[2022] JMCC Comm 31

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO: SU2022CD00094

BETWEEN	**ISLAND MEDICAL SPECIALISTS LIMITED**	**CLAIMANT**
AND	**E.A. CONSULTANCY SALES & SERVICES LIMITED (T/A INTRANET SOLUTIONS)**	**1ST DEFENDANT**
AND	**EDUARDO ANDERSON**	**2ND DEFENDANT**

IN CHAMBERS BY VIDEO-CONFERENCE

Appearances: Simone Mayhew KC and Ashley Mair instructed Mayhew Law for the Claimant

Mr. Hadrian R. Christie and Abbi-Gaye Coulson Instructed by HRC Law for the 1st and 2nd Defendant

Heard: 14th, 15th July 2022 and 4th November 2022

Injunctions – Freezing Order – Whether a real risk of dissipation has been established – Whether Search is to be permitted of computer images containing trade secrets and confidential business records by a competitor – Preservation Order – Anton Piller Order – Failure to make full disclosure

BROWN BECKFORD J

INTRODUCTION

[1] This claim was commenced by way of Claim Form and an Urgent Without Notice Application for Court Orders filed on 8th March 2022 by the Claimant, Island Medical

Specialists Limited **("Island Medical")** against the 1st Defendant E.A. Consultancy Sales & Services Limited (T/A IntraNet Solutions) **("IntraNet")** and the 2nd Defendant Eduardo Anderson. Mr. Anderson is the Chief Technical Officer and principal of IntraNet.

[2] The genesis of the claim is the alleged malicious and unauthorized modification and manipulation of the Claimant's network and servers which resulted in the deletion of the Claimant's patient records and other material data. A contractual relationship between Island Medical and IntraNet had ended that very day and based on information subsequently received, IntraNet and Mr. Anderson were believed to have been the malicious actors. Island Medical seeks Interlocutory Orders to have its data returned or preserved in order to prevent the unauthorised use of its data, and to search the Defendant's computer devices for any of its data. Island Medical also seeks a Freezing Order fearing that the Defendants may dissipate their assets.

[3] The Claimant sought and was granted interim orders for an injunction, delivery up of information, preservation, inspection, a Search Order and a Freezing Order. The Search Order was later stayed pending the interpartes hearing. The Defendants argue that the Orders sought should not be granted as there is no evidence to support Island Medical's assertions. There is no issue raised as to the Court's jurisdiction to grant the Orders sought, the law being generally settled.

BACKGROUND

[4] On February 11th 2021, Island Medical, a multidisciplinary medical centre, contracted with IntraNet, an Information and Communications Technolgy **("ICT")** Company to provide IT Support related services. Per the contract, IntraNet was given access to Island Medical's ICT network which contained highly confidential information such as patient records, staff records and financial and accounting information.

[5] Island Medical, on the basis that it was dissatisfied with the performance by IntraNet, terminated the contract with effect on December 1st, 2021. Island Medical engaged the services of Mario Plummer, who was fomerly contracted to IntraNet, to

provide ICT support services commencing on said date. By email, sent on December 1st, 2021 to Lesley-Ann Dixon, Business Manager of Island Medical, IntraNet provided the adminstative codes and credentials needed to gain access to the servers which concluded the contractual relationship. Ms. Dixon depones that later that day Mr. Plummer advised her that the administrative codes and credentials provided did not work and that he had to bypass them. He concluded that the system was compromised. The 1st Affidavit of Lesley-Ann Dixon[1] details Mr. Plummer's observations as follows:

> *25. …I was further advised by Mr Plummer and do verily believe that it was while doing this he concluded that the computer was compromised because as he went through, the task manager, event viewer, services and task scheduler he noted that these applications showed tasks that were scheduled to run and allowed backdoor remote access to the system resulting in unauthorized restarts and inaccessibility to the server resources from late November 30th 2021 and on the 1st of December 2021. These were included remote access applications included Avrick Watch dog and Managed Engine Desktop Central. Mr Plummer advised me and I do verily believe that he stopped the services and task related to these applications and unplugged the servers from the internet but by this time the malicious attack had already began.*
>
> *26. By December 2, 2021, the Claimant had lost access to core system applications such as QuickBooks, financial drive and Open EMR.*
>
> *27. Mr. Plummer's preliminary checks of the system revealed anomalies within the system as the server appeared to be full, but no information was on it and that a program was triggering commands on the system to include deleting files, user accounts and or change passwords at different times.*

[6] By the following day Island Medical lost access to all its data. The matter was reported to the police and an investigation was launched. Neither Mr. Plummer nor Mr. Anderson were ruled out as the malicious actors. Ms. Dixon contacted Mr. Anderson to advise him of the foregoing issues and to also advise that the administative codes provided did not work. On Decemeber 4th, 2021, Island Medical received a letter from IntraNet's attorneys denying any responsibility for the problems encountered by Island Medical, and with an offer for IntraNet and Mr. Anderson to assist with retrieving their

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[1] **1st Affidavit of Lesley-Ann Dixon, paras 25-27**

data. Island Medical declined the offer due to the ongoing investigations. The data remains unrestored.

[7] Island Medical later engaged the services of Symptai Consulting Limited **("Symptai")** (date of engagement is not stated) to carry out a forensic analysis of their computer system and to provide a report on its findings. Symptai's report dated February 28th, 2022 concluded that there was unauthorized access, unauthorized modification of access and unauthorized modification to Island Medical's system between the period of November 29th, 2021 to December 1st, 2021. The report further noted that one of the applications used to launch the attack was registered in the name of *"Eduardo Anderson"*.

[8] Subsequent to the initial Interim Orders made on the Urgent Without Notice Application for Court Orders there were several applications for variation by the Defendants. At the time of the interpartes hearing the following orders were in effect:

1. The time for the Claimant to comply with Paragraph 2 of the Order made on the 28th day of March 2022 by the Hon. Mrs Justice C Brown Beckford (the "said Order") is extended until 26 May 2022.

2. In executing Paragraph 2 of the said Order, the parties shall do as follows:

   (a) The 2nd Defendant shall procure a new laptop computer and a new external hard drive, which shall remain sealed and in-box up to the beginning of the inspection process;

   (b) The representative(s) of Symptai shall be permitted to inspect the new laptop computer and new external hard drive to verify their condition as being new;

   (c) The 2nd Defendant shall be permitted to conduct the inspection of the forensic drives and the extraction process using the said new laptop computer and new hard drive;

(d) The said laptop computer and hard drive shall, at no time during the inspection be connected to any network whatsoever and shall remain entirely air gapped'

(e) The 2nd Defendant shall be entitled to extract all system log files and application log files to the external hard drive only.

(f) Upon completion of the inspection and extraction process, the representative from Symptai shall be entitled to:

(i) keep for up to forty-eight (48) hours and inspect the external hard drive to ensure that no data other than that which is permitted by this order is contained thereon; and

(ii) delete / wipe the laptop computer in such manner as the parties may mutually agree for the deletion of any data from the forensic drives that are on the computer.

3. The filing of the Defendants' affidavit response(s) under Paragraph 7 of the said Order is varied to 31 May 2022.

4. The filing of the Claimant's affidavit(s) in reply to the Defendant's affidavit(s) pursuant to Paragraph 8 of the said Order is varied to 2 June 2022.

5. The filing and exchanging of full submissions and authorities by both parties pursuant to Paragraph 9 of the said Order is varied to 3 June 2022.

6. Costs of this application is reserved pending the determination of the Claimant's application that is set for hearing on 7 June 2022.

7. Liberty to apply.

8. Claimant's Attorneys-at-Law to prepare, file, and serve this Order.

[9] The Defendants have denied that they are in possession of any of Island Medical's data. Pursuant to the Interim Orders granted, images of the hard drives of the Defendants' devices were made and are currently stored securely. The Court is to determine whether a Freezing Order should be made and whether to permit the search of the images copied from the Defendants' devices. The submissions were concentrated on these issues.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[10] Counsel Mrs. Mayhew KC submits that the issue before the Court for determination is whether to allow inspection of the copied hard drives. She further submitted that the Court should be guided by the principles relating to interim remedies. Counsel relied on **West Indies Petroleum Limited v Scanbox** et al [2022] Comm 4, where Batts J, on an application for preservation and inspection of relevant property, confirmed that the order must be necessary and proportionate and must look to the overriding objective.

[11] Furthermore, at this juncture the Court ought not be concerned with the resolution of factual disputes but need only to be satisfied that there is a serious issue to tried. To this end, Counsel contends that the actions in question raise a serious issue to be tried for causing loss by unlawful means. She relied on **OBG v Allan** [2007] 4 All ER 545. Further, the misuse, unauthorized access, modification and manipulation of Island Medical's servers constitute offences under the **Cyber Crimes Act**. Counsel contends that there is sufficient evidence to not only establish that there is a serious issue to be tried but also to establish that there is a strong prima facie case.

[12] Counsel further submits that the balance of convenience would lay in favour of Island Medical. To this end, she contends that pursuant to the **Data Protection Act**, Island Medical has a duty to protect the health records of patients. It is alleged that the Defendants have information belonging to Island Medical which it has failed to deliver up

upon termination of the contract. Island Medical is of the view that IntraNet's action during the execution of the search lacked probity and as such may conceal or destroy the information in their possession. On this basis Island Medical submits that the Order is necessary to protect their information.

[13] In resisting the Order for inspection the Defendants submit that there is confidential clientele Information on the devices which ought not be subject to search. However, though Counsel accepts that there is the existence of confidential information on IntraNet's devices, she contends that safeguards can be put in place when conducting inspection of said devices. She relied on **McLennan Architects Ltd v Jeremy Jones and Anor** [2014] EWHC 2604 (TCC).

[14] In considering whether the Court should grant a Freezing order, Counsel submits that the Court ought to consider whether there is a good and arguable case and whether there is solid evidence that there is a risk of dissipation of assets. She relied on **Jamaica Citizens Bank v Dalton Yap** (1994) 31 JLR 42. She further submits that Island Medical meets the threshold for a good and arguable case on the basis that the Defendants had access to Island Medical's system after the contract had been terminated. Furthermore, some of the applications used to launch the cyber-attack were registered in the name of Mr. Anderson.

[15] It is further submitted that the conduct of the Defendants during the execution of the search shows a lack of probity and as such this indicates that there is a real risk that steps may be taken by them to dissipate their assets. Additionally, utterances by Mr. Anderson were also taken to be tainted with malice. On this basis Counsel contends that greater loss will be borne by Island Medical if assets are dissipated, as opposed to the loss suffered by the Defendants which could be remedied by the undertaking given as to damages by Island Medical.

[16] Counsel for the Defendants has made allegations against Island Medical of material non-disclosure of material facts in its Without Notice Application for the Search Order, Freezing Order and other Orders. Such non-disclosure includes the failure to

disclose that the IP address used to carry out the attacks was that of Island Medical's IP address, and the failure to disclose that IntraNet's remote access to Island Medical's network was terminated December 1st, 2021. However, Counsel Mrs. Mayhew submits that these facts were not material as the Addendum Report of Symptai does not suggest that the connection was done from a local system or via Wi-Fi. Furthermore, the Defendant's had all the credentials to the ICT network used to carry out the attack remotely. Additionally, the cyber-attack which took place just after the effective date of termination was conducted by remote access applications. Counsel further contends that being that all information has now been advanced by both parties, the Court could exercise its discretion to make a fresh Order on terms notwithstanding proof of material disclosure as in the case of **Catherine Allen v Guardian Life Limited** [2020] JMCA App 23.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[17] Counsel Mr. Christie resisted the application. The Defendants contend that the Interim Orders granted should be discharged on the basis of material non-disclosure. He contends that Island Medical failed to make full and frank disclosure of all facts known to them or would have been known to them had they conducted proper enquires before making their application. To this end he relied on **Venus Investments Limited v Wayne Ann Holdings Limited** [2015] JMCC Comm 9.

[18] Mr. Christie contends that had the Court had knowledge of the following non-disclosures, the Court may not have granted the Interim Orders sought.

(i) IP Address

The IP used to connect to the server of Island Medical to carry out the malicious act was that of Island Medical's own IP address. Counsel further submits that Ms. Dixon could have easily identified Island Medical's IP address had she conducted a proper enquiry, since she was in possession of an email which showed that the IP address belonged to

Island Medical. Further, Counsel Mr. Christie contends that Symptai's report did not suggest that the IP address was from a remote location.

(ii) Software registered in the name of Eduardo Anderson

Counsel contends that Island Medical cannot rely on the fact that the software used to carry out the malicious act was registered in the name of Mr. Anderson as proof of the malicious actor's identity. He submits that software registration can be carried out by inputting the name of any person in the software registration form as there is no validation of identity. He further submits that the name of registered user in the log files can be edited at any time by any person who has access to the computer system. To that end, Counsel contends that had proper enquires been made by Ms. Dixon to Symptai, she would have been made aware of this fact. Further, Symptai, as an expert of the Court, failed to provide such explanation.

(iii) The Activities of Mario Plummer on 1 December 2021

Counsel contends that around the same time Mr. Plummer was attempting to bypass the system commands were being issued by the computer to change the password. He submits that Island Medical has failed to disclose the steps taken by Mr. Plummer to bypass the password. Therefore, Counsel Mr. Christie alleges that Symptai failed to isolate Mr. Plummer's steps from the steps taken by the unknown actors. He further contends that even after repeated requests for full disclosure of the steps taken by Mr. Plummer, Ms. Dixon has failed to do so on the basis that Symptai is aware of the steps taken by Mr. Plummer.

(iv) Mr. Plummer's role during the contract

In Ms. Dixon's first affidavit, she asserted that *"Eduardo Anderson"* was the chief personnel for the project. However, Counsel Mr. Christie submits that Ms. Dixon failed to disclose that Mr. Plummer was the primary person managing the account. He further submits that Mr. Anderson would only be contacted at times when Ms. Dixon could not reach Mr. Plummer.

(v) Ms. Dixon's relationship with Mr. Plummer

Counsel contends that Ms. Dixon failed to disclose that she has a familial relationship with Mr. Plummer. He contends that Mr. Plummer is married to Ms. Dixon's cousin and it is for that reason that IntraNet was engaged for the contract for services.

(vi) Investigation of Mario Plummer

In a telephone conversation between the attorneys-at-law for both parties, Counsel contends that Island Medical indicated that they would have the police investigate both IntraNet and Mr. Plummer. He submits that Island Medical failed to disclose to the Court that they were initially uncertain as to whether IntraNet or Mr. Plummer was the malicious actor.

[19] Counsel Mr. Christie submits that Symptai's report was inadmissible on the basis that it did not conform with (1) **CPR 32.13(2)** (requirement for witness certificates), (2) **CPR rule 32,13(3)** (requirement for written instructions and notes of the oral instructions to be attached to export report) and (3) **CPR 32.3 and 32.4** (requirement for statement that the expert witness understood his duty to the court).

[20] He further contends that a Search Order requires an extremely strong case on the face of the evidence and Island Medical's evidence is entirely circumstantial, as there was no evidence before the Court which definitively indicated that IntraNet was the malicious actor. Counsel maintains that IntraNet is not in possession of any material belonging to Island Medical as all of its data was deleted upon the effective date of termination. He contends that Island Medical has not offered the Court any evidence to rebut this assertion.

[21] Counsel Mr. Christie further submits that Island Medical has provided no evidence to suggest a real risk of dissipation. He submits that merely asserting a risk is not solid evidence to demonstrate that the risk exists. He relied on **Jamaica Citizens Bank Limited v Dalton Yap** [1994] 31 JLR 42 and **Half Moon Bay Ltd. v Earl Levy** [1997] 34 JLR 215. 22.

[22] Additionally, he submits that in considering the totality of the evidence advanced at the inter partes hearing and other further considerations brought to the Court's attention, Island Medical does not have sufficient evident to warrant the orders sought.

ISSUES

[23] The issues to be determined are as follows:

(i) Whether the Court should decline to grant the discretionary Orders sought based on material non-disclosure?

(ii) Whether the Court should grant the Freezing Order?

(iii) Whether the Court should permit the search of the hard drive images of the Defendants' devices?

The Court is mindful that in considering the issues it will not conduct an in-depth assessment of the evidence which is mainly disputed. Such conclusions as are drawn for the purposes of this application are not to be taken as findings of fact.

LAW & ANALYSIS

Whether the Court should decline to grant the discretionary Orders sought based on material non-disclosure?

[24] Parties who seek a discretionary remedy from the Court before notifying the opposing party are obliged to make full and fair disclosure of all material facts. This is necessary to the integrity of the judicial process. The rule of full and fair disclosure also acts as a deterrent against individuals who display a lack of due diligence in conducting proper inquires and those who wish to deliberately mislead the Court. Material non-disclosure will in most instances lead to an adverse outcome for the applicant.

[25] A useful starting point for the Court's approach is the case of **Brink's Mat Ltd. v Elcombe and Others** [1988] 1 WLR 1350 **("Brink's Mat")**, where the English Court of Appeal conducted an analysis of the considerations that should properly be taken into account when determining the materiality of the non-disclosure, and the consequences which flow from said non-disclosure. The facts and ruling of the Court is comprehensively and clearly set out in the headnote reproduced below.

> *The plaintiffs, who had been robbed of gold bullion worth £25m., commenced an action against a number of defendants claiming, inter alia, damages for wrongful interference with stolen gold, damages for conspiracy to injure the plaintiffs and declarations that certain assets were the proceeds of sale, or profits made from the use of, stolen gold and were held on trust for the plaintiffs. Before issuing the writ they had obtained, on an ex parte application, an interlocutory injunction from Roch J. restraining nine of the defendants from disposing of specified assets. The ninth and tenth defendants applied unsuccessfully to Judge White, sitting as a High Court judge, to discharge the injunction. But, on a further application, Alliott J. discharged the injunction as against the ninth and tenth defendants on the ground that there had been innocent but material non-disclosure of facts in the information the plaintiffs had put before Roch J. and that new material had falsified the basis on which the plaintiffs had sought to show a ground of claim against the ninth and tenth defendants.*
>
> *On appeal by the plaintiffs and cross-appeal by the ninth and tenth defendants from the decision of Judge White:—*
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> *Held , allowing the appeal and dismissing the cross-appeal, that, on any ex parte application it was imperative that the applicant should make full and frank disclosure of all facts known to him or which should have been known to him had he made all such inquiries as were reasonable and proper in the circumstances; but that, notwithstanding proof of material non-disclosure which justified or required the immediate discharge of an ex parte order, the court had a discretion to continue the order or to make a new order; that, although the plaintiffs had failed to disclose material facts to Roch J., on the evidence before Judge White, it would have been right for him to continue the injunction; that the additional information before Alliott J. did not establish any further material non-disclosure; and that, as a matter of discretion, it was a proper case for maintaining the injunction*

[26] In coming to this determination, the tribunal in **Brink's Mat** conducted a forensic review of a number of cases[2] which I find to be useful to these proceedings and I adopt them below as follows:

> *In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.*
>
> *(1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486, 514, per Scrutton L.J.*
>
> *(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see Rex v. Kensington Income Tax Commissioners, per Lord Cozens-Hardy M.R., at p. 504, citing Dalglish v. Jarvie (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in Thermax Ltd. v. Schott Industrial Glass Ltd. [1981] F.S.R. 289, 295.*
>
> *(3) The applicant must make proper inquiries before making the application: see Bank Mellat v. Nikpour [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.*
>
> *(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an Anton Piller order in Columbia Picture Industries Inc. v. Robinson [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 92–93.*
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> *(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty:" see per Donaldson L.J. in Bank Mellat v. Nikpour, at p. 91,*

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[2] **[1988] 1 WLR 1350 pg.1356-1357**

citing Warrington L.J. in the Kensington Income Tax Commissioners' case [1917] 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. ***The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.*** *[Emphasis mine]*

(7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:" per Lord Denning M.R. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.

> ***"when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed****:" per Glidewell L.J. in Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc., ante, pp. 1343H–1344A.* [Emphasis mine]

[27] **Brink's Mat** was also relied upon in the more recent case of **Alliance Bank JSC v Zhunus and others** [2015] EWHC 714 (Comm). In this case the claimant, Alliance Bank JSC **("Alliance")**, contended that the defendants, Mr. Zhunus **(1st defendant)** and Mr. Arip **(2nd defendant)**, had devised and executed a scheme to acquire, for their own benefit, shares and assets of two Russian companies to deprive Alliance of the benefit of those assets as security for borrowing facilities and loans made to the original borrowers. The governing law of the torts alleged was that of Kazakhstan. The claimant was granted a worldwide Freezing Order against the second defendant in respect of assets up to the value of Two Hundred and Six Million Pounds **(£206,000,000)** and an order for service outside of the jurisdiction.

[28] Alliance contended that as a result of the allegations pleaded, it had suffered harm. At the ex parte hearing the court granted Alliance permission to serve the Claim Form

and Particulars of Claim Form outside of the jurisdiction and granted a worldwide Freezing Order against Mr. Arip in respect of assets up to the value of Two Hundred and Six Million Pounds **(£206,000,000)**. At the inter partes hearing, Alliance applied for a continuation of the Freezing Order until trial or further order. Mr. Arip applied to discharge the Freezing Order on the grounds that: (i) Alliance did not have a good arguable case against him and (ii) there were material non-disclosures at the without notice hearing. The court ruled that Alliance had no prospect in succeeding in its claims because they were time-barred as a matter of Kazakh law and having regard to the principles set out in the authorities, there had been material non-disclosure on the part of Alliance in the presentation of its application to the judge. The court found that matters which ought to have been disclosed, but which had not been, were matters which were relevant, both to the merits of Alliance's claim and matters which affected limitation. Consequently, the order for service out of the jurisdiction on Mr. Arip and the Freezing Order had both to be discharged.

[29] The underpinnings of **Brink's Mat** were also considered in the case of **Venus Investments Limited v Wayne Ann Holdings Limited** [2015] JMCC Comm 9, where Sykes J (as he then was) discharged the injunction on the basis that material facts which were fully within the knowledge of the defendant at the time of the Without Notice Application were not disclosed. Sykes J opined[3]:

> *The court is fully aware that the injunction can be re-granted at the inter partes hearing but the circumstances where that happens are not very common. At the very least for that to happen the non-disclosure would need to be innocent. But the court should be careful to note that even if the non-disclosure was innocent that does not mean that there will be a re-grant of the injunction. Innocent non-disclosure is one of the factors to be taken into account.*

This decision was upheld by the Court of Appeal. Morrison JA (as he then was) said[4]:

> ***There is therefore an unbroken line of authority in support of the proposition that, on a without notice application, the applicant is***

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[3] [**2015] JMCC Comm 9, para 20**
[4] **[2015] JMCA App 24, para 25**

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

The material non-disclosure of IP Address

[30] I agree that the Court was of the view that the Symptai report was indicating that the IP address used in connection with the remote access application, ZOHO Meeting, was a remote IP address (external to the Claimant), which suggested the conclusion as drawn by the Court that the system failures were caused by an external actor. This is quite detrimental to Island Medical's case as submitted at the hearing of the Urgent Without Notice Application. An extract of the submission is attached below.

> *The findings of Symptai was that one of the remote applications used to launch the attack was registered in the name the 2nd Defendant "Eduardo Anderson" and that this application was launched around 9:24 pm on December 1, 2021, which would have been after the expiry of the Is Defendant's contract with the Claimant.*

Island Medical submitted that this is strong evidence to show that the Defendants were behind the malicious attack on Island Medical's ICT servers. The Court was persuaded by these submissions to grant the ex parte Orders. The Court agrees therefore that the non-disclosure that the IP address was that of Island Medical's, even when accepted to be innocent, was material. The Court further agrees with the Defendants' submissions that no proof has been presented that any person had in fact remotely connected to Island Medical's servers in the manner suggested by Symptai that this could be done.

Non-disclosure of actions of Mr. Plummer

[31] It is true that a review of the affidavits filed on behalf of the Claimant and the Report by Symptai do not disclose in any detail the actions undertaken by Mr. Plummer on the Claimant's servers. Failure to disclose the specific acts by Mr. Plummer, and in particular Symptai's failure in its report to assess those actions against its findings in general, leaves the Court in no position to analyse and consider what weight is to be given to Mr Plummer's actions, especially as Symptai did not treat him as a person of interest. The Court is unsure whether Symptai determined that he was not a person of interest or was told that he was not a person of interest. At paragraph 3.1.1 of Symptai's report, a keyword search was performed with the name given as the person of interest *"Eduardo Anderson"*[5]. **(See extract below)**

> ***3.1.1 Identification of the name Eduardo Anderson***
>
> *A keyword search was performed with the name given as the person of interest, 'Eduardo Anderson', which yielded results. Two files included ManageEngine Desktop Central software; user.log and userlogon.txt contained the search term. These log files are automatically generated by the application and records events that occur on the system and by the user's actions. The activities that are recorded are usually tracked by date and time.*

This non-disclosure is material as it could affect the Court's determination of the strength of the Claimant's case.

Familial relationship between Ms. Dixon and Mr. Plummer

[32] The familiar relationship between Ms. Dixon and Mr. Plummer is credibly suggested as the basis for the initial contractual arrangements between Island Medical and IntraNet. It was not disputed that this client was obtained by Mr. Plummer and that he was initially, even if not the lead person on the account, integrally involved with the account. This information would therefore be critical in the Court's consideration of Ms.

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[5] **Symptai's Report, pg 10**

Dixon's evidence, especially as much of her recount of what took place between the 1st and 2nd December, is hearsay from Mr. Plummer.

Ruling

[33] The rule of full and fair disclosure in an ex parte application is not one that may be easily displaced given the Court's duty to protect the judicial process. Given the import of the non-disclosure the Court would be hard pressed to exercise its discretion to re-grant the Orders at this inter-partes hearing. The questions raised are critical to the outcome of the claim and can only be determined after testing the evidence, for which the trial process is designed.

Whether the Freezing Order granted at the ex parte hearing should be discharged?

[34] It is trite law that in order to be successful in an application for a Freezing Order an applicant must establish a good arguable case and must provide solid evidence of a real risk of dissipation of the asset **(See Citizens Bank Limited v Dalton Yap (1994) 31 JLR 42) ("Dalton Yap")**. In **Dalton Yap**, Forte JA adopted the reasoning of **Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft mbH & Co. K.G. The Niedersachsen** [1984] 1 All ER 398 which states:

> ***It is not enough for the plaintiff to assert a risk that the assets would be dissipated. He must demonstrate this by solid evidence.*** *This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstances of the case. [Emphasis mine]*

[35] In furtherance of this **Half Moon Bay Ltd. v Earl Levy (1997) 34 JLR 215** has gone further to specify the nature of the evidence necessary to justify the grant of a Freezing Order. The court stated:

> *"unsupported statements or expressions of fear by the plaintiff that if a defendant is permitted to sell, the proceeds of the sale could be removed from the jurisdiction is not sufficient to establish the risk factor. Mere intention by the defendant to sell will not suffice either."*

[36] The relevant test, as settled, may also be seen in the English case of **Fundo Soberano De Angola & Ors v dos Santos & Ors** [2018] EWHC 2199 (Comm) which affirmed the requirement for "solid evidence". In this case there was a dispute in relation to the sovereign fund of the Republic of Angola **("FSDEA")** and seven of its subsidiaries **("the Claimants")** to the Quantum Global Group, its owner Mr Bastos de Morais and the former Chairman of FSDEA, Mr. dos Santos **("the Defendants")**. The Court discharged a Three Billion Dollars **(US$3,000,000,000)** worldwide Freezing Order and proprietary injunction **("WFO")** granted against the Defendants in relation to allegations by the Claimants of dishonest conspiracy by the Defendants in the management of the FSDEA. Popplewell J held that the Claimants had not established by solid evidence that there is a sufficient risk of dissipation to justify a Freezing Order. He said[6]:

> *There is no solid evidence of a risk of dissipation against Mr dos Santos. The accepted good arguable case of dishonesty does not support such an inference: the matters complained of were transparent to other senior figures within FSDEA at the time of Quantum's selection and at all material times thereafter; and is in any event matched by a respectable case that there was no dishonesty. There is no evidence that Mr dos Santos received anything from the investments of the Liquid or Illiquid Portfolio, whether by receipt of part of the fees or otherwise. There is no evidence to suggest that he has any control over the Liquid or Illiquid Portfolio. There is no suggestion or evidence that he has used offshore structures to hold or deal with his own assets. There is no evidence of any change of behaviour in any way by Mr dos Santos as a result of the investigations into the transactions in question, of which Mr dos Santos was likely aware for at least several months prior to the without notice application, having been dismissed on 12 January 2018. Nor is there any evidence that he conducted his affairs any differently in the politically changed environment after the summer of 2017 when his father stepped down as President. The allegation of a risk of dissipation by him is no more than mere assertion unsupported by any solid evidence.*

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[6] **[2018] EWHC 2199, para 87**

[37] In coming to his determination, Popplewell J summarised principles[7] from earlier authorities such as **National Bank Trust v Yurov** [2016] EWHC 1913 (Comm) **Holyoake v Candy** [2017] 3 WLR 1131 and **Petroceltic Resources v Archer** [2018] EWHC 671 (Comm). The following aspects are of particular relevance:

> *(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.*
>
> *(2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.*
>
> *(3) The risk of dissipation must be established separately against each respondent.*
>
> *(4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets are likely to be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.*

[38] The Island Medical has relied on the malafides of the Defendants as the malicious actors in the deletion of Island Medical's data. Island Medical also contends that subsequent actions of Mr. Anderson show a lack of probity. Specific complaint is made of Mr. Anderson registering a software in opposing counsel's name. With respect, the Court does not share this view. The point being made by Mr. Anderson was an important one to the assessment of the strength of Island Medical's case. Indeed, the Court now accepts that the name in which the software is registered is not proof of the identity of the person carrying out the installation. Complaint was also made of the Defendants lack of cooperation with the supervising attorney. There is no other evidence of a sufficiently cogent nature on which the Court may rely for the proof that IntraNet or Mr. Anderson may dissipate its assets and thereby prevent the Claimant from realizing the fruits of any

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[7] **[2018] EWHC 2199, para 86**

judgement it may obtain. The evidence is that the Defendants are well established in their field boasting clients from various industries.

[39] The Court, having had the benefit of evidence from the Defendants, is of view that when all the evidence is considered it does not meet the threshold test of a solid risk of dissipation of assets.

Whether the Court should permit the search of the hard drive images of the Defendants' devices?

[40] The case of **Anton Piller KG v Manufacturing Processes Ltd and Others** [1976] Ch. 55 **("Anton Piller")** coined the term Anton Piller Orders. The purpose of this type of Order is to prevent the defendant from destroying evidence in his possession which might support the claimant's claim, by allowing the inspection and preservation of the evidence in question. Pursuant to the aforesaid case the essential pre-conditions which must be established for the grant of an Anton Piller Order are:

(1) There must be a very strong prima facie or apparent case;
(2) The potential damage to the claimant must be very clear;
(3) There must be clear evidence that the defendant has incriminating documents and;
(4) There is a real possibility that the evidence will be destroyed if the order is not granted pre-emptively.

[41] This test was reaffirmed by Batt J in the case of **West Indies Petroleum Limited v Scanbox Limited and Henry, Winston et al** [2022] JMCC Comm 4, where the claimant hired the 1st defendant and by extension the 2nd defendant, managing director of the 1st defendant, as consultants to perform information technology services. Due to the confidential nature of the information the defendants were asked to sign non-disclosure agreements. The 3rd and 4th defendants, formerly directors of the claimant company, also had a duty to keep the confidence of the claimant, avoid conflicts of interest and act in the best interest of the company. The 3rd and 4th defendants caused the 1st and 2nd defendants to modify their access to the claimant's email server to facilitate the 3rd and

4th defendants' unauthorized access and modification of the claimant's email servers. This action resulted in the access and extraction of the claimant's confidential information relating specifically to the business of the claimant. The claimants applied for inspection and preservation Orders and other Orders not relevant to the case at bar.

[42] Batts J, on a review of a number of authorities[8], adopted the reasoning of **McLennon Architects Limited v Jones and Another** [2014] EWCH 2604 (TCC). He said:

> ***Orders for preservation and/or production are made in circumstances where the court is satisfied that : there is an extremely strong prima facie case, the prejudice loss or damage (potential or actual) to the applicant is very serious, there is clear evidence the respondent to the application has the questioned items in its possession and, there is a real danger the items will be destroyed****, see Anton Piller KG v Manufacturing Processes Limited et al [1976] 1 AllER 779 and Universal City Studios Inc et al v Mckhtor & Sons [1976] 2AllER 330 per Templar J at p. 333 b and c. In McLennon Architects Limited v Jones and Another [2014] EWCH 2604 (TCC) Akenhead J, at paragraph 29 of a persuasive but more recent judgment, outlined the circumstances in which search and/or preservative orders may be made:*
>
> > *"It is primarily to the overriding objective to which one must look as to the basis on which to exercise the discretion to make this type of order. It may be helpful if I list (non-exhaustively) the factors which might properly legitimately be taken into account:*
> >
> > *i. The scope of the investigation must be proportionate.*
> >
> > *ii. The scope of the investigation must be limited to what is reasonably necessary in the context of the case*
> >
> > *iii. Regard should be had to the likely contents (in general) of the device to be sought so that any search authorised should exclude any possible disclosure of privileged documents and also of confidential documents which have nothing to do with a case in question.*
> >
> > *iv. Regard should also be had to the human rights of people whose information is on the device and, in particular,*

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[8] **[2022] JMCC Comm 4, para 10**

> *where such information has nothing or little to do with the case in question*
>
> v. *It would be a rare case in which it would be appropriate for there to be access allowed by way of taking a complete copy of the hard drive of a computer which is not dedicated to the contract or project to which the particular case relates.*
>
> vi. *Usually, if an application such as this is allowed, it will be desirable for the Court to require confidentiality undertakings from any expert or other person who is given access."*
>
> *Any such orders must be proven to be "necessary and proportionate", see M3 Property Limited v Zehomes Limited [2012] EWHC (TCC) 780.* [Emphasis mine]

Strong Prima facie Case

[43] As by now been shown, the Claimant cannot be considered to have an extremely strong prima facie case. In addition to the likelihood that a name in which the software is registered would not identify the installer, Symptai's addendum to its report did not expressly determine that the identified IP address was from a remote connection, but was instead suggesting that the IP address was the conduit for the connection. The addendum to the report therefore showed that Symptai did not make a conclusive finding that Island Medical's server was accessed from a remote location. For these reasons the actions of Mr. Plummer could be expected to bear intense scrutiny at trial as the possible cause of the Claimant's woes.

Clear potential damage to the Claimant, Clear evidence that the Defendant has incriminating documents and A real possibility that the evidence will be destroyed if the order is not granted

[44] The remaining pre-conditions to be satisfied for the grant of a Search Order are interconnected and will be discussed collectively. The prejudice to the Claimant of its loss of data being misused cannot be gainsaid. However, at this stage it is still suppositional that the Defendant has the material, as no clear evidence has been presented. It is also

not disputed that the potential damage that could be caused to the Defendants' business of having their operations open to a third party, particularly a third party in the same business enterprise. It has not been shown that the images taken of the Defendants' devices could only contain material belonging to Island Medical. Not only therefore would the Defendants' confidential information be exposed, but also that of clients and other persons and entities with which the Defendants do business. In keeping with the authorities, at this stage of the proceedings the scope of the Search Order would be disproportionate to the information being sought. The material has been preserved by the imaging of the hard drives of the Defendants' computer devices and may be searched if found necessary at a later stage of the proceedings. I am mindful of the Claimant's position that this could be done by a neutral third party as agreed upon by the parties to this claim

CONCLUSION

[45] It is clear that not only are the issues joined between the parties but the evidence put forward by the Claimant is less compelling, the Defendants having put forward their evidence. In the circumstances, and given the material non-disclosure by the Claimant, the Court declines to grant the Orders sought by the Claimant. The question of search is to be renewed at a later stage. The images made are to be delivered to the Registrar who shall preserve same. In keeping with the authorities, at this stage of the proceedings the Search Order would not be proportionate.

ORDERS

[46] My orders are as follows:

1) The Freezing Order against the 2nd Defendant is discharged.
2) The Images of the hard drive of the Defendants' devices to be delivered up to the Registrar of the Commercial Division by Wednesday, November 9, 2022.

3) The question of any damages arising from the Interim Orders are reserved to the trial.
4) Costs of the application and any ancillary application to be the Defendants' costs in the claim.
5) Leave to appeal order number 2 is granted.
6) Claimant's Attorneys-at-law to prepare, file and serve the formal order.

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JUDGE