IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018CD00248

BETWEEN	**CALISTON GRAHAM**	**CLAIMANT**
AND	**COAST TO COAST QUARRIES LIMITED**	**1ST DEFENDANT**
	COAST TO COAST CONCRETE COMPANY LIMITED	**2ND DEFENDANT**
	CLIFTON JOHNSON	**3RD DEFENDANT**
	SHELLY-ANN SIMPSON	**4TH DEFENDANT**
	IDEAL S AND J TRUCKING SERVICES COMPANY LIMITED	**5TH DEFENDANT**

Company Law – Minority shareholder – Section 213A Companies Act – Civil Practice and Procedure – Rule 15.2 – Defendant's application for Summary Judgment – Whether Defendant can obtain Summary Judgment against itself – Whether Claimant entitled to a trial – Whether trial of preliminary issue is appropriate - Anton Pillar order improperly executed – Mareva injunction- Whether orders to be set aside – Whether an order for interim payment should be made – Whether interim receiver should be appointed.

Paul Beswick (Captain) and Aisha Thomas instructed by Ballentyne Beswick & Co. for Claimant.

Georgia Gibson Henlin QC and Nicola Richards instructed by Henlin Gibson Henlin for 1st, 2nd & 5th Defendants.

Ransford Braham QC and S.Tennyson Hanson instructed by Brahamlegal for the 3rd and 4th Defendants.

Heard: 5th & 6th February, and 8th April, 2020.

In Chambers

Cor: Batts, J.

[1] In law, as in life, as soon as one thinks he has seen it all something new comes along. In this case it involves applications for summary judgment. An ordinary enough occurrence. The 1st, 2nd, 3rd, and 4th Defendants are however asking the court for summary judgment in favour of the Claimant and against themselves. The Claimant opposes. He wants the matter to go to trial. The unique procedural question therefore arises: does the court have power to coerce a claimant to accept a judgment, in his favour, which he does not want.

[2] There are several applications to be decided. I heard oral arguments, from all sides about them all, at the same time. Counsel agreed the time strictures, three hours each, and also relied on written submissions. The applications are:

(i) Claimant's application for an injunction and to appoint receiver (filed on the 30th May 2018).

(ii) Claimant's application for interim payment (filed on the 17th September 2018)

(iii) 1st 2nd and 5th Defendants' further amended application for discharge of the ex parte injunction and

for an order to assess damages (filed 19th February 2019)

(iv) 1st 2nd and 5th Defendants' amended application for summary judgment or the trial of a preliminary issue (filed 19th February 2019).

(v) 3rd and 4th Defendants' application to discharge injunction filed (4th February 2019)

(vi) 3rd and 4th Defendant's application for summary judgment or for trial of a preliminary issue (filed 4th February 2019).

[3] The issues arise in the following circumstances. The Claimant, who describes himself as "an investor," owned shares in the 1st and 2nd Defendants. The other shareholders were the 3rd and 4th Defendants. He explains, in an affidavit filed on the 23rd April 2018, that he became acquainted with the 3rd Defendant in or about the year 2003. They, he says, agreed to jointly establish a quarry on lands for which the 3rd Defendant represented that he had obtained a lease. It was agreed that the Claimant would invest US $1,250,000 in return for 25% of the 1st Defendant. That was the company which would operate the quarry. US $250,000 of that amount was borrowed by the Claimant and, it was agreed, would be repaid by the 1st Defendant (paragraph 7 of the affidavit dated 23rd April 2018) .

[4] The 3rd Defendant later represented to the Claimant that he had spent over US$7 million to establish the quarry and, for that reason, the Claimant's share had to be reduced to 19% of the 1st Defendant, or so the Claimant alleges. The Claimant's main residence was then in the United States. He therefore "hired" Ms. Marvia Elizabeth Graham to represent his interests in the company. She was appointed a director and operations manager of the 1st Defendant. The Claimant says that in 2008 the 3rd Defendant gave him J$5 million saying that was his share of profits. (Paragraph 10 of the affidavit filed on the 23rd April 2018)

[5] The Claimant says that the 3rd Defendant invited him, and he accepted the invitation, to invest in the 2nd Defendant. The representation made was that it was a company owned by one Mr. Ferdinand Sappleton. The split in the 2nd Defendant would be 40:30:30 among and between the 3rd Defendant, Mr Sappleton and himself. The Claimant invested J$5 million. (Paragraphs 11 – 12 of the affidavit under reference).The Claimant asserts that he was induced to invest further amounts, in the establishment and operation of the 2nd Defendant, being: J$2 Million (to dismantle, transport and reassemble the 2nd Defendant's plant), US$10,000 to satisfy regulatory requirements and unspecified expenses related to establishing a well. He also spent, he says, over US$30,000 to purchase parts or equipment in the United States of America for the 1st and 2nd Defendants (Paras. 13 – 18 of the same affidavit).

[6] The Claimant says that he has not been receiving any profits or returns on his investment. The 3rd Defendant has repeatedly told him that the 1st and 2nd Defendants were not making profits. He subsequently discerned that the 3rd Defendant had secretly purchased Mr. Sappleton's 30% share of the 2nd Defendant. In 2011, according to the Claimant, at a meeting attended by himself, the 3rd Defendant, the accountant (one Mr. Gilzene), and Ms. Graham, the 3rd Defendant reiterated that the companies were operating at a loss. These representations were repeated in the year 2012. The 3rd Defendant, he says, refused to disclose any accounting records (Paras 24 – 26 of his affidavit).

[7] The Claimant says he later received information from the Company's then accountant (a Mr. White) that the 3rd Defendant was making double entries and operating the companies in a dishonest manner. Mr. White was eventually fired and a new accountant installed. In the period commencing 2013 the Claimant and 3rd Defendant had negotiations towards a buyout of the Claimant by the 3rd Defendant. They were unable to agree on a price for the Claimant's shares. The relations between the Claimant and the 3rd Defendant continued to deteriorate and in November 2017 a boisterous exchange occurred between them at a meeting. The Claimant exhibits, to his affidavit, monthly statements of income,

which he received from Ms. Graham. These support an assertion that in the period May 2016 to January 2017 the 1st Defendant's average monthly income was $23,480,112.90. (Paras 43 – 55 of affidavit filed on the 23rd April 2018). He has no information about the income of the 2nd Defendant. He asserts that the 3rd Defendant's interest in the 2nd Defendant was acquired by a loan which the 3rd Defendant repays from the income of the 2nd Defendant.

[8] Insofar as the 5th Defendant is concerned, the Claimant alleges that, it is an associate company of the 1st and 2nd Defendants. It was established with the 4th Defendant as its sole director with resources from the 1st and 2nd Defendants. The Claimant did not sanction the establishment of the 5th Defendant. He says,

> "*60. That I believe that being a Director of the 1st and 2nd Defendant companies, given that the 5th Defendant Company was established and owns assets purchased with funds from both these companies that I am entitled to the proceeds of any earnings of this company and that I should have been listed as a Director of this company*."

[9] The Claimant alleges that he has received "death threats" from the 3rd Defendant. He goes on to say (in the affidavit under reference) that:

> *"68. The clandestine measures being employed by Mr. Johnson in seeking to divest company funds, disguise true company earnings and falsify records have lead to the establishment of multiple sub-companies for which the court will need to cause an investigation to be conducted in order to unravel the tangled web of deceit.*
>
> *69. That I pray that the Court do cause an investigation to be conducted to see the true*

earnings of the companies and do cause me to be paid my true entitlement of the company profits from the date of my investment to present"

[10] The Claimant, on or about the 4th and 11th June 2018, applied for and obtained pre-trial injunctive relief to protect himself, preserve assets from dissipation and, evidence from destruction. The order was obtained ex parte. The circumstances of its execution were unsatisfactory. I will say no more about that at this stage. Suffice it to say the Defendants have applied to have it discharged.

[11] The Defendants' response, to the assertions made by the Claimant, are to be found in the affidavits on which they rely . Some are in support of their own applications and others respond to the Claimant's. These are:

i. The affidavit of the 3rd Defendant filed on the 21st June 2018, the second affidavit of the 3rd Defendant filed on the 27th June 2018, third affidavit of the 3rd Defendant filed on the 18th July 2018, fourth affidavit of the 3rd Defendant filed on the 24th August 2018, and the fifth affidavit of the 3rd Defendant filed on the 8th January 2019.

ii. The affidavit of urgency (Nicola Richards) filed 27th June 2018

iii. The affidavit of the 4th Defendant filed on the 29th June 2018, second affidavit of the 4th Defendant filed on the 17th July 2018

iv. A joint affidavit by 3rd and 4th Defendants filed on the 4th February 2019

v. Two affidavits of the 3rd Defendant filed on the 4th February 2019 and another, in response to the affidavit of Toni-Ann Smith, filed on the 9th April 2019.

vi. The affidavits of Ewart Gilzean filed on 27th August 2018 and 18th March 2019.

vii. The affidavit of Omar Williams filed on the 11th July 2018

viii. The affidavit of Leonard Campbell filed on the 11th July 2018

ix. The affidavit of Nicole Wright-Oldman filed on the 12th July 2018

[12] It is not necessary to review, in this judgment, all the evidence thus put forward by the Defendants.It suffices to say that most of the allegations, and assertions of fact, put forward by the Claimant are traversed.However insofar as the Defendants' applications, for summary judgment /trial of preliminary issue are concerned, they do not rely on disputed facts. Whereas I may reference some of their evidence, when discussing the other applications, it suffices for present purposes to note that the Defendants do not dispute the Claimant's assertion that he is an investor in the 1st and 2nd Defendants.They do not dispute that he is entitled to a return of his investment in exchange for a transfer of the shares. I will nevertheless reference evidence, from an auditor, put forward by the Defendants. In this regard although separately represented it is fair to say that the 1st 2nd and 5th Defendants on one hand, and the 3rd and 4th Defendants on the other, articulated for the same result in these applications.

[13] Ewart S. Gilzene provided auditing services for the 1st Defendant in the period 2009 to 2011 and for the 2nd Defendant in the year 2011 only. He was a "business management consultant" for the 3rd Defendant in 2014. He exhibits copies of the 1st Defendant's financial statements for 2009 to 2011. He gives an account of the circumstances surrounding the acquisition of the 2nd Defendant and of certain negotiations and/or discussions between the Claimant and the 3rd Defendant. At paragraph 16, of his affidavit filed on the 27th August 2018, he stated:

> *"I withdrew my services as an auditor of the 1st and 2nd Defendant Company after completing the 2011 audit reports. I realized that I was no longer being communicated with and my calls were not being returned. I subsequently learnt that Miss Graham was not comfortable with me in a personal capacity. She was not questioning my expertise but did not appreciate the way I communicated with her."*

[14] Mr. Gilzene points out that cash collections referenced in the Claimant's affidavit do not necessarily constitute income and do not mean there were profits (Paragraphs 19 and 20 of his affidavit under reference). He says that while he performed such services the 2nd Defendant was barely able to "pay its way." He is silent on this aspect with regard to the 1st Defendant although the audited statements he exhibits all show the 1st Defendant as a loss making entity. At paragraph 24 he states,

> *"24. The evidence does not support the Claimant's allegations at paragraph 61 and the contents are not accurate. There is no evidence from what I have seen of the Claimant investing US $1,250,000 in the 1st Defendant. It is not an issue if Mr. Johnson* [the 3rd Defendant] *borrowed money to pay for his shares. The important thing is whether or not it was repaid by the company."*

[15] Mr. Glizene says the allegations of devices and underhanded methods (contained in paragraph 65 of the Claimant's affidavit) are not supported by the auditor's reports. He says there is no evidence of fraud. He says the accounting staff was always controlled by Ms. Graham, who was the Claimant's agent, and therefore the allegation of double entries could not be true.

[16] In an affidavit, filed on the 18th March 2019, Mr Gilzene commented adversely on the affidavit of Peter J Lee dated the 14th September 2018.Mr Lee an accountant had,in that affidavit, indicated preliminary findings from his review of accounting records obtained by virtue of the court's ex parte order. He referred to the income statements from the 1st Defendant and found that they contradicted the sales journal from the Peachtree accounting system (see paragraphs 5 and 6 of his affidavit). He also reviewed the income statements of the 2nd Defendant. Mr Lee states, at paragraph 12 of his affidavit, that

"the income statements for all the periods stated are understated and vary from the sales journals"

Mr Gilzene's critique pointed out that the audited financial statements are more reliable than an accountant's report.In his affidavit, at paragraph 9, he acknowledges that there were discrepancies but said that the audit process constituted an objective and independent examination and was credible.

[17] In an Amended Notice of Application, filed on the 19th February 2019, the 1st ,2nd and 5th Defendants seek:

> *"An order that summary judgment be entered in favour of the 1st and 2nd Defendants against the Claimant on the claim and counterclaim requiring the 1st 3rd and /or 4th Defendants to repay to the Claimant the moneys paid by the Claimant for his shares in the 1st and 2nd Defend*ant
>
> *As to the 1st Defendant the following further orders:*
>
> *i. The sum paid by the 1st Defendant is to be determined by an assessment or account of the payments actually made by the Claimant and sums paid to him or on his behalf by the 1st Defendant.*
>
> *ii. The account is to be conducted by the Registrar of the Supreme Court and/or the Court.*

b. *An order that any payment to or on behalf of the Claimant be deducted from any payment due to the Claimant.*

c. *An order providing directions for the assessment of damages or the account.*

d. *An order that the 1st Defendant pay the Claimant the sums due on the conclusion of the said account or assessment of damages.*

e. *An order that the Claimant resign as director on payment of the said sums;*

f. *An order that the Claimant execute a transfer in respect of his shares in favour of the 1st Defendant Company and/or the 3rd or 4th Defendants accordingly be removed from the register of the 1st Defendant.*

3. *As to the 2nd Defendant:*

a. *An order that the 2nd Defendant and/or the 3rd Defendant pays to the Claimant the sum of $7,000,000.00 being the moneys paid by the Claimant for his shares in the 2nd Defendant Company;*

b. *An order that the Claimant has been repaid in full in relation to the loan of US$30,000.00.*

c. *An order that there be in any event an account or assessment of the sums repaid to the Claimant by the 2nd Defendant;*

d. *An order that the 2nd Defendant pay to the Claimant the sums found due on the assessment or the taking of the accounts.*

e. *An order providing directions for the assessment of damages or the taking of the accounts.*

f. *An order that the Claimant resign as director of the 2nd Defendant on payment of the sums relating to the return of his investment;*

g. *An order that the Claimant execute a transfer of his shares in favour of the 2nd Defendant Company and for his name to be removed from the register of shareholders of the 2nd Defendant Company.*

4. *Alternatively, there be trial of a preliminary issue as to whether the Claimant in all the circumstances as a matter of fact and law the proper order is for the Claimant is to be repaid the moneys paid by him for his shares in the 1st and 2nd Defendant companies;*

5. *An order that the Claimant's case against the 5th Defendant be struck out;*

6. *An order providing directions for the assessment of damages or the taking of the accounts after the trial of the preliminary issue;*

7. *Costs of the Application are costs in the claim.*

8. *Such further and/or other relief as this Honourable Court deems just.*

[18] The 3rd and 4th Defendants, in terms not dissimilar, seek the following (see Notice of Application filed on the 4th February 2019):

*"1. An order that summary judgment be entered in favour of the 1st and 2nd Defendants against the Claimant on the claim and counterclaim requiring the 1st 3rd and /or 4th Defendants to repay to the Claimant the moneys paid by the Claimant for his shares in the 1st and 2nd Defend*ant.

2. An order that the 3rd and 4th Defendants being shareholders in the 1st and 2nd Defendant companies be permitted to purchase the Claimant's shares in the 1st and 2nd Defendant companies upon the repayment of the sums claimed by the Claimant.

3. *As to the 1st Defendant the following further orders:*

i. *The sum paid by the 1st Defendant is to be determined by an assessment or account of the payments actually made by the Claimant and sums paid to him or on his behalf by the 1st Defendant.*

ii. *The account is to be conducted by the Registrar of the Supreme Court and/or the Court.*

b. *An order that any payment to or on behalf of the Claimant be deducted from any payment due to the Claimant.*

c. *An order providing directions for the assessment of damages or the account.*

d. *An order that the 1st Defendant pay the Claimant the sums due on the conclusion of the said account or assessment of damages.*

e. *An order that the Claimant resign as director on payment of the said sums;*

f. *An order that the Claimant execute a transfer in respect of his shares in favour of the 1st Defendant Company and/or the 3rd or 4th Defendants accordingly be removed from the register of the 1st Defendant.*

4. *As to the 2nd Defendant:*

a. *An order that the 2nd Defendant and/or the 3rd Defendant pays to the Claimant the sum of $7,000,000.00 being the moneys paid by the Claimant for his shares in the 2nd Defendant Company;*

b. *An order that the Claimant has been repaid in full in relation to the loan of US$30,000.00.*

c. *An order that there be in any event an account or assessment of the sums repaid to the Claimant by the 2nd Defendant;*

d. An order that the 2nd Defendant pay to the Claimant the sums found due on the assessment or the taking of the accounts.

e. An order providing directions for the assessment of damages or the taking of the accounts.

f. An order that the Claimant resign as director of the 2nd Defendant on payment of the sums relating to the return of his investment;

g. An order that the Claimant execute a transfer of his shares in favour of the 2nd Defendant Company and for his name to be removed from the register of shareholders of the 2nd Defendant Company.

5. Alternatively, there be trial of a preliminary issue as to whether the Claimant in all the circumstances as a matter of fact and law the proper order is for the Claimant is to be repaid the moneys paid by him for his shares in the 1st and 2nd Defendant companies;

6. An order providing directions for the assessment of damages or the taking of the accounts after the trial of the preliminary issue;

7. Costs of the Application are costs in the claim.

8. Such further and/or other relief as this Honourable Court deems just.

[19] In written submissions filed on the 18th March 2019 counsel, for the 1st ,2nd and 5th Defendants, articulates the reasons for summary judgment thus:

"24. On the statements of case and on the evidence it is not disputed that the Claimant paid the sum of $7,000,000.00 for his shares in the 2nd Defendant. The Claimant claims and the Defendants agree that he is to be refunded or repaid this investment of $7,000,000.00 in the 1st and 2nd Defendants in exchange for being removed from the register of the Company.

25. *Similarly, although the quantum is disputed the Claimant claims and the 1st and 2nd Defendants are agreed that he is to be repaid his investment in the Company in exchange for his removal from the register of the Company. The dispute as to quantum does not prevent the court from treating with the matter of liability and leaving the quantum to be assessed. The Claimant says that he paid US$1,250,000.00 and the claimant [sic] says that he only paid the sum of US$765,000.00. The 1st Defendant's position is supported by the Affidavit of Marvia Graham which was filed on the 18th May 2018 at paragraph 6. She depones that she received a receipt for each payment made in relation to Mr. Graham's acquisition in the 1st Defendant. The receipts total US$515,000.00 and were as follows:*

    i. *Receipt letter dated January 11, 2006 – US $200,000.00;*

    ii. *Receipt letter dated December 22, 2006 – US $200,000.00;*

    iii. *Receipt letter dated May 20, 2007 – IS$115,000.00.*

26. *Further there is no dispute that the Claimant took out a NCB Loan in the sum of United States Two Hundred and Fifty Thousand Dollars (US$250,000.00). This would make his total investment Seven Hundred and Sixty-Five Thousand United States Dollars (US$765,000.00). This sum is repaid to NCB by the Company on his behalf.*

27. *Similarly, there is no dispute that the Claimant loaned the sum of US$30,000.00 to the 1st Defendant and that this loan*

has been repaid. The 1st Defendant has provided evidence in the 5th Affidavit of Clifton Johnson filed on January 8, 2019 at paragraph 7 that it has repaid the Claimant the loan in its entirety.

28. *The Claimant's case is based on Section 213A of the Companies, Act. As a matter of law, a shareholder can seek and obtain relief resulting in him being repaid the moneys for his shares.*

29. *Finally, the Claimant cannot succeed in relation to the reliefs sought as against the 5th Defendant.*

30. *It is in these circumstances that these Defendants submit that the Claimant is not able to successfully prosecute the Claim or defendant the counterclaim as against them. The orders sought is in keeping with the overriding objective of saving expense, achieving expedition, avoiding waste of the court's resources and in the interest of justice. The 1st, 2nd and 5th Defendants therefore seek orders in accordance with their counterclaim and a dismissal of the claim."*

[20] The rational articulated by counsel for the 3rd and 4th Defendants is to the same effect. The Defendants say an order to refund to the Claimant the cost of his shares, plus interest thereon, will give him that which he has claimed. Furthermore, as there is no resistance to such an order, then summary judgment should be the result. Alternatively they ask that the matter be dealt with by way of a preliminary issue or that the issues of liability and damages be tried separately. Detailed reference was made to the statements of case (Claim and Counterclaim) as well as to numerous authorities.

[21] Captain Beswick, for the Claimant, submitted that on a true construction of the rules the applicant for summary judgment must do so against the other party's

statement of case.He regarded it as a *"grave procedural error*" for the Defendants to be arguing that their own case must fail.I do not agree. The court has power of its own motion to deal with a matter summarily (Rule 15.4(5) of the Civil Procedure Rules).Therefore either party can invite a court to do so.It seems to me there is nothing to preclude a party,in the event of the other party not applying, inviteing the court to save costs and shorten proceedings in an appropriate case.By making this application the Defendants are doing just that.

[22] Claimant's counsel is ,I think, on firmer ground when he challenged the premise of the Defendant's argument.He submitted that there were issues of fact to be resolved and that ,unless resolved at trial,it was innapproprite to enter judgment.In that regard he referenced the claim and in particular the relief sought. It is not uni-dimensional. As is to be expected the Claimant is concerned, not just about the price paid for, or money invested to obtain, shares in the undertakings, but he is also interested in the present value of such shares and the income he may have earned on such shares but for the Defendants' alleged wrongful conduct. In answer to the suggestion that his client could not be entitled, to both the price paid with interest as well as income earned in the period, Claimant's counsel had an appropriate response. If he had to elect, and he was not conceding that he did, then let that election come after not before the evidence was in. In other words if his client was only entitled to one of two remedies it would be unfair to cause him to select either unless and until he was able to say which would garner for him the greater benefit.

[23] The Claimant, in Particulars of Claim filed on the 20th July 2018, claims the following by way of relief:

> "(*i*) *An order directing an investigation to be conducted into the 5th Defendant company to determine if the assets and holdings were acquired through the income of the 1st and 2nd Defendant companies and cause the register of the 5th Defendant to be amended, to add the Claimant as a Director*

and shareholder with such shares as determined by this Honourable Court;

(ii) *An order that the register of the 2nd Defendant company be amended to assign the Claimant with his true allocation of shares in keeping with his contribution and that the 30% shares which were wrongfully acquired wholly by 3rd Defendant be allocated equally amongst the Claimant and the 3rd Defendant;*

(iii) *An order that the register of the 1st Defendant company be amended to assign the Claimant with his true allocation of shares in keeping with his contribution of US$1.25 million in the company;*

(iv) *An order that the Defendants whether jointly or severally to pay to the Claimant US$1.25 million with regard to the 1st Defendant company, with commercial interest at the rate charged by the Claimant's bankers from November 2007 compounded at daily rests to the date of payment; J$7 milllion and US$10,000 with regard to the 2nd Defendant Company, with commercial interest at the rate charged by the Claimant's bankers from May 2008 compounded at daily rests to the date of payment; being the moneys paid by the Claimant for his shares in both companies and upon such payment that the Claimant be removed from the register of all companies;*

(v) *A declaration that the Claimant is entitled to such percentage returns of the Company profits based on his share capital in the 1st, 2nd and 5th Defendant companies in such sums as determined by this Honourable Court from the date of*

operations of the 1st, 2nd and 5th Defendant businesses to present with commercial interest at the rate charged by the Claimant's bankers from May 2009 compounded at daily rests to the date of payment; and an order directing the Defendants whether jointly or severally to pay to the Claimant such sums prior to the removal of the Claimant from the register of the companies;

(vi) *Damages for mense profits for the loss of use and utility of the Claimant's monies by the illegal actions of the 3rd Defendant in that he deliberately and/or wilfully and/or spitefully and/or maliciously and/or fraudulently falsified documentation to mislead the Claimant in seeking to prevent him from obtaining a return on his investment into the 1st and 2nd Defendant companies;*

(vii) *Aggravated damages on the footing that the 3rd Defendant; deliberately and/or wilfully and/or spitefully and/or maliciously abused his standing as the Managing Director and Majority Shareholder of the 1st and 2nd Defendant companies to mismanage and divert company funds for his own use and did abuse company resources without having due regard to the Claimant's investment and did fail to account properly and did falsify documentation to prevent payment of any monies to the Claimant for which he was and is entitled;*

(viii) *Punitive damages on the footing that any sum awarded for compensatory and aggravated damages will be insufficient both to reflect the gravity of the actions and conduct of the 2nd Defendant and to deter the Defendant and any other person, from permitting its officers, servants and/or agents*

and/or employees from acting similarly in the future and further that the action of the Defendant officers amounted to oppressive, arbitrary and unconstitutional actions of a Director of a company who is accountable to his shareholders;

(ix) That the court appointed receiver for the 1st, 2nd and 5th Defendant companies do pay to the Claimant, the sums assessed herein;

(x) Indemnity Costs and Attorney-at-Law costs on the footing that were it not for the malicious actions of the 3rd Defendant then this claim would not have been necessary;

(xi) Commercial interests;[sic]

(xii) Liberty to apply;

(xiii) Special costs certificate for two (2) Counsel and one (1) instructing Counsel;

(xiv) Such further and other relief as to this Honourable Court may seem fit;" [EMPHASIS ADDED]

[24] It is manifest that the Claimant, contrary to the Defendants' assertion, claims more than just a refund plus interest of amounts paid or invested. It may be true that acceptance of the proffered refund reflects the certain bird in the hand. It would also save court's time and avoid the necessity to consider what may amount to mounds of documentary evidence. However these are not pertinent considerations, for the court, at this stage and on this application.The Claimant wants an allocation of what he considers is his true share entitlement. He wants to be paid the share of profits, on the earnings of the companies, he would have received had the Defendants done right by him. He also seeks aggravated and / or exemplary damages among other things.

[25] Applications for summary judgment are dealt with in Part 15 of the Civil Procedure Rules.

> *"15.2 The court may give summary judgment on the claim or on a particular issue if it considers that –*
>
> *(a) the claimant has no real prospect of succeeding on the claim or the issue;or*
>
> *(b) the defendant has no real prospect of successfully defending the claim or the issue."*

The test is whether a party's claim (or defence) has a real prospect of success.This has been judicially interpreted to mean exactly what it says. A court is therefore required to assess the evidence and say whether the prospect of success is real as opposed to being fanciful. Lord President Paul Harrison explained it thus in **Gordon Stewart et al v Merrick (Herman) Samuels SCCA No.2 of 2005 (unreported judgment decided 18th November 2005)** at page 6:

> *"The prime test being "no real prospect of success" requires that the learned judge do an assessment of the party's case to determine its probable ultimate success or failure.Hence it must be a real prospect not a "fanciful" one-**Swain v Hillman** (supra).The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party ."Real prospect of success"is a straightforward term that needs no refinement of meaning.The latter term should not therefore be equated to the "good and arguable" case concept as required to obtain the issue of an injunction.The "good and arguable case " or "a serious question to be tried" test,in the case of the grant of the injunction,is directed to a preliminary assessment of the party's contention in contrast to an ultimate result"*

[26] What therefore, on the evidence before me, is the probable ultimate result? The Defendants contend that it is that the Claimant will receive a refund plus interest of the sums he invested.That may be so but is that the only probable ultimate result? The Defendants, as seen from the evidence of their expert accountant, do not concede fraud or irregularities.They also deny that the 1st and 2nd Defendants made profits.The Claimant says otherwise and has an accountant's preliminary report in support.Can it be said that the Claimant has no real prospect of success on these issues? The Defendant's expert only speaks to three years of the entire period for one company, one year for another and to only two of the three companies.It is to be borne in mind that the Claimant asserts,and this is a fact in issue, that the Defendants kept two sets of "books" and withheld information from him.

[27] There is similarly no concession, by the Defendants, of the Claimant's entitlement to aggravated or penal damages.Whether he is to receive same will depend on a determination of how, and why, the 3rd and 4th Defendants conducted themselves.They have denied the Claimant's allegations in that regard.These are triable issues.It is not possible to say that the Claimant has no real prospect of succeeding on his claim to profits and/or penal or aggravated damages. A Defendant cannot by admitting one part of a claim compel a Claimant to take a judgment, if to do so, will preclude the Claimant receiving another remedy he desires and in respect of which his prospect of success is real.

[28] There is also the matter of the 5th Defendant.It is submitted that, as the Claimant is not a shareholder or director and as he asserts it was the 1st and 2nd Defendant's resources that were used to form the 5th Defendant, his claim has no real prospect of success. The 4th Defendant, in her affidavit filed on the 17th July 2018, gives a detailed account of how the 5th Defendant came into being.She denies it is an affiliate of the 1st and 2nd Defendants.She explains,with supporting documentation, how she purchased one then two trucks before incorporating the 5th Defendant and transferring the trucks to that company.She is the sole director

and shareholder,(paragraphs 15, 16 and 17 and exhibit SS 5).The 4th Defendant is however a director of the 1st and 2nd Defendants and borrowed money from the 2nd Defendant to purchase trucks for her business (paragraphs 19 and 20).The 5th Defendant does haulage ,pumping of concrete and delivery for the 2nd Defendant (paragraphs 14 to 21 of her said affidavit).The 4th Defendant says she never received a salary from the 1st or 2nd Defendants.

[29] It is submitted that the 5th Defendant ought not to be before the court unless the Claimant had obtained permission to bring a derivative claim in the name of the 1st and/or 2nd Defendants.It is an attractive submission.However the Claimant, although not using those words, is seeking a tracing order.He is asking a court of equity to find that it was his money which was used and that, but for the fraud or breach of trust and/or fiduciary duty of the 3rd and 4th Defendants,he would be part owner of the 5th Defendant.The incestuous relationship, between the 1st , 2nd 4th and 5th Defendants, and the alleged failures to disclose to a fellow board member do not help the 5th Defendant's cause. On the evidence it cannot, at this stage, be said the Claimant's contention has no real prospect of success.

[30] The Defendants also urge that, if there is to be no summary judgment, there should be a trial of preliminary issues.These being (i) Whether the proper order is a refund of shares (ii) Whether on repayment the Claimant is required to resign as a director and, (iii) Whether on repayment the Claimant is required to transfer his shares to the 1st ,2nd ,3rd and/or 4th Defendants. The Defendants filed supplemental submissions on the 24th February 2020 in support of the application to have preliminary issues tried.They cited **Re Tobian Properties Ltd [2013] 2 BCLC 567** and **Television Jamaica Limited v CVM Television Limited [2017] JMSC COMM 1.** The latter case is a decision of Sykes J (as he then was).His statement, at paragraph 4, is to be understood in the context of a case where the evidence on liability was discrete from that with regard to the remedy, see Sykes J's discussion at paragraphs 5 , 6 and 7. In the case at bar much of the same accounting evidence will need to be considered when assessing whether there was misconduct, as well as, when considering the value

of shares or amount of profits lost. The former case, referenced above, involved a petition to wind up. A receiver was in place. In that scenario the court will most likely have reliable reports to hand and different considerations are therefore applicable.Lord Justice Arden's words at paragraph [13] (page 572 (d) of the report) resonates : " ***Gamlestaden*****,**" he said," *serves as a reminder that this court should not erect technical difficulties to prevent Mr Maidment from obtaining redress if there is a sufficient prospect that a potential surplus can at some stage be shown and no unfairness to the other parties is involved".*

[31] When regard is had to my analysis, at paragraphs 26 and 27 above, it is apparent that the issues identified by the Defendants as preliminary cannot be resolved without resolving other factual questions.In a nutshell it has to be determined whether there was misrepresentation, fraud, inequitable conduct, breach of fiduciary duty owed by one partner (or shareholder) or director to another, among other things.The Claimant says it was ,for example, a misrepresentation which resulted in his reduced shareholding.This is a fact in issue.He says also that but for the untruths about profitability he would have received greater returns. These facts have to be decided before a court can decide on an appropriate remedy.Section 213A(3) of the Companies Act offers many other remedies.These include an order to liquidate and dissolve the company as well as the compensation of aggrieved persons.Were proceedings to be bifurcated much of the same evidence, as to accounting,how accounts were kept, earnings, costs incurred, among other things, will have to be considered at both the liability and assessment stages.It seems to me that, in this case, it would not do substantial justice to order the trial of preliminary issues as framed by the Defendants or at all.

[32] I turn now to the Claimant's application for an interim payment.This is governed by Rule 17.6 (1) of the Civil Procedure Rules . It requires the applicant ,in a case like this, to demonstrate that he would obtain judgment or that there has been an admission of liability to pay damages or some amount,see **Blue Waves Investment Limited vJamaica Bauxite Mining Limited [2017] JMSC Comm**

36 (unreported judgment 24th October 2017). One may have thought that, given the Defendants' application disposed of above, an interim payment would be the inevitable result.This is because, as they have conceded that the Claimant is entitled to a refund,he does seem certain to succeed at trial. What remains uncertain however is the form his remedy will take.An interim payment, based on the refund of amounts invested, would be wrong without an order for transfer of shares.A transfer cannot be ordered until it is determined how many shares,at what value, whether he will be allocated a share of profits, at what date and/or whether he will only be given restitution of amounts invested .Indeed an order to wind up may also be on the cards.Is it right to order the Defendants to make an interim payment when, until trial, one can make no determination as to apportionment of shares or as to the impact of such payment on the company.I will make no award at this stage.

[33] The Defendants' application to set aside the order ,made ex parte on the 4th and 11th June 2018 (and which for convenience I will refer to as the Anton Pillar Order), will now be considered. The 1st ,2nd and 5th Defendants applied by notice of application filed on the 27th June 2018 to discharge the order and, as an alternative, certain variations were sought.The application was further amended, and refiled, on the 19th February 2019.By notice of application filed on the 4th February 2019 the 3rd Defendant applied to discharge paragraph 3 of the Anton Pillar order which restrained him from,inter alia, threatening the Claimant.

[34] The impugned order contains some 24 paragraphs and I, reluctantly, set it out in its entirety:

"IT IS HEREBY ORDERED:

> *1. Interim freezing order granted in respect of all assets and bank accounts of the 1st, 2nd and5th Respondents, save in the ordinary course of business, the said assets are not to be sold, pledged, transferred, removed from the jurisdiction or otherwise dealt with until the 21st June, 2018 or further order of the Court;*

2. *The Respondents are restrained whether by themselves, their servants, agents or otherwise Howsoever from mortgaging, assigning, pledging, charging, transferring, disposing of or encumbering, removing from the jurisdiction of the court or otherwise dealing with any assets of the 1st, 2nd, and 5th Respondents until 21st June, 2018 or further order of the Court;*

3. *The 3rd Respondent is restrained whether by himself, servants, agents, or otherwise howsoever from contacting, threatening, or in any way communicating with or taking any step to cause harm or detriment to the Claimant/Applicant or the Claimant/Applicant's family until further order of the court;*

4. *Inter parties hearing is fixed for 21" June, 2018 at 3 p.m. for 1 hour;*

5. *The Claimant/Applicant through its Attorneys gives the usual undertaking as to damages;*

6. *That personal service on the 3rd Respondent is dispensed with and service is substituted on Ms. Janet R. Mignott, Attorneys-at-Law of Suite #2 of 8 Herb McKinley Drive, Kingston 6 for the 3rd Respondent;*

7. *The Respondents, its officers, directors, servants, agents, employees, and anyone else acting on its behalf, and any person(s) appearing to be in charge of the premises known as* ***COAST TO COAST CONCRETE COMPANY LIMITED*** *a company duly incorporated in Jamaica having its registered office at Shop 8, 4 Altamont Terrace, Kingston 5 in the parish of Saint Andrew, and the concrete plant located on Harbour Drive in the district of Harbour View, Kingston 17 in the parish of Saint Andrew,* ***COAST TO COAST QUARRIES LIMITED*** *a company duly incorporated in Jamaica having its registered office at 29-31 Caledonia Avenue, Mandeville in the parish of Manchester and the quarry located at Albion Estate in the district of Yallahs, in the parish of Saint Thomas and* ***IDEAL S AND J TRUCKING SERVICES COMPANY LIMITED****, a company duly incorporated in Jamaica with its registered office at Lots 20 & 30 Mount Nelson, Mandeville in the parish of Manchester (hereinafter collectively referred to as "the Premises") shall forthwith permit entry into the Premises and to any vehicles, storage containers, receptacles of any sort, or building, which in the opinion of the Independent Supervising Attorney detailed herein, is necessary to be attended upon to give full effect to this Order, to the persons authorized herein for the purposes of searching for, identifying, inspecting and reproducing for and under the supervision of the Independent Supervising Attorney, Dr. Raymond Clough of the law firm, Clough,*

Long & Company, any and all documents relative to the 1st, 2nd and 5th Defendants' financials, accounting and related records or otherwise for the period November 2007 to May 31st, 2018, hereinafter referred to as "the Evidence";

8. *For the purpose of giving effect to paragraph 7, the Respondents and any person(s) appearing to be in charge of the Premises shall grant entry and permit re-entry into the Premises to the Authorized persons duly authorized by the Supervising Attorney, collectively or individually, between the hours of 9:00am to 4:00pm on such dates as may be necessary.*

9. *The Independent Supervising Attorney shall act as an officer of the Court in respect of the observance and implementation of the terms of this Order and all persons responsible for service and execution of this Order shall be entitled to take all necessary reasonable measures with the assistance of the local constabulary to enforce it and to reasonably prevent or remove any impediment to its execution;*

10. *This Order may only be served and the entry to the Premises made between 9:00 a.m. and 4:00 p.m. on a weekday and following the service of the Order on any person(s) appearing to be in charge of the Premises, no entry to the Premise shall be permitted unless there are present at the time of entry the Authorized Persons, or any of them, provided that the Independent Supervising Attorney and any such other person as he may require are also present;*

11. *The Respondents, its officers, directors, servants,agents,employees, and anyone else acting on its behalf, and any person(s) appearing to be in charge of the Premises shall allow the Authorized Persons to remain on the Premises during the time set out in paragraph 10.*

12. *The Respondents, its officers, directors, servants, agents, employees, and anyone else acting on its behalf, and any person(s) appearing to be in charge of the Premises shall allow the Authorized Persons to record by audio, video or photograph the Evidence, the Premises, and all acts, conversations and discussions occurring in the course of the Authorized Persons' search of the Premises and that relate to this Order between the time this Order is served and the completion of the search, with the exception of communications between the Respondents and their Attorneys-at-Law.*

13. *If it is impracticable for the Independent Supervising Attorney to search for, identify, inspect or reproduce Evidence located at the Premises or if the Respondents' refuse to*

cooperate and allow reproduction of the said Evidence, the Independent Supervising Attorney shall be entitled to remove such Evidence the storage media in which it is contained into his possession for these purposes. The said Evidence is to be returned to the Respondents within forty-eight (48) hours of their removal.

14. *At the time of initial entry into the Premises, the Respondents and any person(s) appearing to be in charge of the Premises shall be served with this Order that upon service of this Order, the person(s) served shall forthwith be advised in plain language by the Independent Supervising Attorney of the nature of the Order and their legal rights, including the right to seek legal advice and to segregate documents over which legal professional privilege is claimed ("Privileged Documents"), provided that they do so forthwith, and while seeking legal advice and segregating Privileged Documents may refuse entry to the Premises for a period not to exceed two hours to all of the Authorized Persons except for the Independent Supervising Attorney and such other Persons as he may require, who shall be and hereby are authorized to enter the Premises and take such steps as they deem necessary to secure and preserve the Evidence therein and ensure that no steps are taken to alter, deface, discard, conceal or destroy any of the Evidence while the Respondents and/or person(s) served are seeking legal advice, and any Privileged Documents identified shall be provided directly to the Independent Supervising Attorney and sealed pending further order of the Court;*

15. *The Claimant/Applicant's Attorneys shall ensure that a list is made of all the Evidence that is seized or delivered up pursuant to this order and shall serve a copy of that list on the Respondents' Attorneys on or before the 18th June, 2018. The Independent Supervising Attorney shall provide a report to the Court on or before the 21' June, 2018;*

16. *Upon service of the Order, the Respondent and any person(s) upon whom the Order is served, shall forthwith disclose to the Authorized Persons and grant access and deliver up to the Authorized Persons any and all of the Evidence, wherever situated, including but not limited to the whereabouts of all of the Evidence, whether in the possession, custody or control of the Respondents or any third party, and any person(s) upon whom the Order is served, shall forthwith render any necessary assistance to the Authorized Persons to locate, decode, access, and decrypt the Evidence and any and all information or electronic data to which the Authorized Persons may not have ready and immediate access;*

17. *In the event the Authorized Persons find it necessary to remove Evidence into his possession pursuant to Paragraph 13 above, the Respondents' shall provide all keys (physical or electronic), identification codes, passwords, pass-phrases, or any other information or knowledge necessary to achieve access to the Evidence and shall forthwith render any necessary assistance to the Independent Supervising Attorney and the persons assisting him To enable them to effectively carry out their responsibilities under this Order;*

18. *All Evidence reproduced, copied and/or seized pursuant to this Order, including but not Limited to the documents in respect of which privilege is claimed shall be held in the custod of the Independent Supervising Attorney until the 21st June, 2018 or further order of the Court;*

19. *Unless otherwise ordered by this Court, the Respondent, and any of its officers, directors, servants, agents or employees, and any person(s) served with this Order shall not directly or indirectly, by any means whatsoever remove any Evidence from the Premises, erase or delete from any means of electronic storage or transmit any of the Evidence from the Premises, or alter, deface, discard, conceal or destroy in any manner any of the Evidence or alter any text, graphics, electronic data, information, or other content of the Evidence;*

20. *Authorized Persons in this Order refers to the Claimant/Applicant, his Attorneys-at-Law and the Independent Supervising Attorney and his required staff and members of the local constabulary. The Authorized Persons on the Premises shall not exceed ten (10) persons at any one location at any one time.*

21. *The Respondents are to be served with this Order, the ex parte notice of application, all affidavits in support, the Fixed Date Claim, the affidavit in support and a transcript of the ex parte proceedings giving rise to this Order;*

22. *Liberty to apply;*

23. *Claimant/Applicant's Attorney to prepare, file and serve this Order;*

24. *Costs in the claim."*

[35] At the inter partes hearing on the 21st June 2018 I extended the Anton Pillar order with some variations.These made it clear that the Defendants were allowed to operate their accounts in the ordinary course of business.It gave firm directions permitting the Defendants to inspect and claim privilege over such

documents as they wished.The latter order was necessary because the Claimant's legal representatives and/or the Independent Supervising Attorney had not executed the order in the manner intended.On the 4th July 2018 I ordered the immediate return of all items and evidence seized and the delivery of same to the Defendants.The question of costs was reserved.On the 12th October 2018 I adjourned all applications,including the applications to discharge ,to the 18th February 2019. On that date orders for the filing of written submissions were made.After further adjournments, and efforts to mediate,the applications were heard in February 2020.

[36] I am satisfied,having reviewed all the evidence and submissions,that the order made ex parte was justifiably made.The evidence is that the Claimant had not been given returns on his investment on the basis that the companies were running at a loss.Further that,although a director, he was not provided with information he requested.There was evidence that the companies had contracts of great value and there were income statements involving large amounts.The Claimant had information, from a former accountant of the companies, that two sets of books were being kept.The alleged conduct of the 3rd Defendant at meetings was also important.This all sufficed to demonstrate a strong prima facie case (which I have already decided has a real prospect of success).It is clear that the only real evidence, in the form of company books and records, was under the Defendants' control and, when regard is had to the conduct alleged, it was probable that if alerted they would take steps to hide or destroy that evidence.This suffices to satisfy the test for the grant of an Anton Pillar order, see ***Elvee Limited v Clive Taylor et al [2001]EWCACiv 1943(unreported 6th December 2001)*** per Chadwick LJ at paragraph 48, with which the Vice Chancellor agreed, and ***Columbia Picture Industries INC and others v Robinson and others [1987] Ch Div 38*** (more fully discussed below).The extreme caution sometimes expressed,see for example ***CBS Butler v Joe Brown and others [2013] EWHC 3944*** (judgment of Tugendhat J) *and* ***Lock Plc v Beswick and others [1989] 1 WLR 1268*** per HoffmanJ (in which the order

allowed the search of a competitor's premises),should be applied in context. In the case before me the evidence to be preserved was material to which the Claimant, as a director, had a legal right.

[37] The Defendants have not demonstrated that there was material nondisclosure, at the time of the exparte hearing, such as to justify it being set aside.Their primary contention is that the execution of the order was done in a manner which was contrary to the terms of the order itself.The Claimant ,they say, should suffer the consequence of these irregularities by having it set aside.They want, among other things, all copies of the documents seized returned.

[38] It is quite clear that there were irregularities in the execution of the Anton Pillar order. This is apparent if one reads the report dated 14th June 2018 and the four reports dated 18th June 2018, all filed by or on behalf of the Independent Supervising Attorney, and compare what was done to the terms of the Order (see paragraph 34 above).In the first place, the Independent Supervising Attorney delegated his authority to servants or agents of the attorneys representing the Claimant. This clearly defeated the purpose of having an independent attorney oversee the execution of the Anton Pillar order. Secondly the order stipulated,in paragraph 7, that copies of the relevant documents were to be taken. Seizure should only occur if it was impracticable to make copies or if the Defendants refused to allow their reproduction (paragraph 13 of the order). Neither the Independent Supervising Attorney nor the Authorised Persons (respectively defined in paragraphs 7 and 20 of the Anton Pillar order) attempted to copy ,or requested copies, of any item or document. They merely proceeded to seize. Thirdly, the documents were left in the custody of the Claimant's attorney after they were seized. This was a gross violation. The order contemplated that not only would documents, to which privilege was claimed be segregated, but that any document seized would remain in the custody of the Independent Supervising Attorney (paragraph 18). Furthermore only documents, for which no privilege was claimed, ought to be copied (paragraph 14). The Defendants also complain that the personal telephones of staff

members were seized as well as other items whose connection to this litigation is hard to justify.

[39] I agree, and so find, that the manner of execution breached the order of this court. Whereas it was a breach of the order to seize the original documents without first endeavouring to copy them, it does appear that privilege was not claimed in respect of any document.This notwithstanding that the Defendants were allowed to contact attorneys at the time of seizure and allowed to read the order.My order of the 21st June 2018, permitting the Defendants to attend,inspect and claim privilege, ameliorated the breach.The subsequent order, directing that all documents seized be returned, further improved the Defendants' situation.In these circumstances I decline to set *aside the Anton Pillar order .My decision is consistent with the approach of Scott J in* ***Columbia Picture Industries INC and others v Robinson and others [1987] Chancery Div 38*****.** The order I made conforms generally with the safeguards required (see pages 76 to 77 of his judgment). In that case, although the order was obtained by gross material non disclosure and for an improper purpose and was executed in an oppressive manner , the learned judge declined to set it aside.The Motion to set it aside had been adjourned for hearing at the trial of the action , three years after the execution of the order.The learned judge said of the suggestion that the order should at that stage be set aside:

> *"It is a somewhat bizarre proposition.The Anton Pillar order was executed on 21June 1982,some three-and-a- half years ago. Setting it aside now would be a gesture devoid of practical effect. The extent to which the defendants are entitled to recover damagesunder the cross-undertaking does not ,as I see it , depend upon whether or not the order is formally set aside."*

He declined to set it aside. In the matter at bar two years have passed.The documents seized, or at any rate the great majority of them, were items to which the Claimant as a director and shareholder was entitled. They would have had to be disclosed in the discovery process anyway.Ordering the return of all copies made would be a waste of time and resources. The observations of Sir John Donaldson MR and Dunn LJ, both of whom said that in such matters the court looks at the reality of the situation,also supports my decision in this case,see ***WEA Records Ltd v Visions Channel 4 Ltd and others [1983]2 AllER 589*** at 593 and 594.

[40] This court must however give voice to its strong disapproval of the manner in which its order was executed.The responsibility, for which, cannot be directed solely at the Independent Supervising Attorney (who was Dr Raymond Clough now deceased). The Claimant's legal representatives ought to have been aware that to name themselves as agents of the Independent Supervising Attorney, and to take custody of the original documents, defeated the purpose of having an Independent Supervising Attorney. Furthermore the failure to attempt to copy,or to allow the Defendants an opportunity to do so,before seizure is inexcusable. Finally the manner in which the seized documents were stored, and the condition in which they were returned (see the evidence and photographs at exhibit CJ1 and paragraphs 4,5,6 & 7 of the third affidavit of Clifton Johnson, filed on the 18th July 2018), adds insult to the injury of the breaches.It is in these circumstances that I order that, whatever be the result of the litigation ,the Claimant is to recover no part of the costs of obtaining or executing the Anton Pillar order. The 1st ,2nd and 5th Defendants are to have the costs related to their application to set it aside as well as any legal costs incurred as a result of its irregular execution.This is because, in all the circumstances, it cannot be said that their application to set aside was unreasonable.It goes without saying that the Defendants are protected by the Claimant's undertaking as to damages and as such, if successful at trial, they will be able to recover damages for any loss caused by the grant of the Anton Pillar order.

[41] With regard to the application to set aside paragraph 1 of the Anton Pillar order, being a freezing or mareva injunction, I have come to a similar conclusion. No material non disclosure has been established.The Defendants point to Marvia Graham's affidavit filed on 18th May 2018 and say that given her position in the company,as operations manager and director and agent of the Claimant,the Claimant could not have been deceived in the way he alleges.They say further that her affidavit makes no allegation of impropriety against the Defendants.The affidavit was filed in support of the Claimant's assertions of amounts paid and shares received. Her abovestated position in the companies, to my mind,does not negate the Claimant's account of unfair treatment . The Claimant's evidence, with respect to the conduct of the Defendants, if true is such as to raise a likelihood that if not restrained assets may be diverted.This is a material consideration before the grant of such an order, see ***Peter Krygger et al v F1 Investments Inc CL 2009 HCV 3034 (unreported Judgment 22nd January 2010)*** per Sykes J (as he then was) at paragraph 21 and ***Jamaica Citizens Bank Limited v Dalton Yap (1994) 31 JLR 42*.** The evidence, as to the 3rd and 4th Defendants' conduct, is to be tested at trial.There a determination will be made as to whether accounts have been falsified or profits hidden.I make no such finding and nothing I have said should be so construed.

[42] The order, as amended, allows the business of the companies to continue until these legal issues are resolved.The balance of convenience favours its continuation.Greater and incalculable loss will flow to the Claimant, if the Defendants were to dissipate assets between now and the trial ,than is likely to befall the Defendants in consequence of the continuation of the injunction.The status quo will therefore continue until the trial of the action.

[43] With respect to the 3rd Defendant's application, to vary or discharge paragraph 3 of the Anton Pillar order, Mr Braham submitted that there is no evidence that a threat had at any time been reported to the police.Furthermore, as the parties had met and had discussions several times without incident since the making of the order, it ought to be discharged. They are both still directors and the order

can be an impediment to their administering the business of the companies.The 3rd Defendant's affidavit, filed on the 4th February 2019 (in particular paragraphs 5 to 8), has not been answered.I will in these circumstances discharge paragraph 3 of the Anton Pillar order.The costs of the application to discharge will be the 3rd Defendant's in any event.

[44] The Claimant's application, to appoint a receiver, is dismissed. It is best that the status quo ,as at the making of the Anton Pillar order, remain in place. Appointing a receiver is, in the circumstances of this case, inappropriate until the issues are determined at trial. The Mareva injunction will, I think, suffice to protect the Claimant until the trial of the action. Counsel for the Claimant conceded, in the course of oral submissions, that the appointment of a receiver was an alternative to continuation of the freezing order.The refusal of this application does not preclude the appointment of an independent forensic accountant,or other appropriate expert, to assist the court. This is a matter to be considered at a case management conference.Save to say, that a joint agreement by the parties on one such expert would be welcomed, I say nothing more about that at this time.

[45] In the result my orders are as follows:

(1) The Defendants' applications for summary judgment and/or to strike out the claim and/or for trial of preliminary issues are dismissed with costs of the applications to the Claimant to be taxed or agreed.

(2) The 1st, 2nd and 5th Defendants' applications to set aside and/or vary the Order made on the 4th and 11th June 2011 are dismissed with costs of the applications to the 1st, 2nd & 5th Defendants to be taxed if not agreed.These costs are to include those incurred in the course, or by virtue of, the execution of the order.

(3) The 3rd Defendant's application to vary the order made on the 4th and 11th June 2018 is granted and

paragraph three of the order is deleted. The costs of the application will go to the 3rd Defendant,against the Claimant, to be taxed or agreed.

(4) The order made on the 4th and 11th June 2011,as amended on the 21st June 2018, 4th July 2018 and by this order, will stand until the trial of the action or further order of the court.

(5) The Claimant's application for interim payment is dismissed with costs of the application to the Defendants to be taxed or agreed.

(6) The Claimant's application to appoint a receiver is dismissed with costs of the application to the Defendants to be taxed or agreed.

(7) No order for costs is made with respect to the costs of this hearing because the ultimate results are evenly balanced .

David Batts
Puisne Judge