems to be quite impatient with retaining all but the shadow of the privilege and in his judgment confirming that the confidentiality which had been offered as a balance against the privilege was appropriate in the circumstances of this case, had this to say in his concluding paragraph:

> "The fact that the Claimants have been driven to offer this unsatisfactory form of confidentiality as a foil to the privilege against self-incrimination is another reason for concern at its expansion a form a protection against State oppression into a *fraudster's refuge*". (My emphasis)

At paragraph 33 of the judgment, he said further:

> ...these appeals illustrate vividly the potentially stultifying effect of the privilege against self-incrimination on the administration of justice. It is something to which Sir Nicolas Browne-Wilkinson V-C drew attention when, for apparently the first time, the privilege was

> claimed in a civil action for fraud: **Sociedad Nacional etc v Lundqvist** [1991] 2 QB 310, 338:
> "... the clearer the facts alleged, the stronger will be the privilege against self-incrimination."

At paragraph 35 he commented and then asked a question:

> ...how has an exclusionary rule designed to promote justice by preventing the use of torture or pressure to extract confessions become transmuted into a personal right which is able to defeat the ends of justice? It is of great importance to civil liberties and human rights that no state authority should be allowed arbitrarily to extract from individuals information which may incriminate them.

At paragraph 36 he articulated his concern at the conflict between the right of the claimant to justice and the privilege of the defendant to a search order to the PSI.

> "It is in my view still an open question whether in civil proceedings, where a good prima facie case of fraud is pleaded (and counsel are professionally forbidden to put their name to anything less), and when on the basis of it both sides are called upon to place their cards face up on the table, the law should accord to defendants a right to withhold from the court the very material which may establish their liability, and to do so on the precise ground that it will have that effect".

77. The learned judge makes a compelling case for restricting the scope of the privilege. It is suggested that this can be done consistently with more narrowly drawn orders which provide protection for defendants such as the Claimant submits, is the position in the instant case. Indeed he seems to question the jurisprudential basis of the privilege being preserved in civil cases. He states:

> "When in 1898 legislation for the first time permitted accused persons to give sworn evidence in their own defence, it expressly withdrew the accused's privilege against self-incrimination. The reason was obvious: if the accused, albeit in the dock against his will, was to seek to exculpate himself by testimony, he must be prepared to come clean. A defendant to a civil fraud claim is likewise before the court against his will. If he does not concede the claim he is in a very similar position to a person accused of crime. If

so, it is not at all easy to see why he should enjoy an immunity, together with the power to be his own judge of its availability, which no criminal defendant enjoys. A claimant faced with such a claim to privilege would be justified in thinking that there is a serious inequality of arms.

What can the courts do to redress the balance? One step is close scrutiny of a claim to this privilege."

78. The inexorable conclusion from adoption of this approach is that the search orders given herein are valid as a result of the protections given therein. Further, the fact that the first defendant has not claimed the privilege at this time and despite his opportunities to do so while accompanied by his attorney and otherwise, means it is now too late to do so. In that regard, I specifically adopt the reasoning and the conclusion of Lindsay J, in **O Ltd v Z**. I feel satisfied that this approach reflects the present and correct Common Law reality and ought to inform both the nature of the orders included in search orders made by the Court as well as the coverage given by the exercise of the privilege, and I so hold. I have already expressed my views on a good and arguable case, non-disclosure and risk of dissipation of assets.

RULING

79. In light of the foregoing, I make the following orders.

80. The Claimant's application for the Freezing Order granted by Cole-Smith J on December 28, 2009 and subsequently extended to the date of the hearing, to be extended to date of trial, is hereby granted.

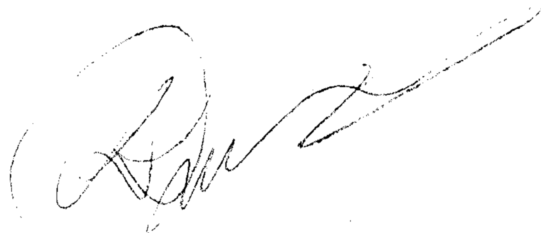
81. The first Defendant's applications dated January 8, 2010, to set aside the Freezing Order and the Search Order, are hereby denied.

82. Costs of the application for the Freezing Order and the First Defendant's application to set aside the Freezing Order are to the Claimant's, to be taxed if not agreed.

83. Costs on the application for the Search Order to be costs in the Claim and the costs of the application to set aside the Search Order are to be the Claimant's, to be taxed if not agreed.

84. The Supervising Attorney shall deliver up to the Claimant's attorneys the material mined from the search and analysis of the clones made of the 1st Defendant's computers or other data storage devices pursuant to the execution of the Search Order made by this Honourable Court on December 28, 2009.

84. Leave to appeal granted to the 1st Defendant.



ROY K. ANDERSON

PUISNE JUDGE

APRIL 8, 2010.