

BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

IN THE MATTER of the Supreme
Court of Judicature Act and the Civil
Procedure Rules made there under

CLAIM No. 2192 of 2012

BETWEEN:

ALTMAN REAL ESTATE (A FIRM)

APPLICANT/CLAIMANT

AND

CUSHMAN & WAKEFIELD OF
CALIFORNIA, INC

FIRST RESPONDENT/DEFENDANT

INTER-AMERICAN
DEVELOPMENT BANK

SECOND RESPONDENT/DEFENDANT

VALEANT PHARMACEUTICALS
INTERNATIONAL INC

THIRD RESPONDENT/DEFENDANT

VALEANT HOLDINGS
(BARBADOS) SRL

FOURTH RESPONDENT/DEFENDANT

VALEANT INTERNATIONAL
(BARBADOS) SRL

FIFTH RESPONDENT/DEFENDANT

VALEANT PHARMACEUTICALS
HOLDINGS (BARBADOS) SRL

SIXTH RESPONDENT/DEFENDANT

HYTHE PROPERTY INC

SEVENTH RESPONDENT/DEFENDANT

Before the Honourable Mr. Justice William Chandler, Judge of the High Court

Mr. M. Tariq Khan for the Applicant/Claimant

Mr Michael R. Yearwood with Mr Junior Allsop for the Third Respondent/Defendant

Mr Ramon O. Alleyne with Mr. Benjamin D. Norris for the Second Respondent/Defendant

Date of Hearing: December 5th, 6th, and 14th 2012

Date of Decision: December 14th 2012

DECISION

[1.] On the 14th December 2012 I discharged the Freezing Injunction granted in favour of the Applicant against the second named Respondent and promised to give my reasons at a subsequent date. I do so now.

The Freezing Order

[2.] On the 5th December 2012 the Honourable Chief Justice Sir Marston Gibson K.A granted an injunction against the Second and Third Respondents upon the oral application of the Applicant which was represented by Mr. M. Tariq Khan, Attorney-at-Law. The relevant orders are contained in paragraph 1 under the caption 'Freezing Order' and relate to Disposal of Assets and are in the following terms:

- (1) The Second and Third Respondent must not: (1) release or remove from Barbados any of their assets which are in Barbados whether in their name or not and whether solely or jointly owned up to the value of \$325,000.00 or (2) in any way dispose of, or deal with or diminish the value of any of their assets whether they are in or outside Barbados, whether in their own name or not and whether solely or jointly owned up to the same value. This prohibition includes the following assets in particular the purchase monies of the Second Respondent in relation to the purchase of the property known as the 'Valeant building' and the proceeds of sale of the Third Respondent's property known as the 'Valeant building' or the sale money of the property known as the 'Valeant building' if it has been sold.*
- (2) If the total unencumbered value of the Second and Third Respondents' assets in Barbados exceed \$325,000.00, the Second and Third Respondents may remove any of those assets from Barbados or may dispose of, or deal with them so long as the total unencumbered value of the Second and Third Respondents' assets still in Barbados remain above \$325,000.00.*

[3.] The further Order of the Honourable Chief Justice related to disclosure of information and provided that:

(1) The Second Respondent must inform the Applicant in writing at once of all their assets whether in or outside Barbados and whether in their own name or not and whether solely or jointly owned, giving the value, location and details of all such assets, and

(2) The information must be confirmed in affidavit which must be served on the Applicant's Attorney-at-Law within 7 days after this order has been served on the respondents.

Background to the Order

[4.] The Applicant on the 6th December 2012 filed a without notice application for a freezing order together with a Certificate of Urgency. An Affidavit in support of the order deposed to by Mr. Terrance Michael Hanton, Director of Sales of the Applicant, was also filed. Attached to that Affidavit are several e-mails which speak for themselves and a broker co-operation agreement (“the agreement”) between the First Respondent and the Applicant with respect to the proposed sale to the Second Respondent of property located at Hythe, Welches, Christ Church.

[5.] Paragraph 4 of the Agreement provides:

“Broker agrees that in no event should C&W be under any obligation or have any liability for payment to broker of the cooperating broker's portion of the commission unless and until C&W has received unconditionally payment thereof from the owner”.

[6.] Clause 7 provides:

“This Agreement constitutes the entire agreement between C&W and broker and supersedes all prior discussions as to the subject matter hereof. No modifications of the Agreement will be effective unless made in writing and signed by both C&W and broker. This Agreement is binding upon the parties hereto and their respective successors and assigns.”

[7.] C&W refers to Cushman & Wakefield of California Inc., whilst Altman Real Estate is referred to as the Broker in the Agreement and Valeant Pharmaceuticals International Inc. is referred to as the owner.

Application to Discharge the Freezing Order

[8.] On the 10th December 2012 the Second Respondent applied for the following:

- (1) That the order of the Honourable Chief Justice to be discharged as being in contravention of section 5 of the Inter-American Development Bank Act Chapter 323(B) of the Laws of Barbados (hereinafter referred to as “the IADB Act”);
- (2) That the Second Respondent be removed as a party to these proceedings under Rule 19.3(1) under the Civil Procedure Rules (hereinafter referred to as the CPR);
- (3) That cost of the application be borne by the applicant and assessed pursuant to Rule 65.11 of the C.P.R.

The Grounds of the Application

[9.] The grounds for the application to discharge the order are as follows:

1. The Order is void *ab initio* as being contrary to section 5 of the IADB Act;
2. The Freezing Order in relation to disclosure is contrary to the said Act, and
3. There is no basis for the grant of the freezing injunction against the Second Respondent as it presents no credible risk of dissipation of assets.

Immunity of the Inter-American Development Bank

Submissions of the Second Defendant

[10.] Mr. Alleyne, Counsel for the Inter-American Development Bank, submitted that Barbados’ membership in IADB was governed by the Agreement between the parties and the IADB Act which gave the agreement the force of law. He referred to section 3 of Article XI of the Agreement which contained the privileges and immunities of the Bank. He also submitted that section 5 of the IADB Act gave sections 2 to 9, inclusive of Article XI, the force of law. Section 3 of Article XI of the IADB Agreement is set out at paragraph 15 of this decision.

[11.] He submitted also that the freezing order was an interlocutory judgment and therefore an attachment in the simple meaning of that word. The Order, therefore, was contrary to the provisions of the said Act which rendered the assets of the Bank immune from attachment or seizure since the order impinged on those immunities. He conceded, however, that the immunity of the Bank was not an immunity from suit.

Submissions of the Claimant

[12.] Mr. Khan contended that a line of authority had developed internationally with respect to the immunities of the IADB and similar international organizations which render international funding aid. He relied on the case of **Lutcher. S.A. Cellulose e Papel v IADB 382 F.2d 454 (D.C. CIR. 1967)** which established that the IADB Agreement had no reservation of immunity nor did it mention any categories of cases in which it (the IADB) could not be sued.

- [13.] He relied on **Janet E Atkinson v IADB 156 F. 3d 1335** in support of the proposition that commercial activity of the Bank was an exception to immunity and such activity was satisfied in the **Atkinson** case where the action was based upon a commercial activity carried out in the United States by a foreign state. He submitted that the present proceedings arose from a private treaty for the sale of property and was therefore a private transaction, ipso facto, the exception based on commercial activity of the organisation, applied.
- [14.] He also submitted that international law provided for waiver of immunities in circumstances such as those with which the Court was now faced, namely commercial transactions by independent funding agencies. Thus, the immunities could not be raised as a bar to the present suit. He further argued that the appellant in the **Atkinson** case failed in her application for garnishment proceedings against the IADB because her application did not rest on the commercial activity of the Bank. He, therefore, submitted that, in this matter, a similar waiver applied to the immunity claimed by the Second Respondent which entered into a private treaty to purchase the building in question.

Discussion

- [15.] Section 3 of the IADB Act authorises the Minister responsible for Finance to empower, by instrument under his hand, such person as may be named in the instrument to (a) sign the Agreement on behalf of Barbados; and (b) to deposit with the General Secretariat of the Organisation of American States an instrument setting forth that Barbados has accepted, in accordance with its law, the Agreement and all the terms and conditions of the resolution and has taken the steps necessary to enable it to carry out all of its obligations under the Agreement and the Resolution. Once these formalities relating to signature and deposit of the Agreement are complied with, the Agreement becomes binding in international law.

Incorporation of the Agreement into Domestic Law

- [16.] The IADB Act provides at section 5 that,
“The provisions of sections 2 to 9, inclusive of Article XI of the Agreement establishing the Inter-American Development Bank which relate to the status, immunities and privileges to be accorded to the Bank, shall have the force of law in Barbados.”
- [17.] Section 3 of Article XI provides,
“The property and assets of the Bank shall wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank” (emphasis added).

[18.] The immunities enjoyed by the Bank under the Agreement are incorporated into the domestic law of Barbados by virtue of section 5 of the Act. The language of the IADB Act is clear in the intention of Parliament to provide these immunities prior to final judgment.

Immunities of the Inter-American Development Bank and the Janet Atkinson Decision

[19.] The **Atkinson** case dealt with garnishment proceedings against the Bank. The Court in **Atkinson** noted at paragraph 14 of the decision that:

“Appellant’s first claim is that the International Organisations Immunities Act (IOIA) does not contemplate immunity from garnishment proceedings. She argues that there is a de minimis exception to the immunity granted by the IOIA, and that garnishment proceedings fall within the exception because the burden of being a garnishee is minimal. Yet even assuming the burden were minimal, a point on which we expressed doubts above, we think the plain language of the IOIA refutes the notion of a de minimis exception. The IOIA speaks in terms of “immunity from suit and every form of judicial process” 22 U.S.C. s 288a(b), language which admits of no exception for “unobtrusive” judicial processes. Cf Stena Rederi AB v Comision de Contratos, 923 F.2d 380, 392 (5th Cir. 1991) (holding that garnishment proceedings are not excepted from the general jurisdictional immunity provided to foreign states by 28 U.S.C. s 1604, which provides that “a foreign state shall be immune from the jurisdiction of the courts of the United States ...”).”

[20.] In this particular matter, the Court is not concerned with a final order but with an interlocutory application heard prior to the filing of the Applicant’s claim. In the **Atkinson** case at paragraphs 9, 14 (quoted above) and 15 the Court noted,

[9] The parties disagree on whether the waiver is broad enough to encompass a garnishment proceedings such as the one appellant hopes to bring. While the provision might be read to establish a blanket waiver of immunity from every type of suit not expressly prohibited elsewhere in the articles of agreement (only suits by members are expressly prohibited), we rejected that reading in Mendaro v World Bank, 717 F.2d 610, 614-15 (D.C.CIR 1983) (citing Lutcher, 382 F.2d at 456) (interpreting identical language in the agreement establishing the World Bank). Instead, we adopted a test for determining when, in the context of a particular suit against the Bank, section 3 should be construed as a waiver of immunity: “since the purpose of the immunities accorded international organisations is to enable the organisations to fulfil their functions, applying the same rationale in reverse, it is likely that most organisations will be unwilling to relinquish their immunity without receiving a corresponding benefit which will further the organisation’s goals.” Ibid at 617.

[15] Now to the more general, and more important, dispute between the parties – the scope of the immunity provided by the IOIA. The Bank submits that immunity under the IOIA is absolute and therefore poses a bar to any suit, regardless of its origin or subject matter. Appellant rejects that notion, contending that the IOIA, by virtue of its reference to “the same immunity from every suit and every form of judicial process as is enjoyed by foreign governments”, 22 U.S.C. s 288a(b) incorporates the commercial activities exception to immunity, a central doctrine of the modern law governing the immunity of foreign governments from judicial process. She proceeds to argue the Appellee’s payment of wages from Kestell constitutes a commercial activity, so that her garnishment proceeding - - a suit appellant depicts as arriving out of that activity - - is not barred.

[21.] The Court went on, in paragraph 25, to state,

[25] In light of this text and legislative history, we think that despite the lack of a clear instruction as to whether Congress meant to incorporate in the IOIA subsequent changes to the law of immunity of foreign sovereigns, Congress’ intent was to adopt that body of law only as it existed in 195: when immunity of foreign sovereigns was absolute (as we noted above, absolute immunity under the IOIA is merely a baseline that is subject to modification by Executive Order.) The canon Appellant urges on us is but one factor in discerning Congress’ intent and we think it is outweighed by the text and legislative history in this case.

[22.] The Court also discussed the power of Congress in relation to the immunities enjoyed by foreign states and organisations and noted that section 1609 of the United States Code stated the general rule that the property of foreign states was immune from attachment or execution and section 1610 set forth exceptions to the general rule which are roughly analogous to the commercial activity exception to jurisdictional immunity in section 1605.

[23.] I am of the opinion that the **Atkinson** case does not bear out the interpretation sought to be placed on it by Mr. Khan that there is an exception to the immunity of the IADB based upon the concept of commercial activity. There was statutory authority in the United States for an exception based on commercial activity, however, there appears to be no such statutory authority in Barbados for such an exception. In **Atkinson** the reference to an exception based on commercial activity is a reference to the commercial activities of states as opposed to organisations.

[24.] Further, the **Atkinson** case was concerned with the commencement of proceedings against the Bank for the purposes of enforcing a judgment. Here the Second Respondent's counsel has conceded that the immunity is not in relation to the commencement of the suit but in relation to the attachment of property prior to final judgment, so that the argument in relation to waiver of immunity from suit is irrelevant. The Second Respondent has relied upon its immunity from attachment as did the IADB in the **Janet Atkinson** case and in that case, the Court held that, in the absence of waiver, the immunities of the IADB remained absolute.

Waiver vs. Exception

[25.] With reference to Mr Khan's submission on waiver, in the **Mendaro** case the Court noted at paragraph 21,

“Of course, like other immunities, the immunity from employee suits may be waived by the members of the international organisation, or its administrative directors. However, under national and international law, waivers of immunity must generally be expressly stated. The Act confers immunity “except to the extent that such organisations expressly waive their immunity for the purpose of any proceedings or by the terms of any contract ... The requirement of an express waiver suggests that courts should be reluctant to find that an international organisation has inadvertently waived immunity when the organisation might be subjected to a class of suits which would interfere with its functions.”

[26.] The waiver referred to in **Mendaro** was predicated upon section 2(b) of the International Organisations Immunities Act which defined the privileges accorded to qualified international organisations:

“International organisations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit as is enjoyed by foreign governments except to the extent that the such organisations might expressly waive their immunity for the purpose of any proceeding or by the terms of any contract”.

[27.] The thrust of the argument for waiver does not take into account that waiver is an option which the organisation possessing the immunity may or may not exercise. The Court cannot impose a waiver on any party, especially an international organisation, without statutory authority so to do or without the organisation itself waiving its immunity. To do so would undermine the purpose of having the immunities in the first place. When the court is statutorily empowered to do so this could constitute an exception to the immunity and not a waiver.

[28.] It is, therefore, the decision of the Court that the provisions of the IADB Act, incorporating, as they do, the Agreement establishing the IADB, provides immunity from seizure, attachment or execution of their assets on an interlocutory application such as this. The freezing order granted on the 5th December 2012 is therefore void and of no effect.

Disclosure of Assets Worldwide

[29.] The Second Respondent submitted that the IADB is a large international organisation possessing assets in 119 countries and that any order requiring disclosure of all these assets is unreasonable in its scope. Mr Khan did not proffer any real submission with respect to the scope of the order. Mr Alleyne further buttressed his argument by submitting that there was no risk of dissipation of assets and that no such risk was alluded to in the Affidavit filed in support of the Application.

Discussion

[30.] In Mr. Hanton's Affidavit at paragraph 33, the deponent stated that the only asset of which the Applicant was aware that was in the possession of and control of the Third Respondent was the property known as the 'Valeant building'. At paragraph 34 of the said Affidavit, under the caption 'Dissipation of Assets', the deponent submitted that the Third Respondent had assets within the jurisdiction from which the Applicant's claim might be satisfied, namely the 'Valeant building' and the proceeds of sale therefrom "but this asset will easily be dissipated or removed from the jurisdiction by way of its impending sale of which I verily believe completion is imminent".

[31.] Paragraph 35 of the said Affidavit provided as follows:

"in addition, the sale of the property known as the 'Valeant building' leaves the Third Respondent with no other assets in Barbados. I am saying that it is my belief that the Third Respondent will, when it has completed the sale of the property known as the 'Valeant building', repatriate the funds to its main places of business which are either Bermuda or the United States of America".

[32.] In paragraph 36 the deponent stated:

"further I respectfully submit that there is a real risk that any award of damages the Applicant will obtain in the High Court will go unsatisfied, in whole or in part, unless a freezing order is granted".

[33.] In this regard, in paragraph 34 the deponent also deposed:

"I respectfully submit that the Applicant has a good arguable claim for its loss of commission claim against the breach of contract, the broker co-operation

agreement, and I know of no possible counterclaim which the Respondents have intimated or might be entitled to raise against it by way of set-off”.

- [34.] I will return to this paragraph in relation to the submissions relative to whether there is (1) a cause of action against the Second Respondent and (2) the application to strike out the Second Respondent as a party.
- [35.] The position of the Applicant with respect to the removal of the asset from the jurisdiction was somewhat confusing. The Agreement for Sale of the property was exhibited in the Affidavit of Ms Christal Saab, the Acting Country Representative of the Second Respondent, and is made between Hythe Property Incorporated (as Vendor) and the IADB (as Purchaser) so that the Second Respondent as purchaser will be the estate owner of the fee simple in the property on which the building known as the ‘Valeant building’ is situated.
- [36.] Since it is real estate which is being purchased and, in respect of which there is no allegation that the Second Respondent will resell or otherwise divest itself of the ownership of the property, there is no basis for the submission that there will be no assets of the Second Respondent available to satisfy any judgment which the Applicant might obtain against the Second Respondent. The alleged fear that the sale of property will have the effect of leaving any Respondent without assets in Barbados is in relation to the Third Respondent. This is clear from paragraph 35 of the Affidavit above quoted. There is, therefore, no merit in the submission that there is a fear of dissipation of assets in Barbados or the removal of assets from this jurisdiction to justify the continuation of the freezing order against the Second Respondent.
- [37.] With reference to the nature and scope of the disclosure of assets worldwide of the Second Respondent it is clear that, given the claim of the Applicant/Claimant for BDS \$325,000.00 and any costs which may be awarded if the Claimant is successful and given the fact that a proper reading of the Agreement for Sale would reveal that an asset which is being purchased for US\$6.5 million or BDS\$13 million will be vested in the Second Respondent, that the order for disclosure of the Second Respondent’s assets worldwide is unreasonable in its nature and scope and unnecessary.
- [38.] The Court agrees with the submission of counsel for the Second Respondent that the IADB, is an international banking institution and that the circumstances must be unusual for a court to grant an injunction directly against a bank. Even though the power to do so exists, given the relationship of a bank with its depositors and the need for public confidence if its business is to continue, unusual circumstances would have to exist for that power to be exercised. It would be better if such a freezing order was

to be granted to require the bank to preserve a specified sum pending trial (see **Injunctions 8th Edition by David Bean** paragraph 7.14 and **Polly Peck International Plc v Nadir** (No. 2) [1992] 4 All ER 769).

Disposal

[39.] In the circumstances, the order for disclosure against the Second Respondent is discharged.

Striking out the Second Defendant as a Party to the proceedings

Submissions of the Second Defendant

[40.] Mr. Alleyne for the Second Respondent submitted that under CPR 19.2(3) the test for adding a party to proceedings was (a) whether it was desirable to add the new party so that the Court could resolve all the matters in dispute in the proceedings or (b) there was an issue involving the new party which is connected to the matters in dispute in the proceedings and it was desirable to add the new party so that the Court could resolve that issue.

[41.] He relied on **BIPA Inc. et al v British American Insurance Company (Barbados) Limited** (Unreported) Claim Number 4 of 2012, CA where Burges JA noted,

“First the operation of Part 19.2(3) is expressly limited to allowing the Court to “resolve all the matters in dispute in the proceedings”. Thus a critical element of the tests set down in Part 19.2(3) is that there must be shown to be “matters in dispute” before a party could be joined under that Part. In the Supreme Court of New South Wales case of Re Great Eastern Cleaning Services Pty. Ltd (1978) 2 NSWLR 278 at 281, the expression “matters in dispute” was thought to mean what could be considered to be the issue in the proceedings.”

[42.] Counsel further submitted that it was clear from the Applicant’s Affidavit in support of its claim for interlocutory relief that the issue in dispute was whether commission was owed to the Applicant in respect of the sale of the ‘Valeant building’.

[43.] He submitted further that it was clear that the Applicant was contending that the First Respondent alone was responsible for the commission by virtue of a broker co-operation agreement between the Applicant and the First Respondent. He also submitted that, under the caption “Cause of Action – Brokerage Agreement” in the Affidavit, it was clear that no cause of action or issue against the Second Respondent was pleaded. There was, therefore, no nexus or connection between the Second Respondent and the proceedings before the Court and that the Applicant had failed to disclose any cause of action against the Second Respondent. There was no contractual

relationship with the Applicant or any obligation owed to the Applicant and, therefore, no basis for a claim against the Second Respondent.

Submissions of the Claimant

[44.] Mr. Khan, on the other hand, submitted that the Second Respondent was a proper party to the proceedings on the basis of the Affidavit of Terrance Hanton, namely, paragraphs 15 and 19 which evidenced that Delta Associates acted on behalf of the Second Respondent and, upon the successful negotiation, the Applicant was subsequently able to reveal the identity of the purchasers, namely the Second Respondent.

[45.] He also submitted that paragraph 16 of the said Affidavit contained emails detailing the degree of contact between the Second Respondent and the Applicant and the level and range of information sought by the Second Respondent from the Applicant in aid of the then potential purchase.

[46.] Counsel referred to correspondence, for example, Exhibit TMH 12 relating to an inquiry from the First Respondent that the Second Respondent was not seeking any commission. He cited in support, *inter alia* further correspondence TMH 13 evidencing that the offer letter was copied to all parties *“involved in or subject to the purchase of the ‘Valeant building’ including the Applicant”*.

[47.] Counsel further submitted that the Applicant sought the relief of discovery from the Second Respondent by way of its claim filed on the 10th December 2012 to disclose the precise reasons why the Applicant was advised to refrain from contacting it (the Second Respondent).

Discussion

[48.] The resolution of this issue was inextricably bound up in the issue as to whether or not a cause of action existed between the Applicant and the Second Respondent. The submissions in relation to the existence of a cause of action were as follows:

(1) The Second Respondent submitted that there was no cause of action between the Applicant and the Second Respondent since there was no evidence of a contractual relationship existing between the parties or of any other obligation due by the Second Respondent to the Applicant in law.

(2) The Claimant/Applicant submitted that the cause of action was related to the claim for the relief of discovery in the prayer for relief in his filed Claim.

Is there a cause of action against the Second Defendant?

[49.] In the Claim Form filed on the 10th December 2012 the Claimant claimed against the First Defendant: (1) BBD \$325,000.00 being the amount of commission payable for its

services as agent under an agreement dated the 23rd and 24th days of July 2012 and made between the Claimant and the First Defendant .

- [50.] The claim went on to state that the Claimant was duly identified as the sole and exclusive agent of the Second Defendant of property owned or controlled through and by the Third, Fourth, Fifth and Seventh Defendants. The claims contained in paragraphs 2, 3 and 4 which are based upon quantum meruit, breach of contract and for interest, respectively, are against the First Defendant.
- [51.] There was an alternative claim for damages for breach of contract against the Third to Sixth Defendants jointly and severally and against the First Defendant for breach of warranty of authority.
- [52.] There was a further claim for an order by way of specific performance and/or disclosure that the Defendants do “forthwith disclose to the Claimant precise reasons why the Claimant was specifically advised to refrain from contacting the Second Defendant in the first instance on 8th August 2012 and the Second to Seventh Defendants subsequently on the 14th August 2012 because this information is necessary in order to fairly dispose of proceedings between the Claimant and the Defendants”. In the prayer for relief the claim for discovery is again repeated.
- [53.] Reference has already been made to the co-brokerage agreement entered into between the Claimant and the First Defendant. Nowhere in that agreement was any obligation imposed upon the Second Respondent, which was referred to as the purchaser of the subject property, towards the Claimant. The agreement went on to state that it superseded all prior discussions as to the subject matter of the agreement and that no modifications of this Agreement would be effective unless made in writing and signed by both the First Respondent and the Claimant.
- [54.] The Court is of the opinion that a proper reading and interpretation of the said agreement does not reveal any contractual nexus between the Claimant and the Second Respondent. Discovery is a principle in the law of evidence which is used to enable a party to elicit relevant evidence in support of their claim. The claim for discovery is not a sufficient rationale for saying that a cause of action exists, neither is it a sufficient basis in law for the submission that the Second Respondent is joined so that all matters in dispute may be resolved.
- [55.] In the face of the co-brokerage agreement, the terms of which have already been referred to, it is difficult to see the relevance of the rationale which is posed by the Claimant as the reason for the order of discovery in its Statement of Claim, namely that the

Defendant forthwith disclose to the Claimant precise reasons why the Claimant was specifically advised to refrain from contacting the Second Defendant in the first instance on 5th August 2012 and the Second to Seventh Defendants subsequently on the 12th August 2012 because this information is necessary in order to fairly dispose of proceedings between the Claimant and the Defendants.

[56.] Further, the Claimant has not demonstrated that if the relevant question was posed that the Second Respondent would be unwilling to give evidence if called as a witness.

Disposal

[57.] The Court is of the opinion, therefore, that the claim for discovery against the Second Respondent is not a cause of action and further, that the joinder of the Second Respondent simply for the purpose of resolving an issue of discovery is not necessary for the purpose of allowing the Court to resolve all the matters in dispute in the proceedings. Therefore, on this basis the application to strike out the Second Respondent as a party ought to succeed.

[58.] No issue arises between the Claimant and the Second Defendant with reference to any commission. The commission is claimed against the First Defendant. Exhibit TMH 12 of Mr Hanton's Affidavit contained correspondence between Michelle Marshall of Altman who wrote to Marilyn Sussan as follows:

“Greg Ficke has expressed some concerns regarding IADB's expectations to receive a fee should you conclude a successful negotiation for the Valeant building. He would therefore like to have confirmation from you in writing that neither IADB nor your counsel would be seeking any commission arising out of the purchase and sale of the Valeant building”.

[59.] Marilyn Sussan of IADB responded:

“neither we nor our counsel expect any fee or commission of any type - I am not certain how Greg got that idea. In my addendum to the representation letter, my comment was to advise that fee or commission arrangements that may exist between Altman and CW were between your two firms and is of no concern to the Bank”.

[60.] Therefore, the evidence in support of the Application showed no nexus between the Claimant and the Second Defendant with reference to the payment of commission on the sale of the building that could provide a cause of action.

Order of this Court

[61.] In the premises it is ordered as follows:

- (1) The freezing injunction is set aside insofar as it relates to the Second Defendant/Respondent.
- (2) The Second Defendant/Respondent is removed as a party to these proceedings under Rule 19.3(1) of the Supreme Court (Civil Procedure) Rules 2008.
- (3) The Claimant/Applicant shall within 3 days file an amended Freezing Order together with amended versions of any other documents already filed in this matter therein removing all reference to the Second Defendant/Respondent.
- (4) The Claimant/Applicant shall immediately serve copies of those amended documents on the Second Defendant/Respondent who shall be at liberty to apply.

Costs

[62.] The parties having agreed the costs order it is FURTHER ORDERED BY CONSENT that the Claimant pay the Second Defendant the costs of the application in the sum of \$5,400.00.

The Hon. Mr. William J. Chandler
Judge of the High Court