[2021] JMCC Comm. 7

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2020CD00147

IN THE MATTER OF the Arbitration (Recognition and Enforcement of Foreign Awards) Act, 2001

AND

IN THE MATTER of the Arbitration Act 2017

AND

IN THE MATTER OF ICC Case No.20549/ASM/JPA (C-20550/ASM) PHILLIPS PETROLEUM COMPANY VENEZUELA LIMITED AND CONOCO PHILLIPS PETROZUALTA B.V. v PETROLEUS DE VENEZUELA, S.A., CORPOGUANIPA, S.A. AND PDVSA PETRÓLEO, S.A.

BETWEEN	**PHILLIPS PETROLEUM COMPANY VENEZUELA LIMITED**	**1ST CLAIMANT**
AND	**CONOCO PHILLIPS PETROZUALTA B.V.**	**2ND CLAIMANT**
AND	**PETRÓLEOS DE VENEZUELA, S.A.**	**1ST RESPONDENT**

AND	**CORPOGUANIPA, S.A.**	**2ND RESPONDENT**
AND	**PDVSA PETRÓLEO, S.A.**	**3RD RESPONDENT**

IN CHAMBERS

Ms Kashina Moore and Mr Jovell Barrett instructed by Nigel Jones & Company, Attorneys-at-Law for the Claimants

Mrs Nerine Small and Ms Catherine Williams representing the Attorney General (at the invitation of the Court)

Heard 21st and 28th January, 19th and 25th February 2021

Recognition and enforcement of arbitration award - Receiver- Appointment in aid of protection of property - Principles to be applied – Property assigned - Whether applicants will be entitled to claim property during subsequent enforcement proceedings - Whether real risk of dissipation of property which is currently the subject of sanctions imposed by a third party state

LAING, J

BACKGROUND

[1] The Claimants pursued claims in the International Chamber of Commerce ("ICC") against the Respondents in respect of the Respondents' breaches of agreements between the Claimants and the Respondents. These agreements were in relation to certain oil projects.

[2] The Claimants obtained in their favour, an award of the Arbitral Tribunal dated the 24th of April 2018 as amended by an addendum dated the 19th July 2018 made in the matter of ICC Case No.20549/ASM/JPA (C-20550/ASM) between the Claimants and the Respondents ("The Award").

[3] The Respondents initially made payments towards the Award, but the Claimants are asserting that they defaulted on their obligations and as at 10th February 2020 the amount outstanding for payment, allowing for additional accrued interest, was US$1,292,478,124.00, together with interests continuing to accrue on that amount at a daily rate of US$287,154.00. It is on this basis, that the Claimants sought recognition and enforcement of the Award by a Fixed Date Claim Form filed on 26th March 2020.

[4] On the 30th July 2020, the first hearing of a Fixed Date Claim Form, The Hon. Mr. Justice Batts ordered that the Award be registered in the Supreme Court of Jamaica and that the Applicant is permitted to enforce the Award. ("the Registration Order").

[5] Mr. Justice Batts also ordered that the Respondents shall have 28 days from the date of service of the Registration Order to make an application to set aside registration of the Award. The Claimants were granted permission to serve the Registration Order outside the jurisdiction and by registered post on the Defendants. The Claimants have not been able to do so and the Court has granted an amendment to the Registration Order in respect of the method of service to be employed.

[6] The Claimants assert that once the Respondents are served with the Registration Order, they will take active steps to prevent the enforcement of the Award. The Claimants are seeking to preserve significant assets within the jurisdiction of Jamaica which they say they have identified as assets to which the Defendants are entitled, pending further enforcement measures being taken.

The Notice of Application

[7] By Notice of Application filed 16th December 2020, the Claimants sought the appointment of an interim receiver over the assets of the 1st and 3rd Respondents (referred to herein as "PDVSA" and "Petróleo" respectively). It should be noted that although the Claimants are only seeking an appointment of a receiver over the

property of the 1st and 3rd Respondents, for convenience, they will be referred to together as ("the Respondents").

Principles on which a receiver is appointed

[8] Pursuant to **section 49(h) (Supreme Court) Act** the Court has the jurisdiction to appoint a Receiver and provides as follows:

> *(h) A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made; …*

[9] Part 51 of the **Civil Procedure Rules 2002** ("CPR") deals with the appointment of a receiver. **CPR 51.3** sets out the conditions for the appointment of a receiver and is in the following terms:

> *51.3 In deciding whether to appoint a receiver to recover a judgment debt the court must have regard to-*
>
> *(a) the amount of the judgment debt;*
>
> *(b) the amount likely to be obtained by the receiver; and*
>
> *(c) the probable cost of appointing and remunerating the receiver.*

[10] It is settled law that the effect of an interim receivership such as is being sought by the Claimants will be similar to that of an injunction in that it will restrain the affected party from control of the relevant property, but an important feature is that it will not vest the property in the receiver. The authors of **Kerr on Receivers and Administrators, Seventeenth edition, at pages 5-6** have succinctly summarised the two bases on which a receiver can be appointed and it is well worth reproducing as follows:

> ***Object of appointment.*** *A receiver can only be properly appointed for the purpose of getting in and holding or securing funds or other property, which the court at the trial, or in the course of the action, will have the means of distributing amongst, or making over to, the persons or person entitled thereto. The object sought by such appointment is therefore the*

> *safeguarding or property for the benefit of those, entitled to it. There are two main classes of cases in which the appointment is made:*
>
> *(1) to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property pending realization, where ordinary legal remedies are defective; and*
>
> *(2) to preserve property from some danger which threatens it.*
>
> (reproduced without footnotes)

[11] In **Kerr** (supra) at page 7, reference is also made to the guiding principles which ought to inform the exercise of the Court's discretion in deciding whether a receiver ought to be appointed, which I adopt and rehearse as follows:

> *If the court is satisfied upon the materials it has before it that the party who makes the application has established a good and prima facie title, and that the property the subject-matter of the proceedings will be in danger, if left until the trial in the possession or under the control of the party against whom the appointment of a receiver is asked for, or at least, that there is reason to apprehend that the party who makes the application will be in a worse situation if the appointment of a receiver be delayed, the appointment of a receiver is almost a matter of course. If there is no danger to the property and no fact is in evidence to show the necessity or expediency of appointing a receiver, a receiver will not be appointed.*
>
> *The duty of the court upon a motion for a receiver is merely to protect the property for the benefit of the person or persons to whom the court, when it has all the materials necessary for a determination, shall think it properly belongs. On a motion for a receiver, the court will not prejudice the action, or say what view it will take at the trial. Indeed, the court will not appoint a receiver at the instance of a person whose right is disputed, where the effect of the order would be to establish the right, even if the court be satisfied that the person against whom the demand is made is fencing off the claim…*

[12] In **Masri v Consolidated Contractors International UK Ltd and others (No 2)** [2008] 1 All ER (Comm) 305, at first instance, Gloster J sitting in the Commercial Court, made the following observations:

> ***[109]*** *It is perhaps helpful to start with an analysis of the nature of the relief sought by the claimant in this case by the appointment of a receiver. In one sense, contrary to Professor Nuyts' contention, it is truly a protective measure because it is sought to protect and preserve the receivables from the sales of oil by CCOG, ie the oil revenues, pending the claimant's actual enforcement against those moneys and the satisfaction of the judgment debt out of any moneys collected. But it is also fair to say that the*

> *appointment sought is also by way of equitable execution, as it is intended to assist in the enforcement process. Mr Salzedo fairly conceded this, although the terms of his proposed order, as revised, do not actually provide for the judgment debt to be satisfied out of any moneys paid into court.*

[13] In **Masri v Consolidated Contractors International (UK) Ltd and others (No 2)** [2008] 2 All ER (Comm) 1099 at 115- 116, Collins LJ in the English Court of Appeal explained the term equitable execution in the following way:

> ***[56]*** *The phrase "by way of equitable execution" attached to receiverships ordered following judgment is, it has been said, capable of giving rise to confusion. As Cotton LJ said in* ***Re Shephard, Atkins v Shephard*** *(1889) 43 Ch D 131 at 135:*
>
> *"Confusion of ideas has arisen from the use of the term "equitable execution". The expression tends to error. It has often been used by judges, and occurs in some orders, as a short expression indicating that the person who obtains the order gets the same benefit as he would have got from legal execution. But what he gets by the appointment of a receiver is not execution, but equitable relief, which is granted on the ground that there is no remedy by execution at law; it is a taking out of the way a hindrance which prevents execution at common law."*
>
> ***[57]*** *So also Bowen LJ said (at 137): "Equitable execution is not like legal execution; it is equitable relief, which the Court gives because execution at law cannot be had. It is not execution, but a substitute for execution." Fry LJ said (at 138): "the appointment of a receiver was not execution, but was equitable relief granted under circumstances which made it right that legal difficulties should be removed out of the creditor's way."*

[14] In **Norgulf Holdings Limited and Incomeborts Limited v Michael Wilson & Partners Limited** Civil Appeal No 8 of 2007 29 Oct 2007, the Eastern Caribbean Court of Appeal held that on an application for the appointment of a receiver the threshold test to justify an appointment should be at least equal to that which is required for obtaining a freezing injunction and accordingly, the applicant should have a good arguable case in respect of the underlying claim.

[15] The Eastern Caribbean Court of Appeal in **Vinogradova v Vinogradova** BVIHCMAP 2018/052 affirmed the correctness of the "good arguable case" test and also confirmed that an applicant for the appointment of a receiver should demonstrate "a serious "risk of dissipation" by "solid evidence". I appreciate that

Norgulf and **Vinogradova** are persuasive authorities, nevertheless, I accept the analyses contained in both cases as legally sound. I am therefore fortified in my conclusion that on an application for the appointment of an interim receiver there are similarities to be found with the test in applications for a freezing order, in that the applicants must also show by adducing "solid evidence" that there is a "real risk" of dissipation of the relevant assets.

[16] In **Norgulf** (supra) at paragraph 27 the Court accepted the statement in **Gee on Commercial injunctions** that the appointment of a receiver is more intrusive, more expensive, and less reversible than the grant of an injunction. This is more evident in the situation where a receiver is appointed in respect of a going commercial concern, the consequence being that the company no longer has control of its assets and its operations. In the case at bar, there is no evidence that the Respondents are operating as a going concern in this jurisdiction, but in my opinion this does not alter the caution which the Court ought to exercise. In some respects, there are parallels with the position of international business companies in offshore financial centres, which act as holding companies. Their operation as holding companies, without more, is not a basis for the relaxation of the stringent requirements which accompany applications for the appointment of a receiver in respect of those companies' assets. Likewise, a similar approach should be adopted by this Court. Notwithstanding the fact that the Respondents in this case are not operating businesses in this jurisdiction, the Court must remain cognisant of the seriousness of the appointment of an interim receiver.

[17] In making a receivership order, and especially an *ex-parte* one, the Court must exercise great care. The Claimants are claiming interim relief based on what they have asserted is the right to enforce the Award in this jurisdiction, and which will be formalised shortly. In my opinion, a similar test should be applied as in **Norgulf** and **Vinogradova**, with appropriate modification, that is, this Court should be satisfied that the Claimants have a good arguable case for enforcement of the Award in this Jurisdiction.

The identified assets

[18] The Claimants have identified two primary assets which they assert are at risk of dissipation. They are described in the affidavit of Stephen Hayes filed 16 December 2020 (the "Hayes Affidavit") as follows:

> *28. First, GoJ appears to owe PDVSA up to US $115 million as debt obligations arising under the PetroCaribe Energy Co-operation Agreement made in or about November 2005 between Jamaica and the Bolivarian Republic of Venezuela (the "**PetroCaribe Agreement**"). The PetroCaribe Agreement was a long-term oil supply agreement. Venezuela made similar agreements with several other Caribbean nations at around that time. It has been reported that although the PetroCaribe Agreement has been winding down in recent years, GoJ remains subject to significant debt repayment obligations under it. GoJ has established the PetroCaribbean Development Fund ("**the PCDF**") as the entity through which its obligations under the PetroCaribe Agreement are to be met. Further, it appears from press reports that GoJ is willing and able to meet its outstanding obligations, but has been hampered in doing so by the effect of sanctions issued by the United States Office of Foreign Assets Control ("**OFAC**"). In the circumstances, the GoJ/PCDF reportedly has established an escrow account to hold the funds required to settle its debt under the PetroCaribe Agreement. I exhibit as **SRDH29** an article dated October 15, 2019 from the Caribbean Business Report which refers to these matters.*
>
> *29. Secondly, GoJ appears to be liable to pay compensation of at least US $17 million to PDVSA arising from the GOJ's compulsory acquisition of shares in Petrojam Limited ("**Petrojam**"). Petrojam was a joint venture company established by PDVSA and the Petroleum Company of Jamaica in or about August 2006 with a view to co-operation in the modernization of Jamaica's energy infrastructure. GoJ decided to nationalize Petrojam in 2019 when it appeared that PDVSA was no longer willing to fulfil the intentions of the joint venture, particularly a necessary upgrade to the refinery at Kingston. The GoJ has reportedly complained of a collapse in the value of Petrojam as a result of a "decade of broken promises, delays and inaction on the part of the Venezuelan government", per a November 3, 2019 article in the Gleaner, which I exhibit at **SRDH30.***

[19] The article from the Caribbean Business Report to which reference is made in paragraph 28 of the Hayes Affidavit suggests that the amount which the GoJ owes to PDVSA may be as high as US$115,000,00,00.

[20] By a letter dated 18th February 2020, the Claimants' Attorneys-at-Law, Nigel Jones & Company requested certain documents from the Ministry of Science, Energy and

Technology pursuant to **sections 6 and 7 of the Access to Information Act** ("the Letter of Request"). The first document requested was a joint venture agreement dated 14th August 2006 between Petrojam Limited, the Petroleum Corporation of Jamaica and PDV Caribe S.A. (the "Joint Venture Agreement"). It should be noted that the Court has not seen the Joint Venture Agreement.

[21] The Claimants have exhibited documents obtained pursuant to the Letter of Request such as an extract of the Statement of Financial Position of the PetroCaribe Development Fund as at 31st March 2018, which under the heading Current Liabilities, recorded current liabilities Portion - PDVSA Venezuela for 2018, to be J$595,185,000.00 or approximately US$4,059,370.00 and non-current liabilities of J$13,901,495,000.00 or approximately US$94,813,100.00 (at an exchange rate of US$1=JA$146.62).

[22] The Claimants have also asserted, based on information received pursuant to the Letter of Request, that the GoJ has established a segregated US dollar denominated bank account at the Bank of Jamaica which reflected a balance in the sum of US$5,174,910.48 as at 31st March 2020. Ms Moore has submitted that this balance may reflect the PetroCaribe Development Fund's current liability to PDVSA as at March 2020.

The compulsory acquisition of shares in Petrojam Limited

[23] The Letter of Request also requested a letter dated June 2019 from Mr. Michael Hylton QC on behalf of PDV Caribe S.A to the Minister with responsibility for Petrojam Limited, claiming compensation pursuant to the **Compulsory Acquisition (Shares in Petrojam Limited) Act, 2019** ("the Petrojam Act")

[24] An article in the Jamaica Gleaner newspaper dated 3rd November 2019 which the Claimants have exhibited, asserted that Mr Michael Hylton QC wrote to the Government of Jamaica claiming a minimum of US$50,000,000.00 in core share value as compensation, plus other supplementary add-ons in relation to dividends

and prospective value that brought the total compensation package sought to US$250,000,000.00 in respect of the acquisition pursuant to the Petrojam Act.

[25] It should be noted, that in the Petrojam Act "applicable property" means all shares in Petrojam Limited held by persons other than the Petroleum Corporation of Jamaica immediately before the coming into operation of the Act. Another defined term is "joint venture agreement" which means the joint venture agreement dated August 14, 2006, between Petrojam Limited, the Petroleum Corporation of Jamaica, and PDV Caribe S.A. (A mercantile society formed under the laws of the Bolivian Republic of Venezuela and having its principal offices in Caracas, Venezuela).

[26] Section 3 of the Petrojam Act provides for the determination of the value of the applicable property pursuant to section **5(2) (a) and (3).** It also provides for the amount of this value to be paid into an escrow account: out of the consolidated fund or loan funds of the Government or any other source of funds available to the Government and which the Government determines to be appropriate in the circumstances.

[27] In paragraph 12 and of her written submissions Ms Moore advanced the following position:

> *12. GoJ is liable to pay compensation to PDVSA arising from the GoJ's compulsory acquisition of shares in Petrojam Limited ("Petrojam"). Petrojam was a joint venture company established by PDVSA and the Petroleum Corporation of Jamaica in or about August 2006 with a view to co-operation in the modernisation of Jamaica's energy infrastructure. PDVSA's interest in Petrojam were nationalized under the Petrojam Act in 2019. The Petrojam Act provides a compensation scheme for parties affected by the nationalization of Petrojam.*
>
> *14. As explained in the Hayes Affidavit at paragraph 33-35, the Claimant's primary position, which is supported by the GoJ's documents described above and exhibited to the Hayes affidavit, is that the PetroCaribe Rights and the Petrojam Rights are assets of PDVSA. However, there is evidence that Petróleo (a subsidiary of PDVSA) has played an active role in the international operations of PDVSA, including in respect of the PetroCaribe Agreement. It is therefore possible that the GoJ may have liabilities to*

> *Petróleo also. Accordingly, the Claimants also seek the appointment of an interim receiver over the assets of Petróleo in Jamaica.*

Additionally, in paragraph 30 of the Hayes Affidavit he states the following:

> *30. The Claimants understand that PDVSA's shares in the joint venture were held in the name of a subsidiary, PDV Caribe SA("**Caribe**"), and that those shares have been compulsorily acquired pursuant to the Compulsory Acquisition (Shares in Petrojam Limited) Act 2019 ("**the Petrojam Act**"). As such, GoJ is now liable to pay compensation pursuant to the Petrojam Act…*

[28] Up to the first date on which this application was heard, beyond the bare assertion that the GoJ is liable to pay compensation to PDVSA arising from the GoJ's compulsory acquisition of shares in Petrojam Limited, the Court was not presented with sufficient evidence to support that claim. The Claimants appeared to have conceded that the shares which have been compulsorily acquired were standing in the name of PDV Caribe S.A., which it asserts is a subsidiary of PDVSA.

The assistance of the Attorney General

[29] Having regard to the unsatisfactory quality of the evidence before the Court including references to newspaper publications and other articles, the Court considered it prudent to invite the Attorney General to assist the Court by providing any relevant information which may be of assistance to the Court in considering the risk of dissipation.

[30] It was confirmed to the Court, that by Share Sale and Purchase Agreement dated the 11th August 2007, PDV Caribe S.A. acquired forty-nine percent of the shares in Petrojam Limited and that these shares were subsequently acquired by the Government of Jamaica pursuant to the **Compulsory Acquisition (Shares in Petrojam Limited) Act 2019.** It was also confirmed that compensation for these shares is currently being held in escrow.

[31] The Court was also advised by way of evidence contained in an affidavit sworn to by Ms. Darlene Morrison, the Financial Secretary in the Ministry of Finance, as follows:

> *4. There are funds previously due by the Government of Jamaica under the PetroCaribe Agreement to PDVSA Petrlóeo, S.A. However, since on or about 2015 instructions were provided by the Petróleos De Venezuela, S.A. the 1st Respondent to the Government of Jamaica pursuant to Notices of Assignment effective May 28, 2015, December 2, 2015, April 6, 2016, and December 21, 2016 for the Government of Jamaica to pay over such funds to the Banco Central de Venezuela. The Government of Jamaica has been acting in compliance with these instructions, however, funds now due and payable to Banco Central de Venezuela have been placed in escrow.*

[32] I have assumed that the reference to "PDVSA Petrlóeo, S.A." is a reference to the 3rd Respondent which is referred to herein as "Petróleo" despite the difference in spelling arising from the placement of the first "o". I have also noted the point which was highlighted by Ms. Moore, that the instructions received from PDVSA or the purported assignments were not provided to the Court. This is not a criticism of the affiant, or the GoJ, since there may be issues of confidentiality at play. It is simply an acknowledgment that the Court does not have these documents to aid in its analysis. Nevertheless, for purposes of this Application I will assume that the assignments to which Ms Morrison referred have fulfilled the necessary legal requirements as to capacity and due execution and are valid on their face. I will therefore conduct my assessment on the basis that the relevant funds due to "Petróleo" pursuant to the PetroCaribe Agreement have been duly assigned to Banco Central de Venezuela and I will refer to these assignments herein collectively as ("the Assignment").

The supplemental submissions

(a) Compensation for the Shares

[33] In their written submissions that were first filed, the Claimants did not make any submissions in respect of the doctrine of corporate personality and whether the Court would be asked to lift the veil of incorporation and disregard the separate personality of PDV Caribe S.A. and in so doing find and declare that, the proceeds of the shares held by it in Petrojam Limited, are the property of PDVSA. However, in their supplemental submissions filed after evidence was provided to the Court by the Attorney General, the Respondents have indicated that they were asserting

that the Court at the appropriate time should make such a finding relying on **Prest v Petrodel Resources Limited** [2013] 4 All ER 673.

[34] It should be noted that the principles established by the UK Supreme Court in **Prest v Petrodel** (supra) have been followed by our Court of Appeal in **International Hotels (Jamaica) Limited v Proprietors Strata Plan** [2013] JMCA Civ 45 and by this Court in **McDonald Millingen v Geddes and Bardi** [2019] JMCC Comm 30. In **Prest** (supra) Lord Sumption at paragraph 27 accepted that the authorities confirmed that there was a general principle that "*the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing*". In his opinion it is in determining the nature of the wrongdoing which ought to be deemed sufficient to justify the application of the principle that poses the difficulty. He expressed the problem in paragraph 28 the following terms:

> *"**[28]** The difficulty is to identify what is a relevant wrongdoing. References to a "facade" or "sham" beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil."*

[35] **Prest** emphasised the point that whereas the Court could disregard the corporate veil, the circumstances in which it would do so would rarely arise. On this Application there is very limited evidence of the nature of the wrongdoing which ought to be deemed sufficient to justify the application of the principle of

disregarding the corporate personality. It appears, *prima facie*, that PDV Caribe S.A. was a corporate entity which legitimately entered into the Joint Venture Agreement and lawfully acquired and held forty-nine percent of the shares in Petrojam Limited. I have not been presented with sufficiently cogent evidence that this is one of the limited types of cases in which a Court could find that it should disregard the corporate veil. Accordingly, it would be improper of me to find that the compensation for the Petrojam shares ought to be the subject of a receivership order, on the basis of the mere possibility that the Court may disregard the corporate veil.

[36] The Claimants main thrust is an agency relationship between Caribe and PDVSA. I have noted that the **Petrojam Act** defines "interested person" to mean "*a person claiming, for the purposes of compensation, an interest in the applicable property compulsorily acquired under this Act*". However, it has not been asserted that PDVSA could be properly entitled to claim as an "interested person". It has also not been demonstrated to the Court, that there is some contractual agreement, operation of law, equitable principle or practice, by which the GoJ would be liable to compensate PDVSA rather than PDV Caribe S.A., the registered shareholder of the shares which have been compulsorily acquired.

[37] I therefore find that I have not been satisfied on a balance of probabilities that the compensation for the shares in Petrojam Limited which were previously held by PDV Caribe S.A. are funds or other property, which the Court in the course of the enforcement action, will have the means of distributing to the Claimants or any of them. Accordingly, I find that such funds do not constitute property which can properly be the subject of a receivership order.

(b) The Assignment

[38] It has been submitted on behalf of the Claimants that the **Statute of Elizabeth 1571** is still the applicable law in Jamaica giving the Court power to avoid a fraudulent transfer or assignment by a debtor of its assets in order to prevent or

frustrate the enforcement of a judgment debt against the debtor's assets. Reliance is placed on the **Interpretation Act** which states that all laws of England received into the island before 1727 continue to be the laws of the island until repealed or amended by an act of Parliament.

[39] The Claimants have not identified any local decisions in which the Jamaican courts have relied on the **Statute of Elizabeth** to avoid a fraudulent transfer or assignment and neither have I been able to do so. However the Claimants have relied on a number of Canadian cases to support their position. These cases include **Peter John Koziol v Valerie Linda Smith** [1997] CanLII 15013 (NSCS)**,** a Judgment of the Honourable Justice J Michael MacDonald in which he referred to what he described as the province of Nova Scotia's leading authority on the Statute of Elizabeth namely the decision of Hallet J (as he then was) in the case of **Bank of Montréal v Crowell and Crowell** (1980),37 N.S.R. (2d) 292 (N.S.S.C., T.D) where Hallet J opined as follows:

> *"in my opinion, the **Assignments and Preferences Act**, although it deals with the same subject matter as the **Statute of Elizabeth** (fraudulent conveyances), does not repeal the **Statute of Elizabeth** by implication. The **Statute of Elizabeth** enables an attack on conveyances made by solvent persons Assignments and Preferences Act deals with insolvent persons and the matter of preferences which are not subject to attack under the **Statute of Elizabeth**. The two acts are not inconsistent or repugnant. I am satisfied that effect can be given to both statutes at the same time and there is therefore no repeal by implication [of the **Statute of Elizabeth**] …"*

[40] Jamaica has not expressly repealed the **Statute of Elizabeth** and in my opinion, it cannot be reasonably argued that it has been repealed by implication based on the passage of any legislation which is currently in existence. Consequently, I accept Counsel's submissions on the applicability of the **Statute of Elizabeth**.

[41] Justice MacDonald in **Koziol** (supra) also relied on Hallet J's threefold test in **Bank of Montreal v Crowell** (supra) which was deemed to be necessary in order to set aside a conveyance under the **Statute of Elizabeth**. Pursuant to this test, he opined that the plaintiff need only to prove three facts:

> 1. *The conveyance was without valuable consideration…;*
>
> 2. *The grantor had the intention to delay or defeat his creditors. It is not necessary that the creditor exist at the time of the conveyance… but the court will impute the intention if the creditors exist at the time of the conveyance provided the conveyance is without consideration and the new woods the grantor debtor of substantially all his property that would otherwise be available to satisfy the debt…;*
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> 3. *That the conveyance **had the effect** of delaying or defeating the creditors…"*

[42] I appreciate that these are questions of fact in respect of which the Claimants must adduce sufficient evidence to meet the requisite standard at the appropriate time of the hearing of the application to set aside the Assignment. Accordingly, at this stage, I am primarily concerned in determining whether the Claimants have demonstrated a good arguable case that they will be able to enforce the Award and in addition similarly demonstrate that they will be entitled to enforce against the funds which have now been assigned. This necessarily means that the Claimants also need to demonstrate a good arguable case that they will be able set aside the Assignment.

[43] Ms. Moore has submitted that the chronology of events strongly supports the argument of the Claimants that the Assignment is liable to be set aside as fraudulent: having been effected by the 1st and 3rd Respondents, as debtors of the Claimants, in order to avoid or prevent enforcement of the Award. Counsel submitted that the conduct which resulted in the dispute between the parties and which formed the basis for the arbitration dated back to 2007. The ICC Arbitration Panel was constituted and the arbitration convened on 1st April 2015. It is therefore significant that the first Notice of Assignment to which Ms. Morrison refers, is effective 28th May 2015, shortly after the arbitration panel was convened.

Evidence of the Respondents' conduct

[44] In the Affidavit of Stephen Hayes in support of Notice of Application for Court Orders, he has identified examples of the conduct of the Respondents which he

asserts point to a risk of dissipation of any assets to which the Respondents are entitled. This conduct is also being relied on by the Claimants in support of their assertion that the Assignment was a part of a larger effort to place funds to which the Respondents were entitled outside the reach of the Claimants as creditors. I have reproduced a portion of these allegations below:

> *17. In 2014, PDVSA announced its intention to sell its single largest asset outside of Venezuela, namely the companies in the United States through which it owns and controls CITGO Petroleum and affiliates (together,"**CITGO**"). According to various media reports, PDVSA and Venezuelan government officials stated at the time that PDVSA's intention in selling CITGO was to evade enforcement of certain arbitration awards.*
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> *23. PDVSA has also taken improper steps to resist enforcement actions taken by the Claimants specifically in respect of the Award. I am informed of the following matters by Josef Klazen, an attorney admitted to practice in New York and one of the partners in Kobre & Kim responsible for the enforcement actions on behalf of the Claimants that I now describe, and believe the information to be true. I further rely on a Declaration of Jacob C. Maris and its exhibits made in a discovery application by the 1st Claimant in the United States District Court for the Southern District of Texas made on June 20, 2018 ("**the Maris Declaration**"). I exhibit the Maris Declaration and its exhibits as **SRDH25**. As is apparent from the Maris Declaration, Mr. Maris is an attorney licensed to practice in Curacao, and acted for the Claimants in Curacao in relation to the enforcement actions I describe below.*
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> *24. More recently, PDVSA relocated its European office from Lisbon to Moscow. This move was specifically attributed to PDVSA's efforts to shield assets from creditors. Speaking about the decision to relocate to Moscow, Venezuelan Vice President Delcy Rodriguez stated that Europe had shown that it was no longer able to guarantee the safety of Venezuelan assets. The relocation and the remarks of Vice President Rodriguez were reported by Reuters on March 19, 2019, exhibited here as **SRDH26**. On August 6, 2019, the Moscow office of PDVSA was registered in Russia's Unified State Register of Legal Entities. I exhibit at **SRDH27** the Russia Business Today article disclosing the same, published on September 12, 2019.*
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> *25. Similarly, in April 2020, a Venezuelan commission submitted a proposal to a Committee of the Venezuelan government recommending that PDVSA restructure its global assets ("**the Restructuring Proposal**") (as noted in an April 28, 2020 article from S&P Global which I exhibit at **SRDH28**). In particular, the Restructuring Proposal contemplated the assignment of PDVSA's European subsidiaries, namely AB Nynas and APS S.P.A., to PDVSA's newly created Russian subsidiary. In doing so, PDVSA would effectively move two of its subsidiaries to a jurisdiction that it considered would protect those assets from seizure by creditors.*

[45] The issues which remain for the Court's determination are twofold. Firstly, whether the 1st or 3rd Respondents may still be entitled to the proceeds of the Assignment if the Assignment is set aside and secondly, whether there is a real risk that such funds are currently still at risk of dissipation. I have accepted that the conduct of the Respondents which was identified in the Hayes Affidavit and the timing of the first Notice of Assignment supports the assertion that the Assignment was done to prevent those funds from being available to the Claimants in the event that they were successful in the Arbitration. Following the guidance in the **Bank of Montreal** case (supra) I find that although the Assignment was prior to the Award, it does not, *per se,* prevent a challenge by the Claimants to the validity of the Assignment. I am therefore satisfied that the assigned funds constitute property which may properly be the subject of a receivership order.

Is there a real risk that the funds which are the subject of the Assignment may be dissipated and if so how does the risk arise?

[46] The Respondents will have twenty-eight (28) days in which to apply to set aside the Registration Order once they are served. The Claimants are prohibited from taking any steps to enforce the Registration Order on until (a) the expiration of this twenty-eight (28) day period (if there is no application by the Respondents to set it aside), or (b) if there is an application, the date on which any such application to set aside is determined in the Claimants' favour. The Claimants accept that until the Registration Order has been served and they become entitled to enforce it, they do not have the formal status of judgment creditors in Jamaica. If the Claimants become entitled to enforce the Award, they will at that stage be able to seek the appointment of a receiver by way of equitable execution.

[47] The Claimants' fear has been expressed in a more nuanced manner than was the case initially. Now that they have become aware of the Assignment, the fear is that the Respondents will try to use their influence over Banco Central de Venezuela, the party to which funds have now been assigned, to take steps to prevent the enforcement of the Award. This would be achieved by dissipating the funds and

putting them outside the reach of the Court and the Claimants, in this interim period between the service of the Registration Order and the date when the Claimants will become entitled to enforce the Award and set aside the Assignment. It is for these reasons that the Claimants wish to have the appointment of an interim receiver as a protective remedy before the relief that will be sought once they become entitled to enforce the Award. The Claimants therefore wish to have the interim Receiver "hold the ring" until such time as proper enforcement proceedings are possible. Ms Moore has submitted that the case of **In re Mouat: Kingston Cotton Males Company v Mouat** [1899]1 Ch 83 supports the authority of the Court to hold the ring while the Court considers a challenge to an assignment under the **Statute of Elizabeth** and I accept that as a matter of law and principle, this Court has such a jurisdiction.

[48] The Claimants have produced ample evidence that the United States of America has imposed sanctions on the regime of Venezuelan President Nicholas Maduro which includes various state owned entities such as PDVSA. It is a safe assumption that one of the goals of these sanctions is to cut off sources of financing for the Venezuelan state, it being very dependent on its earnings from its exports of petroleum products. It is therefore at least arguable by the Respondents, that these sanctions, if obeyed strictly may be effective to prevent the payment of the funds which have been assigned to Banco Central de Venezuela. The Claimants have submitted, in response to this anticipated argument, that they should not have to rely on the effect of a sanctions regime imposed by a third-party state, the effect of which may be uncertain and particularly where that state has just had a change of administration that could result in policy changes to the sanctions regime.

[49] The Court has been provided with hearsay evidence originating from Mr Sean Buckley an Attorney based in the New York Office of Kobre and Kim who is a former US Department of Justice Prosecutor. The Claimants assert that has extensive experience with the procedural workings of US Sanctions and consequently, the requirements for the lifting or amending of these sanctions with

which we are concerned. It is being advanced that the lifting or variation of the current sanctions regime could be effected by President Biden very quickly and without prior public notice.

[50] In any event, it is my opinion that it is not absolutely necessary for these sanctions to be lifted or otherwise modified in order to permit the GoJ to make payments to Banco Central de Venezuela or on its behalf. The GoJ is able to make the payments even in the absence of the lifting of the sanction if it so decides. Admittedly, the process may be very difficult using the usual banking channels of routing united states dollar payments through banks in the United States of America if the payee is going to be a Venezuelan entity. However, there seems to be other possible means of payment, for example using other currencies and the Claimants suggested that even a direct transfer of actual currency notes is conceivable, the United States itself having previously employed that method.

[51] Nevertheless, the likelihood that there might be serious political consequences for Jamaica if payment were to be made in breach of an existing sanction should not be minimised and this could conceivably include Jamaica itself becoming the subject of retaliatory action on the part of the United States of America. Mr. Barrett in his affidavit dated 16th February 2021 has exhibited a Ministerial Brief dated 19th February 2019 which contains a discussion of the effect of the sanctions on the GoJ's inability to pay compensation in respect of the Petrojam shares in which it is stated that:

> *"Perhaps more relevant to today's action however, is the clear reality that as a result of the sanctions, we will be unable to remit the funds to our counterparts without putting Jamaica's financial banking systems seriously at risk."*

[52] Those potential consequences would apply equally to any payment to Banco Central de Venezuela. However, the possible consequences which may arise from a payment to Banco Central de Venezuela pursuant to the Assignment, do not completely negate the risk of the payments being made. I am therefore of the opinion that in the absence of any insurmountable barrier to payment (the

existence of sanctions not being considered by me to fall within this definition), or an undertaking by or on behalf of the GoJ to the Claimants that payment will not be made to Banco Central de Venezuela or its nominees or assigns, then there exists a real risk of dissipation. This risk will continue to exist until the Claimants are in a position to take enforcement steps against the funds which arose from the arrangement between the GoJ and PDVSA under the PetroCaribe Energy Co-operation Agreement. Such dissipation, were it to occur, would frustrate the ability of the Claimants to successfully complete enforcement procedures in respect of those funds. I wish to note, that my finding as to the existence of this risk should not be in any way construed to be questioning the judgment of the GoJ, but is a clinical assessment based on political realities and the vagaries of international politics.

Is it just and convenient to appoint an interim receiver?

[53] A receiver should not be appointed where a freezing order would provide adequate protection, but this is not such a case. I accept the submissions of Ms Moore that an application for an injunction at this stage was not pursued because an injunction would not be an effective remedy primarily because the Respondents have no physical presence in Jamaica and enforcement in Venezuela would be a practical impossibility. Furthermore, an injunction is not available against the GoJ under the terms of the **Crown Proceedings Act**.

[54] A receivership will be refused where the costs would be disproportionate to the sums at stake. However, in this case the costs of the interim receiver are estimated to be $50,000.00.00. This does not appear to be high in the context of the amount which the Claimants assert is outstanding. Having regard to the fact that the assets are currently being held in escrow by the GoJ the functions of the interim receiver will be limited and I will not order that he provides any security at this stage.

[55] Having considered the grounds on which this application is based and the likely impact of the Appointment of an Interim Receiver order on the Respondents as

well as Banco Central de Venezuela the assignee of the relevant funds, I am of the view that it is just and convenient to appoint such a receiver in these circumstances as identified above.

Disposition

[56] For the reasons stated herein, I am satisfied that the Claimants have a good arguable case for enforcement of the Award in this Jurisdiction and I find that it is wholly appropriate to appoint an interim receiver in this case. In the premises I hereby order as follows:

1. Kenneth Tomlinson of 11 Connolley Avenue, Kingston 4, Jamaica (the "**Receiver**") is appointed as interim receiver over the assets of the 1st and 3rd Respondents within Jamaica including but not limited to any right to receive principal and interest debt repayment owed now or in the future by the State of Jamaica, the Government of Jamaica, any department of the Government of Jamaica or the PetroCaribe Development Fund under the PetroCaribe Energy Co-operation Agreement made in or about November 2005 between Jamaica and the Bolivarian Republic of Venezuela and specifically includes any such funds which have so originated but which have been assigned by PDVSA Petroleo, S.A. to Banco Central de Venezuela or any other party (the "**Receivership Assets**").

2. The Receiver is not required to give security for his appointment.

3. Until further order, the Receiver shall have, to the exclusion of any other person, the right to do all and any of the following:

    a) Collect and take control of the Receivership Assets;

    b) Request information relating to the Receivership Assets from any third party within Jamaica as the Receiver may reasonably require for the purpose of carrying out his functions, notwithstanding that no

third party shall be obliged to provide such information solely by virtue of this Order;

c) Exercise in relation to the Receivership Assets all such powers authorities and rights as the Receiver would be capable of exercising if he were the absolute owner of the same, in order to preserve or protect the Receivership Assets on an interim basis, and to use the name of the 1st or 3rd Respondents so far as necessary for such purpose;

d) Bring, defend, continue or compromise any proceedings or any action within the jurisdiction as he may think fit, acting in his own name and/ or the name of the 1st or 3rd Respondents, in order to collect, gather in, recover and preserve or protect the Receivership Assets;

e) Hire any and all professionals and employ staff as necessary to assist in the execution of the powers and authorities provided in this Order;

f) Seek further directions from the Court as and when he sees fit by application in these proceedings.

4. The Receiver and his staff are entitled to be remunerated at their ordinary hourly rates and to be reimbursed for their costs and expenses from the Receivership Assets up to a limit of US $50,000. The Receiver has liberty to apply to increase this limit. Should the Receivership Assets be insufficient to cover the Receiver's remuneration, costs and expenses, they shall be met by the Claimants.

5. The Receiver and his respective officers, employees, legal counsel, solicitors, agents and such other persons retained by him in the performance of his functions shall be indemnified from the Receivership

Assets in his hands from and against all losses, liabilities, proceedings, claims, damages, costs and expenses incurred by them in the proper and reasonable conduct of the receivership, provided always that this indemnity shall not apply to any losses, liabilities, proceedings, claims, damages, cost or expenses incurred by reason of their acts of gross negligence or wilful misconduct.

6. The parties have liberty to apply to the Court as may be advised.

7. This Order shall be served by the Claimants on the 1st and 3rd Respondents and the Receiver by such processes as have been previously approved by this Court for the service of other Court Documents related to the claim herein.

8. Each of the Respondents shall have 28 days after service of this Order upon them to apply to set aside, discharge or vary this Order. Any such application shall be made in writing supported by evidence.

9. The costs of this application are to be costs in cause, unless any of the Respondents apply under paragraph 8 to set aside, discharge or vary this Order, in which case the costs are reserved to the judge hearing that application.