SUPREME COURT OF BARBADOS

IN THE HIGH COURT OF JUSTICE

CLAIM No. 99/2015

BETWEEN

CLICO INTERNATIONAL LIFE INSURANCE LIMITED **Claimant**

AND

LEROY PARRIS **First Defendant**

BRANLEE CONSULTING SERVICES INC **Second Defendant**

THE ESTATE OF DAVID THOMPSON **Third Defendant**

(acting through duly appointed Personal Representative

Marie-Josephine Mara Thompson)

Before: The Hon. Sir Marston C.D. Gibson, KA, Chief Justice

2015: April 10, 14, 17, 21

2016: February 22

Mr. Ramon Alleyne and Sheena-Ann Ince for the Claimant

Mr. Hal Gollop QC and Mr. Michael Yearwood for the First Respondent

Mr. Vernon O. Smith QC, Mr. Steve Gollop and Teri Manning for the Second Respondent

Sir Maurice King QC, KA, and Mr. Edmund King QC for the Third Defendant

(Mr. Barry L. V. Gale QC, Mrs. Leodean Worrell and Mrs. Laura Harvey Read, on a watching brief for The Bank of Nova Scotia)

DECISION

GIBSON CJ:

Introduction

[1] In this application, the first and second defendants, Leroy C. Parris ("LCP") and Branlee Consulting Services Inc. ("BCS"), seek the discharge of a freezing order granted *ex parte* to the claimant, CLICO International Life Insurance Limited ("CIL"), on 29 January 2015 (***Chandler J***). CIL contends that the freezing order was properly granted because the asset frozen, an amount of $4,500,000.00 in a Fixed Deposit Account held at the Bank of Nova Scotia ("BONS"), was part of its corporate property which had been wrongfully under the control of LCP and BCS.

[2] The basis of CIL's application for injunctive relief which resulted in the freezing order was its assertion that there was a risk of dissipation of the funds. LCP and BCS attack the freezing order as an improper application of either the principles governing the grant of ***Mareva*** injunctions or those governing the more widely known interlocutory injunctions under the authority of ***American Cyanimid v Ethicon***, *per* ***Lord Diplock***, as reformulated and applied by our Court of Appeal in ***Toojays v Westhaven Ltd***, *per* ***Burgess JA***.

[3] ***Chandler J*** later recused himself from continued involvement in the matter and, in the interest of judicial economy I assigned the matter to myself under **Supreme Court (Civil Procedure) Rules 2008 ("CPR**"), **Rule 2.4(4)**.

[4] This matter raises several issues of both procedural law in the ("CPR") and interim injunctive relief, as well as substantive company law under the **Companies Act, Cap 308** of the **Laws of Barbados**, particularly the rules governing the legal status of companies within a corporate group. Companion litigation has continued before ***Chandler J***. Many of the facts are taken from the affidavits of the parties but also from two Reports of Forensic Audits conducted by the Forensic and Dispute Services team of Deloitte Canada. As will soon appear, Deloitte & Touche (or more accurately, Deloitte Consulting Ltd), a Canadian-based accounting firm with offices in Barbados, was appointed the Judicial Manager ("JM") of the claimant CIL.

Factual and Procedural Background

[5] CIL was a very successful insurance company for many years and operated throughout the Caribbean. It was a subsidiary of CLICO Holdings (Barbados) Ltd ("CHBL") and part of the wider CLICO group of which the ultimate parent company was CL Financial Ltd ("CLFL"), a Trinidad-based insurance conglomerate. From about January 2009, several of the

companies in the group began to endure significant financial stress and, on 14 April 2011, the High Court, upon the application of CIL, appointed Deloitte Consulting Ltd ("DCL"), acting through Messrs Oliver Jordan and Patrick Toppin ("PT"), to act as JM of CIL. Mr. Jordan has since resigned from DCL, leaving PT as the sole JM. The Court's Order was based on **sections 56** through **70** of the **Insurance Act, Cap 310** of the **Laws of Barbados**. On 29 April 2011, the Court issued a Directions Order which set out the JM's authority and directed that an interim report be submitted within 30 days of the date of the Order. Submitted into evidence during the hearing were two Forensic Reports, one as of 5 December 2011 and the other as of 21 June 2013.

[6] The first defendant (LCP) had been CIL's President and Chief Executive Officer for many years immediately preceding his retirement after some 34 years in the insurance field. As President, he had responsibility for the company's operations in Barbados and the Eastern Caribbean. There is no gainsaying that the financial success enjoyed by CIL was due in no mean measure to LCP's business acumen in the insurance field. He is also presently a director, along with his wife Faye Wharton-Parris ("FWP"), of the second defendant, Branlee Consulting Services Inc ("BCS").

[7] The third defendant is the Estate of David Thompson QC, late Prime Minister of Barbados and former principal of the law firm of David Thompson & Associates [DT&A], which had acted on behalf of both CIL and LCP on numerous occasions prior to the group running into financial difficulty. Central to CIL's claim was an invoice for legal fees for services purportedly performed for CIL, and the transfer to LCP, as a gratuity, of the legal fees once received by the law firm.

[8] By letter dated 5 December 2002, Mr. Lawrence A. Duprey ("LAD"), the chairman of the board of directors of CLFL, the overall parent company of the Clico group of companies, wrote to LCP as follows:

> December 5, 2002
>
> Mr. Leroy Parris
> President
> CLICO Holdings (Barbados) Limited
> Whitepark Road
> Bridgetown
> BARBADOS
>
> Dear Mr. Parris,
>
> You have made a verbal application to me to arrange some sort of lump sum reward for the work you have done in growing the asset base of CLICO Holdings (Barbados) Limited and transforming CLICO International Life Insurance Company Limited and CLICO International General Insurance Company Limited into profitable companies.
>
> I have considered your application and I will make the following financial arrangement for you. The commitment of CLFL is conveyed in this letter and I have expressed my prerogative as Chairman to do so. CLICO Holdings (Barbados) Limited will pay you five million United States Dollars (US$5,000,000) *in a tax effective form* under the following conditions:

> 1. Lawrence A. Duprey ceases to be Group Chairman.
>
> 2. Leroy Parris ceases to be Chief Executive officer of CLICO Holdings (Barbados) Limited.
>
> 3. We both are still active and hold our offices on December 31, 2010. Then this payment will be made to you in lump sum by January 31, 2011.
>
> Terms and conditions of this agreement are *between Leroy Parris, CEO, CLICO Holdings (Barbados) Limited and Lawrence A. Duprey, Chairman, CL Financial Limited and CLICO Holdings (Barbados) Limited*.
>
> Signed
> Lawrence A. Duprey
> Chairman
> CL Financial Limited.
>
> (Emphasis added.)

[9] The December 2002 agreement was put into more formal language by an agreement dated 15 May 2005 and made between CHBL, as "'the employer' which expression shall include where the context so admits its subsidiaries Clico International Life Insurance Limited, Clico International General Insurance Limited, Clico Mortgage and Finance Corporation, Todds Estates Limited, Clico Property Development Limited, Clermont Development Inc., Clico Financial Holdings Inc., Rodney Bay Limited, Clico Property Development (St. Lucia Limited), CL Financial Limited, and Professional Financial Services, Inc., whose registered office is at Dayrells Heights in the parish of St. Michael, hereinafter called 'the employee' which expression shall include where the context so admits its principal employee Leroy C.

Parris and its agents assigned to perform tasks under the terms of this agreement." The agreement was for a term of 10 years commencing on 15 May 2005.

[10] Under the rubric "Remuneration and other benefits," CHBL, as employer, agreed to pay to Professional Financial Services Inc., ("PFSI"), a company of which LCP was a director, "a basic annual salary of Three Hundred and Sixty Thousand dollars ($360,000.00) (or such increased basic rate as the parties may from time to time agree)." Clause 14 of the May 2005 agreement provided as follows:

> The employer will pay to Professional Financial Services Inc. and/or Leroy Parris a gratuity of US$5,000,000.00 on the 15th of May 2008 in such manner as may be agreed between the parties on terms as set out but amended herein as to the date of payment but in no way otherwise in a letter dated December 5, 2002 between Leroy Parris and Lawrence Duprey.

[11] The signatures on the agreement were witnessed by David Thompson, Gale B. Prescod, and Onika E. Stewart of the law firm of DT&A. It should also be noted parenthetically that CHBL was the parent company of CIL, and LCP was a director of CHBL. The gratuity agreement was ultimately confirmed by a unanimous resolution of CHBL's Board of Directors dated 15 May 2005.

[12] On 30 December 2008, the law firm of DT&A submitted to CHBL an invoice for legal fees totaling $3.333 million. The invoice was as follows:

Invoice # 20067
Invoice Date 30th December 2008
File Number CL1

IN ACCOUNT WITH

THOMPSON & ASSOCIATES
ATTORNEYS AT LAW
Consultant: Maurice King Q.C.
Onika Stewart LLB (Hons), LLM Lond; Gale Prescod LLB (Hons); Amiri Dear LLB (Hons)

CONSOLIDATED INTERIM INVOICE:

To: Clico Holdings (Barbados) Limited,
Whitepark,
BRIDGETOWN.

RE: PURCHASE OF SAM LORDS CASTLE AND RELATED PROPERTIES; PURCHASE OF GRANTS HOTELS LIMITED SHAREHOLDING; LITIGATION INVOLVING MARRIOTTS CORPORATION AND ITS SUCCESSORS; LITIGATION INVOLVING ABARCO INC.

Our Fees and Expenses in connection with the above matters:

To retainer for US and Canadian Counsel in respect of the action by Marriotts Corporation and its successors to enforce the terms of mortgage for $19 million in the sum of US $900,000.00 x 2 = BDS $1,400,000.00	1,800,000.00
To disbursements, expenses and fees related to searches in US Corporate Registries, Canadian registries, due diligence investigations, Assessor's fees, valuation expenses, commencement proceedings for disclosure, opinion on international arbitration and settlement process US$523,000.00 x 2 = BDS $1,046,000.00	$1,046,000.00
Retainers for watching brief for Maurice King Q.C. and Junior Counsel in the matters Abarco Limited vs. Grant Hotels Limited	$250,000.00
To legal fee on Construction and Financing Agreements between Clico Holdings (Barbados) Limited and the University of the West Indies in connection with the construction of a Teaching Block at Cave Hill Campus	$237,000.00
Total:	$3,333,000.00

Approved

.....
Chairman
Clico Holdings (Barbados) Limited

[13] LCP approved the invoice in his capacity as Chairman of the Board of CHBL and it is notable that the invoice clearly stated that it was "To Clico Holdings (Barbados) Limited." A further note is that in a CHBL document entitled "Statement of Account: Professional Financial Services Inc", prepared by Trudy White, Financial Analyst, there appears the following line item:

> January 2009. . .Gratuity – part payment – ($3,333,000.00). . .paid by CIL.

[14] It is common ground, however, and pivotal to the determination in this case, that CIL, as a corporate entity, was never a party to the gratuity agreement, and no resolution has been produced indicating that CIL ratified or undertook in any way to be bound by the agreement. I will return to this aspect of the matter when I discuss the law relating to Corporate Groups (see paras [86] to [98] below).

[15] On 17 January 2013, in the course of the forensic audit, the JM's attorneys wrote to Sir Maurice King, K.A., QC, requesting information regarding the legal work purportedly performed by him and junior counsel as detailed in the invoice. By letter dated 18 January 2013, Sir Maurice stated:

> Please be advised that I did not represent Clico Holdings (Barbados) Limited or any of its associated companies nor did I receive a retainer or any fee from Clico Holdings (Barbados) Limited or any of its associated companies in the matter Abarco Limited v Grant Hotels Limited.

> I am not privy to any information on what fees retainers or other payments, if any, which junior counsel, whoever that may be, may or may not have received in respect of the matter to which you refer.
>
> I am not in the habit of preparing or settling invoices for legal work in which I am not involved and have not deviated from that habit in respect of the invoice to which you refer nor am I in the habit of collecting fees for work which I have not done or in respect of which I have not been briefed.
>
> In summary I received no fee of $250,000.00 or any amount in respect of the matter to which you refer.

[16] A similar disavowal by De Novo Legal, the successor law firm to DT&A, followed the request by letter of 11 January 2013 of the JM's counsel for information regarding the invoice. In their letter dated 29 January 2013, the firm indicated that it had consulted with Ms. Onika Stewart and Mr. Amiri Dear, Attorneys-at-law whose names appeared on the DT&A invoice but who were not associated with De Novo. Ms. Gale B. Prescod of De Novo wrote:

> (a) The copy of the invoice forwarded to us from your office is not consistent with the format used by the office of Thompson & Associates, Attorneys-at-law in December 2008 or otherwise and/or which have been authorised for issue by any of the Attorneys-at-law named in the heading of that invoice.
>
> (b) The searches by our accounts personnel have revealed that the invoice number #20067 is not an invoice number which was generated in the accounting programme used by the firm of Thompson & Associates, Attorneys-at-law at December 2008.
>
> (c) All invoices or letters of request for payment issued out of that office in December 2008 or otherwise always bore the signature of either the Attorney-at-law who had conduct of the particular matter or an authorized [sic] person from the accounts department; the address of the firm and all contact information including telephone and facsimile numbers.

(d) We have been unable to locate a file with the catalogue number CL1 in the physical or electronic filing system of Thompson & Associates.

[17] During the application before ***Chandler J***, it became evident that there never was any legal fee due and owing to DT&A. In the Forensic Audit Report as of 21 June 2013, the JM noted that the payment was "in the nature of a gratuity pursuant to the [letter agreement of 5 December 2002 and the 15 May 2005 agreement] and was not in respect of the 'Fees and Expenses' described in the Thompson & Associates invoice." Indeed, in his affidavit sworn to on 9 March 2015, defending against the claim by that he was a constructive trustee of the monies, LCP deposed that

> the monies received by the Second Defendant [BCS] from [DT&A] were paid to [BCS] in pursuance of (1) an agreement made between [LCP], the President of [CHBL] and [LAD], the Chairman of [CLFL] evidenced in writing by a letter dated 5th December 2002 . . . and (2) an agreement in writing dated 15th May 2005 and made between [CHBL] of the One Part and [PFS] (which includes where the contract so admits the Principal employee [LCP]) which was duly ratified by unanimous Resolution of the Board of Directors of [CHBL].

[18] The Forensic Auditors, at pp. 10-11 of the June 2013 Report, spoke of the interview of Mr. Terrence Thornhill [TT], then President and CEO of CHBL. The Report said:

> In [TT's] opinion, as the invoice was from an attorney it would not have been queried and would have appeared legitimate. . .[TT] knew the true purpose of the invoice when he received it – the invoice was made to look as if it was for professional services so that confidentiality over the payment to [LCP] was maintained. . .[TT] has explained that as the gratuity was payable pursuant to a valid legal agreement, he had no difficulty effecting the payment by having the invoice processed and signing the cheque to [DT&A].

[19] Under the heading "Timing of the Payment", the Report stated, at pp 11-12:

> We note that the creation and submission of the invoice and its payment by CIL arose very shortly before the public announcement of financial difficulties being experienced by [CLFL] in Trinidad and Tobago on January 30, 2009. The timing is noteworthy as [LCP] was a Director of [CLFL] and enjoyed a close relationship with the Executive Chairman of [CLFL], [LAD]. While [TT] was not a Director of [CLFL], he worked closely with [LCP] and was the most senior finance employee at CIL, with responsibility for CIL's and CHBL's financial reporting to [CLFL] . . .
>
> [TT] believed that the creation, approval and submission for payment of a false invoice to facilitate a significant payment from CIL to [LCP's] benefit (via PFS) and to conceal its true nature was an acceptable transaction.

<u>Tracing the Money – The Norwich Pharmacal Orders</u>

[20] In the Directions Order, at para [8 (u)], ***Chandler J*** directed the JM to commence "such actions as may be necessary to protect, recover or obtain assets and/or monies belonging or due to [CIL]." In his affidavit sworn to on 20 January 2015 in support of the application before ***Chandler J*** for a freezing order, PT, acting for the JM, detailed the tracing exercise to identify and to recover the money paid to DT&A and, ultimately, to LCP via BCS. The exercise, set out in paras [18] through [38] of the affidavit, revealed a maze of bank transactions.

[21] Acting on information indicating that First Caribbean International Bank ("FCIB") was the depository bank for DT&A, the JM obtained the first Norwich Order dated 27 August 2013 directing FCIB to produce a transaction history of DT's clients' account. FCIB forwarded the

information to the JM's attorneys during the month of September 2013. It revealed that the cheque was deposited into DT&A's clients' account at FCIB on 16 January 2009 and that, thereafter, there were several withdrawals the most significant of which totaled approximately $4,025,777.10. Included in the withdrawals were two cheques made payable to DT&A, one dated 20 February 2009 for $1,052,777.10 and the other dated 23 April 2009 for $2,833,000.00. Both cheques were deposited into an account to the credit of DT&A held at Republic Bank (Barbados) Ltd ("RBBL").

[22] The JM made another application before ***Chandler J*** for a tracing order and, as a result of an Order dated 18 October 2013, RBBL forwarded to the JM account information for the months of February through October 2009. It indicated, among other things, a cheque from DT&A dated 27 April 2009 for $2,833,000.00, made payable to Branlee Consulting Inc. (it should have been to second defendant Branlee Consulting Services Inc., the directors of which were LCP and his wife, Faye Wharton-Parris ["FWP"]). A review of the transaction history of BCS showed that both directors had signed cheques and issued other instructions in respect of the accounts in the name of Branlee Consulting Inc. The JM noted that the deposit of $2,833,000.00 was the same amount as the cheque drawn on the DT&A Clients' Account.

[23] The JM sought two further tracing Orders which indicated that the $2,8333,000.00 was deposited into a Term Deposit Account and, on maturity, they were deposited into another Term Deposit Account. There were minor withdrawals in May 2012 and, on 23 May 2012, there was a major deposit of $6,088,608.93 from another Term Deposit. The balance on that Account No. 1500030 was $9,905,572.01 which was disbursed on 29 May 2012 in two drafts of $5,000,000.00 and $4,905,572.01 in favour of LCP. That same day, the drafts were deposited in an account numbered 12781188 held by BCS with the RBC Royal Bank (Barbados) Ltd ("RBC").

[24] The JM concluded that the BCS account 1271188 included the proceeds of the cheque which were deposited into the BCS account at the BONS in 2009 and reinvested along with other funds into various term deposits at the BONS. After a fourth tracing Order, it appeared that a deposit in the sum of $4,500,000.00 was made on 3 June 2013 to an account No. 12203741 in the name of LCP who, three days later on 6 June 2013, transferred the funds to Term Deposit Account No. 12203742 held in the name of BCS at the BONS. It was on the basis of the above transactional information, involving the many bank accounts into and through which the proceeds of the cheque had been deposited and transferred, that the JM believed, and contended before ***Chandler J***, that there was a risk of dissipation.

The Underlying Action and the Injunctive Proceedings

[25] On 27 January 2015, CIL commenced an action against LCP and BCS seeking the recovery of the amount of $4.5 million which was in the term deposit account at Bank of Nova Scotia ("BONS") in the name of BCS. CIL also sought an *ex parte* freezing order (a ***Mareva*** injunction) freezing the moneys in place until determination of the claim. The matter came on for hearing before ***Chandler J*** who, on 27 January 2015, granted the application in the following terms:

> 1) This is a freezing injunction made against [LCP] (the first defendant) and [BCSI] (the second defendant) on the 27th day of January 2015 by the Honourable Mr. Justice William Chandler sitting as a Judge in the High Court on the application of [CIL] (the claimant)…
>
> 2) This order was made in private at a hearing without notice to the first defendant. The first defendant has the right to apply to the Court to vary or discharge the Order…
>
> 3) There will be a further hearing in respect of this Order on the 16th day of February 2015 (the return date).
>
> 4) If there is more than one defendant
>
> i) Unless stated otherwise, references in this Order to the Defendant(s) are references to all or any of the Defendants; and
>
> ii) This Order is effective against any defendant on whom it is served or who is given notice of it.
>
> Freezing Injunction
>
> 5) Until the return date or further order of the Court the first defendant and the second defendant whether by their directors, officers, servants, agents or any trustee must not

i) Remove from Barbados any of his, its or their assets which are in Barbados whether in his its or their name or not and whether solely or jointly owned up to the realisable value of BDS $4,500,000.00 and/or

ii) In any way dispose or deal with or diminish the value of any of his assets whether they are in or outside of Barbados whether in his its or their own name or not and whether solely or jointly owned up to the same realizable value.

6) Paragraph 5 above applies to all (of) the first defendant's and or the second defendant's assets whether or not they are in the name of the first defendant and/or the second defendant whether they are solely or jointly owned. For the purpose of this Order the first defendant's or the second defendant's assets include any asset he it or they has/have the power, directly or indirectly to dispose of or deal with as if it were his its or their own. The first defendant and or the second defendant is to be regarded as having such power if a third party holds or controls the asset in accordance with his its or their direct or indirect instructions.

7) …

The Present Application

[26] By application filed 11th February 2015, LCP and BCS applied to the Court to have the freezing order of ***Chandler J.*** discharged. They alleged the following grounds:

1) That the order granted against the second defendant is irregular in that no application was brought by the claimant against the second defendant for the said order.

2) That in breach of **section 59(7*)*** of the **Insurance Act Cap 310** of the Laws of Barbados the judicial manager failed to report to the Financial Services Commission (FSC) of his intention to file this action and/or apply for the said freezing order or furnish the said Financial Services Commission with the necessary information for its guidance in the matter and so as to permit the Financial Services Commission an opportunity to be heard under **section 59(8)** of the said **Act**.

3) That the claimant does not have a good cause of action against the first and second defendants.

4) That there has been material non-disclosure by the claimant in obtaining the said order in that the claimant failed to disclose

   a) That the forensic auditors in their report of December 2011 characterised the payment of the subject cheque as a part gratuity payment due to the first defendant by [CHBL] and that the same having been paid the said auditors listed it as a debt due to the said claimant by CHBL.

   b) That the first defendant filed an action entitled Civil Suit No 2070 of 2013 Professional Financial Services Incorporated (of whom the first defendant in this matter is the Managing Director) and CIBC First Caribbean International Bank Barbados Limited claiming *inter alia* damages for breach of contract by CIBC First Caribbean International Bank Limited for closing the accounts of the first defendant

   c) That by virtue of a judicial manager's report published on 15th day of December 2014 the said Judicial Manager expressed his intention to apply for liquidation of the claimant company.

   d) Its weakened financial position so as to assist the court in consideration of its undertaking in damages given by the claimant on the obtaining of the order

   e) Failed to disclose that the first defendant is the owner of various Executive Flexible Annuity Policies issued by the claimant and that the claimant is holding an account of the first defendant the sum of $3,656,133.79 plus interest

   f) That by High Court Claim No. 337 of 2011 filed on 2nd day of March 2011 entitled *Leroy C. Parris and Clico International Life Insurance Ltd*, the first defendant instituted an action against the claimant for recovery of the said sum of $3,656,133,79 plus interest thereon

5) That there is no likelihood of the first and or second defendants dissipating their assets so as to avoid satisfying any judgment which the claimant may or is likely to obtain.

6) That the freezing order does not make provision for the first and second defendants accessing any funds so frozen as to permit the first and second defendants to meet their usual living and business expenses and has created hardships to the first defendant and second defendants.

Alternatively, the first and second defendants sought a variation of the order:

a) To permit the first and second defendants access to such sums as to provide for their ordinary living and business expenses;

b) To permit the first and second defendants to access such sums as to provide for the defence of this claim inclusive of but not limited to legal and accounting fees;

c) That the claimant do pay the first and second defendants the costs of this application;

d) Such further orders this honourable court may deem just.

[27] The third defendant by application filed 20 February 2015 applied separately for the following orders

1) An order for summary judgment under **Civil Procedure Rules 2008 Part 15** against the claimant on the whole of its claim against the third defendant;

2) Alternatively, that the statement of case as it relates to the third defendant be struck out under **Civil Procedure Rules 2008 Part 26**, **Rule 26.3**; and

3) Provision be made for the costs of the claim including this application

[28] The grounds of the third defendant's application are:

i) The Estate of David Thompson is not a legal personality and cannot be made a party to this claim.

ii) The claimant has no real prospect of succeeding on the claim or issue against the third defendant.

iii) Statement of Claim in relation to the third defendant be struck out as it discloses no reasonable ground for bringing the claim.

iv) There is no other reason why the case or issue against the third defendant should be disposed of at a trial.

<u>The Third Defendant's Application - Discussion</u>

[29] It is convenient to address the application of the third defendant at this juncture. Conspicuously, there has been no reply to this application from either the claimant CIL or defendants LCP and BCS.

[30] As a procedural matter, **section 3(1)** of the **Succession Act, Cap 249** of **the Laws of Barbados**, provides that "[t]he real and personal estate of a deceased person shall on his death. . .become vested in his personal representatives," and **section 2(1)** states the meaning of "personal representative" as "the executor or administrator for the time being of the estate of a deceased person." The estates of deceased persons are not separate entities and are represented by either an executor where the deceased died testate, or an administrator where the deceased died intestate.

[31] This truism is recognised in **Part 21** of the **Supreme Court (Civil Procedure Rules) 2008 (CPR)**. **Rule 21.7 (1)** confers power on the court to appoint a personal representative to represent a deceased person where proceedings have been commenced against the deceased person and it appears that the estate has no personal representative. Moreover, **Rule 21.9(1)** provides that where a claimant dies and his personal representative does not apply to be substituted as claimant under **Part 19** of the CPR, the defendant may apply for the claim to be struck out. The third defendant,

therefore, quite properly contends that it is not a legal personality or entity and is therefore not properly a party to this claim. The proper party ought to have been the named personal representative of the estate. (See, also, ***Re Amirteymour, deceased [1978] 3 All ER 637*** [***Lord Diplock, Viscount Dilhorne*** and ***Lord Scarman***, sitting as additional Lord Justices in the Court of Appeal, Civil Division]).

[32] But there is a more substantive basis upon which the third defendant's position can be predicated. Apart from the allegation that DT&A may have facilitated the improper acquisition of funds from CIL, there is no claim in the underlying action that the personal representative possesses any property belonging to either CIL or LCP. Indeed, had this matter proceeded to case management as an *inter partes*, and not an *ex parte*, matter, ***Chandler J*** would have been empowered, under the wide panoply of case management powers conferred by **Parts 25** through **27** of the **CPR** to order the striking out of the action against the third defendant. The claimant CIL and defendants LCP and BCS must have recognised this and quite sensibly have mounted no defence to the request of the estate to be let out of the case. Accordingly, the application of the third defendant is granted and the action against the third defendant is struck out.

The First and Second Defendants' Application - The Affidavit Evidence

[33] In support of the application seeking discharge of the injunction, LCP filed an affidavit dated 11 February 2015. He stated that he was the first President of CIL, which was a subsidiary of CHBL, and as such he was CIL's principal representative. He was also the sole director and shareholder of both PFS and BCS.

[34] LCP stated that he was advised by his attorneys that the claimant did not have a cause of action against him. A trust had not been established which made him liable for any dealings which he had or might have had with the claimant. He never held any property in trust either as the claimant's agent or as its trustee. All sums paid to him were the subject of the agreement of 15 May 2005.

[35] LCP took issue with the assertion that the JM had exercised and performed the powers and duties relevant to the management of CIL, and stated further that the JM had been in flagrant disregard of **section 59(7)** of the **Insurance Act Cap 310** in that it had failed to disclose a number of matters pertinent to the defendants of which the judicial manager must have or ought to have had knowledge. He noted that the JM had failed to disclose to the court or its regulator the FSC that he, as a director of PFS, had commenced legal proceedings against FICB on the grounds *inter alia* of breach of contract for

terminating his account with that bank and returning all sums held. This information would have been a major influence in disabusing the Court of any desire he might have to dissipate his assets. Additionally, correspondence between his legal counsel and banks in Barbados would have shown that he was battling to keep his assets in Barbados.

[36] LCP stated further that the JM had not drawn to the Court's or the FSC's attention crucial information appearing in one of its own exhibits before the court, namely the Forensic Audit of CLICO International Life Insurance which disclosed that the deposited sum of $3,333,333.00 was part of a larger sum of $10 Million which was due and owing to the first defendant and which had been paid under the authority of the agreement dated 15th May 2005 and 18th June 2010 between CHBL and PFS. The report had indicated that the payment of the $3.333 million worth of gratuity in 2009 payments via DT&A was funded by CIL.

[37] LCP further stated that the claimant had not disclosed to the Court or the FSC that it was not now in a strong enough position to give the usual undertakings in respect of compensating the second defendant or himself in damages should the instant action fail. In fact the judicial manager had expressed its intention to liquidate the company. There was no evidence to

show that the first or second defendant ever considered moving any of its assets from Barbados or disposing or dissipating them in any way.

[38] In his affidavit, LCP listed his assets as including real property owned by PFS valued at $6,450,000.00; cash in the bank as $6,817,000.00 plus a Central Bank deposit of $5,000,000.00 and some $2,680,000 in real property owned by High Rise Investment Co. in which he was the majority shareholder. He stated that he was not aware of any effort made by the JM to ascertain the existence of the assets which he owned or was entitled to.

[39] He noted further that CHBL's audited accounts could have assisted the JM in reducing the difficulty of which it complained in effectively estimating the value of assets. He asserted that there was nothing improper about a subsidiary being used as a source of funds to satisfy the financial requirements of a parent company and in the absence of antitrust legislation it was a normal practice.

[40] Referring to his dealings with DT&A, LCP stated that the personal representative was the only person qualified to answer any question related to the invoice in question in this matter and it had not been shown that the JM at anytime sought the assistance of the personal representative of David Thompson, deceased. He contended that for the JM to state that the invoice in issue was 'not legitimate in form and content' was misleading given that

the deponent did not set out or indicate the legitimate form of an invoice or what it must contain.

[41] He stated further that the accounts of David Thompson deceased could only be traced into by making proper inquiries of the personal representative and no pre-action letters in breach of the ***Civil Procedure Rules*** had been addressed to any of the defendants.

[42] In respect of the gratuity payment, LCP stated that an agreement between CLFL (the parent company in Trinidad) and PFS Inc. to pay to PFS USD$5,000,000.00 as a gratuity payment was unanimously approved and ratified by the Board of Directors by resolution executed on 15 May 2008. The balance to date that was due and owing was $6,546,123.32 and legal proceedings had been commenced to recover same.

[43] LCP stated further that the claimant had not disclosed that he commenced proceedings to recover $3,656,133.79 representing the proceeds of three Flexible Annuity policies held by the claimant. He was therefore in an identical position to all policy holders including all members of the Barbados Investors Policy Association. The claimant had failed to disclose policies in the name of his children and in the name of the second defendant and there has been no reply to letters sent to the judicial manager to date seeking information on same.

Claimant's Reply Affidavit

[44] The claimant's reply affidavit was filed on 16 February 2015 by PT on behalf of the JM. He stated that the sum of $3,333,000.00 was issued to the claimant pursuant to an invoice for *inter alia* professional fees and retainers. The funds were not paid pursuant to any agreement dated 15 May 2005 between CHBL and PFS, and there was no evidence to indicate that CIL had hired PFS to provide any services.

[45] PT stated that there was no basis for the assertion that the claimant had been in flagrant disregard of **section 59(7)** of the **Insurance Act** which required the JM to notify the FSC in circumstances where the JM sought instructions or directions from the Court as to its judicial management of the claimant. The instant action was a separate claim to recover assets and it was therefore not necessary to notify the FSC of the institution of the proceedings.

[46] PT stated further that the JM was not aware of any claim against CIBC First Caribbean by LCP. It was not a party to the proceedings and had no interest in same. The fear of dissipation of assets and the application for injunctive relief was based on LCP's and BCS' receiving funds through acts of dishonesty and treating the funds since 2009 as their own.

[47] Contrary to LCP's suggestion, the contents of the Forensic Audits were known to both the FSC and the Court. The statements in the audit referencing the payment of the $3,333,000.00 were not conclusive and the Court and the FSC were both aware of CIL's financial position. There was no intention to liquidate the claimant and no final determination had been made on the claimant's future.

[48] PT stated that on receipt of the $3,333,000.00 which he maintains was dishonestly obtained, LCP and BCS treated the proceeds as their own and moved the funds through various bank accounts. When the audited accounts of CHBL were reviewed, investigations revealed that many of the values stated therein were not supported or substantiated by appropriate documentation and that some of the assumptions and valuations utilized in the statements were not consistent with established accounting principles.

[49] Mr. Toppin stated that contrary to the first defendant's assertion that there was nothing improper about a subsidiary using its funds to satisfy the financial requirements of its parent company, such activity was not in accordance with established corporate governance principles.

[50] With regard to the first defendant's contention that pre-action protocols were not issued, this was not always practical in circumstances of urgency. It was necessary to apply for ***Norwich Pharamacal*** Orders so as to secure

verifiable documentation from an independent third party as to the proceeds of the cheque in issue.

[51] PT stated further that the claimant had no obligation with respect to the deemed gratuity ($10,000,000.00). CIL did not enter into any agreement with LCP and no such payment was authorized by CIL's directors.

The *Mareva* Injunction/Freezing Order

[52] Before discussing the freezing order granted in this matter, a few comments are apposite. First, the application for the injunction or freezing order was filed, and the order granted to CIL *ex parte*. Recently, in my decision in ***In the Matter of Banks Holdings Limited, Ansa McAl v Banks Holdings, CV 1533/2015*** (decided 26 November 2015; hereinafter "***Ansa***"), I had occasion, citing the Privy Council decision in ***National Commercial Bank Jamaica Ltd v Olint Corpn. Ltd***, ***[2009] 1 W.L.R. 1405***, to deprecate the filing of applications, and the granting of orders, for injunctive relief *ex parte*.

[53] As long ago as 1912, ***Isaacs J*** (as he then was) in the High Court of Australia observed in ***Thomas A. Edison Ltd v Bullock***, ***(1912) 15 C.L.R. 679, 681***:

> There is a primary precept governing the administration of justice, that no man is to be condemned unheard; and therefore, as a general rule, no order should be made to the prejudice of a party unless he has the opportunity of being heard in defence. But instances occur when justice could not be

> done unless the subject matter of the suit were preserved, and, if that is in danger of destruction by one party, or if irremediable or serious damage be imminent, the other party may come to the court, and ask for its interposition even in the absence of his opponent, on the ground that delay would involve greater injustice than instant action.

[54] ***National Commercial Bank Jamaica Ltd v Olint Corpn. Ltd***, *supra*, involved the termination by a bank of its relationship with a client. There, ***Olint Corpn Ltd*** ("the company") carried on the business of providing administrative and other services as an investment club which had offered its members very high returns allegedly derived from profits made in foreign exchange trading. In 2005, it opened two accounts with the National Commercial Bank Jamaica Ltd ("the bank") and opened a third in 2007. The language of ***Lord Hoffman***, at paras 2-3, best captures the central facts:

> Towards the end of 2006 the company attracted a good deal of unfavourable publicity in the press. There were allegations that it was, not to put too fine a point on it, a pyramid or Ponzi scheme in which the returns to investors were paid out of moneys subscribed by new investors attracted by the prospect of high returns.

[55] In August 2007, the bank asked to see the company's audited accounts and, when these were not forthcoming, the bank in November 2007, "no doubt apprehensive that if the rumours turned out to be true, it might at best suffer some damage to its reputation and at worst find itself on the receiving end of a claim for negligence or dishonest assistance in paying away money derived from club members, decided that it did not want to continue to be the company's bank." (*Ibid*)

[56] On 11 January 2008, the company, without any notice formal or informal to the bank, successfully applied *ex parte* for an injunction restraining the bank from closing its accounts until 25 January 2008 when the application came before a Judge in the High Court *inter partes*. On ultimate appeal, the Privy Council held that "in the absence of express contrary agreement, a contract by a bank to provide banking services to a customer is terminable upon reasonable notice" (*op cit*. at para [1]).

[57] As to *ex parte* orders, the opinion of ***Lord Hoffman*** must be quoted *in extenso*:

> 13. [T]here appears to have been no reason why the application for an injunction should have been made ex parte, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge, audi alteram partem is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless *either* giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) *or* there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Supreme Court of Jamaica Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none.
>
> 14. In this case, the applicants were told on 22 November 2007 that their accounts would be closed on 14 January 2008 and a request for a further extension was refused on 24 December 2007. No explanation has been given for why it was not possible for the bank to be given notice of the application to the court made on 11 January 2008. Their Lordships were told that such last-minute ex parte applications have become common practice in Jamaica. In ***World Wise Partners Ltd v RBTT Bank Jamaica Ltd*** (unreported) 13 June 2008 the bank wrote on 28 February 2008 to the

> plaintiff saying that their accounts would be closed on 15 May 2008. On that day, the plaintiff applied ex parte for an injunction which was granted and not discharged until after an inter partes hearing on 13 June 2008. In ***Smith v National Commercial Bank Ltd*** (unreported) 3 September 2008 the bank notified the plaintiffs that their accounts would be closed on 14 April 2008 and they applied for an injunction ex parte on 14 April 2008. Following the decision of the Court of Appeal in this case, that injunction has been extended until trial.
>
> 15. These cases appear to show a disregard of rule 17.4(4) for which no justification is offered. If the rule is not generally enforced, plaintiffs will be encouraged to make a tactical use of the legal process which should not be allowed.

[58] **Spry** ***Equitable Remedies (8th Edn., 2010 United Kingdom, Sweet & Maxwell)***, p. 511, states as follows:

> In the absence of special circumstances an application for an injunction should be made *inter partes*, in the sense that the person whom it is sought to enjoin should be made a respondent to the material proceedings, and proper notice of the application should be given to him. The applicant should not proceed ex parte unless either it is impractical to give notice in the available time or there is a sufficient apprehension that on receipt of the notice the respondent would forestall the court's orders.
>
> Where an application is made ex parte the court balances the need of the plaintiff for immediate relief, together with any difficulties that may be encountered in proceeding *inter partes*, against the undesirability of making an order in the absence of the defendant, and account is taken of the various other matters that affect the balance of justice.

[59] There is good reason for the counsel against the grant of an *ex parte* injunction in a case such as this. There was much evidence which I was afforded the opportunity to peruse during the arguments for and against the discharge of the *ex parte* injunction, but which was never placed before ***Chandler J***, and so his Lordship cannot be faulted for the grant of the ***Mareva*** Order on the evidence which he saw. For example, there was much

evidence about LCP or a company under his direction moving money from one bank account to another, and of the necessity for ***Norwich Pharmacal*** orders to trace this money.

[60] There was, however, also affidavit evidence offered by LCP that he had, in an effort to forestall the bank's stated intention of ending its relationship with him and closing his account, fought to keep his money in the bank. While I cannot state with any certainty that this would have influenced the exercise by ***Chandler J*** of his discretion to grant the injunction (indeed, it may not have since his Lordship might well have concluded that, like the National Commercial Bank of Jamaica Ltd, the banks here were wary of the unfavourable publicity resulting from their association with funds emanating from CLICO), it is clear that, in the context of a hearing on an *inter partes* application, his Lordship would have had fuller and better facts upon which to make a more informed determination.

[61] As in ***Ansa***, therefore, I cannot deprecate any more strongly the practice of granting *ex parte* orders unless there is clear evidence for doing so. As we will soon see, the presence of a strong hint of artifice or dishonesty will be taken into account in determining whether a notice of the hearing is tantamount to a warning to the defendant to conceal the assets. In a legal system which is predicated upon a Constitution which requires that persons

in a court be granted a "fair hearing," under which term the *audi alteram partem* principle must, perforce, be subsumed, courts must now look askance at applications seeking the grant of orders against one who has been given no hearing at all, much less a fair one. As ***Lord Hoffman*** observed in the ***National Commercial Bank*** case, a telephone call to LCP's attorneys and the bank could have obviated much of the procedure in this case.

[62] I also wish to add a few comments about the care which must be taken with ***Mareva*** or freezing injunction. It is obviously too late in the day to deny their existence or their use in protecting claimants against unscrupulous defendants who attempt to make themselves judgment-proof by dissipating their assets or removing them from the jurisdiction. But there is still a view that is a counsel of prudence against the too-ready application of ***Mareva***.

[63] **Meagher, Gummow & Lehane** ***Equity, Doctrines and Remedies (4th Edn, LexisNexis-Butterworths 2002***, **Meagher, Heydon & Leeming**) at paras [21-435]-[21-455], sounded a note of caution concerning the use of ***Mareva*** injunctions. They wrote:

> In truth, there is no jurisdiction at all to grant a ***Mareva*** injunction. In the first place, a century of established precedent is against it. The Court of Appeal in ***Lister & Co v Stubbs (1890) 45 Ch D 1*** so decided. ***Cotton LJ*** in that case said bluntly: "You cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property" (at 14). . .It is obvious that by obtaining a ***Mareva*** injunction even an innocent plaintiff can wreak havoc with the defendant's business, and an unscrupulous plaintiff can ruin his opponent. That these abuses, inherent in the very nature of the injunction, do occur has been all too evident. In due course,

> the very judges who invented the new remedy have spent their time deploring its use. It is as if the leaders of the Gardarene swine murmured to each other as they approached the cliff 'I wonder who has manoeuvred us into this position?'

[64] When those concerns are juxtaposed to the practice of seeking such injunctions *ex parte*, it requires little thought to see how an innocent defendant can be irreparably harmed. The best example of the careful approach to be taken when dealing with ***Mareva*** applications is that of former ***Chief Justice Sir Denys Williams*** in ***Coney Island Caribbean Amusements Inc v Good Times Shows Inc et al***, ***(1984) 37 WIR 79*** ("***Coney Island***") which concerned an application seeking a ***Mareva*** injunction against a foreign defendant where "[t]here [was] obviously a risk of the assets being removed before judgment [was] satisfied" (37 WIR, at 82). At p. 81, referring to the judgment of ***Lord Denning MR*** in ***Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara [1977] 3 All ER 324***, ***Sir Denys*** stated:

> At page 334 ***Lord Denning MR*** stated that he would hold that an order restraining assets can be made whenever the plaintiff can show that he has a good arguable case and that the procedure should apply not only where the assets to be restrained consist of money but should apply to goods also, although he stated that care should be taken before an injunction is granted over assets which would bring the defendant's trade or business to a standstill or would inflict on him great loss, for that may not be fully compensated for the undertaking in damages.

[65] Indeed, it bears noting that ***Sir Denys*** also cited the statement of ***Lord Denning MR*** in ***Rasu Maritima SA*** that:

> So far as concerns defendants who are within the jurisdiction and have assets here, it is well established that the court should not, in advance of any order of judgment, allow the creditor to seize any of the money or goods of the debtor or to use any legal process to do so. His proper remedy is to get judgement under RSC Order 14 if he can, and issue bankruptcy proceedings against the debtor. In those proceedings any

> fraudulent conveyance or preference done to defendant creditors can be set aside. There are statements of the highest authority to this effect.
>
> ***([1977] 3 All ER 324, 332***, cited in ***Coney Island***, *supra*, at 80-81)

[66] What is really at issue, then, is whether, on the facts before ***Chandler J*** in the *ex parte* application, there was enough of a basis shown in the papers submitted to justify the grant of a ***Mareva*** injunction. Concomitantly, the question also arises whether, after the *inter partes* hearing before me, there was anything revealed by the defendants which justified the discharge of the injunction. On the record before me, I conclude that the grant of the freezing injunction by ***Chandler J*** was justified and nothing was revealed which requires the discharge of the injunction even though, as will soon appear, I would have preferred another, I suggest, firmer ground.

[67] As is clear from ***Coney Island***, the statutory basis for the grant of a freezing injunction is exactly the same as the basis for an interlocutory injunction, namely **section 44** of the **Supreme Court of Judicature Act, Cap. 117A** of **the Laws of Barbados** which provides that a court may grant injunctive relief where it is just and convenient to do so. In ***Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG, The Niedersachsen*** [***1984] 1 All ER 398***, ***402-404***, ***Mustill J*** (as he then was) set out the underlying considerations for a ***Mareva*** injunction as follows:

> (1) [T]he plaintiff must have a case of a certain strength before the question of granting *Mareva* relief can arise at all. I will call this the 'threshold';
>
> (2) [E]ven where the plaintif shows that he has a case which reaches the threshold, the strength of his case is to be weighed in the balance with other factors relevant to the exercise of the discretion. It seems to me plain that the second proposition is justified by common sense and by the authorities. …..
>
> (3) The court cannot, and should not attempt to, try the issues at the interlocutory stage.
>
> (4) Nor does the expression 'made sufficiently to appear' mean that the court should apply the same standard of proof as will be appropriate at the trial. …..
>
> (5) [T]he plaintiff has to do substantially more than show that the case is merely 'arguable': a word which to my mind at least connotes that, although the claim will not be laughed out of court, the plaintiff will not be justified in feeling any optimism. On the other hand, if I am right on proposition (4), the plaintiff need not go so far as to persuade the judge that he is likely to win.

[68] Pivotal to the determination of the ***Mareva*** application in this matter is the extent to which the evidence of dishonesty was a factor which ought to have influenced ***Chandler J***. In other words whether the dishonesty was such as to create in the mind of the learned judge a perceived palpable risk that the assets would be dissipated prior to the obtaining by the plaintiff of a judgment. In ***Patterson v BTR Engineering (Aus) Ltd (1989) 18 NSWLR 319***, the New South Wales Court of Appeal held that where a prima facie case had been made out that the defendant had fraudulently misappropriated money, that evidence may be relied upon to infer that if such sum were still under the control of the defendant, he would not preserve it for the plaintiff

were he successful in the action; in that regard, what has to be shown is a real risk of the dissipation of assets whether by removal from out of the jurisdiction or some dealing within the jurisdiction, so that if the plaintiff succeeds he will not be able to have his judgment satisfied.

[69] CIL and the JM have contended that dishonesty was a factor tending to support the conclusion that there was in a risk of dissipation. They referred the Court to **Iain S Goldrein '*Commercial Litigation: Pre-emptive Remedies*' *(6 May 2014 Sweet & Maxwell)*** at page A2-174A where the learned author stated:

> [W]here the dishonesty alleged is at the heart of the claim against the relevant defendant, the court may well find itself able to draw the inference that the making out, to a necessary standard, of the case against the defendant also establishes sufficiently the risk of dissipation of assets. Moreover, evidence of dishonesty, involving allegations of misuse of assets, coupled with a failure on the part of the respondent to explain what has happened to such assets may suffice."

[70] The claimant referred further to ***Guan Chong Cocao Manufacturer v Pratimi Shipping SA [2003] 1 SLR 157***. There the Singapore Court of Appeal indicated that the critical factors it had considered were

1) The fact that the defendant had sold its one asset;
2) The fact that the defendant had ceased business;
3) The dishonesty of the defendant; and
4) The ease with which the proceeds of sale in the form of cash could be dissipated or removed from the jurisdiction.

[71] The court in ***Guan*** found that these factors constituted solid evidence indicating a risk of dissipation. Another factor the court considered was the defendant's silence in relation to the dishonesty and lack of explanation as to the actions taken. In ***Jarvis Field Press Limited v Chelton & Others [2003] EWHC 2674 (Ch)*** the court considered the risk of dissipation posed by the dishonesty of the defendant so grave that, despite the considerable delay in the application, it granted the freezing order. The court highlighted that the defendant in that case was not guilty of mere dishonesty but of dishonesty with regard to the very assets at the centre of the claim.

[72] The defendants submitted the case of ***Can-cara Development Limited v Magil Construction Jamaica Limited JM 2005 SC 34*** in which ***Campbell J*** stated that the fear of dissipation must be based on facts disclosed on affidavit evidence and further that the material had to be persuasive. Referring to the Canadian case of ***Chittel v Rothbart (1982) 39 OR (2d) 513*** which in turn referred to the decision of ***Lord Denning MR*** in ***Third Chandris Shipping v Unimarine (1979) 2 All ER 972***, ***Campbell J*** stated:

> [T]he applicant must persuade the court by his material that the defendant is removing or there is a risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment or that the defendant is otherwise dissipating or disposing of his assets in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact and in law.

[73] In ***Jarvis Field***, ***Patten J*** referred to the warning sounded by ***Peter Gibson LJ*** in ***Thane Investments Ltd v Tomlinson [2003] EWCA Civ 1272*** against the tendency to infer a risk of dissipation from the fact that allegations of dishonesty are made against a defendant. In ***Thane Investments***, an appeal from the judgment of ***Neuberger J*** (as he then was) dismissing an application seeking the discharge of a freezing order, ***Peter Gibson LJ*** said:

> The appeal before us is, of course, not from Judge Thompson's order: it is from the decision of ***Neuberger J***, and that judge was viewing the matter afresh and had a discretion whether or not to discharge the freezing order, and, if he did discharge the freezing order, whether or not to impose a new freezing order. In my judgment ***Neuberger J's*** reasons for finding Judge Thompson's order one which should not be discharged are insufficient to justify the order which he made. First, ***Neuberger J*** said that the matters which were relied on for the good and arguable case applied in demonstrating that there was a real danger of the defendants dissipating their assets to defeat the judgment. I regret that I do not see that the judgment does support a conclusion that in the particular circumstances of Mr Tomlinson and Reyall there was a real risk of assets being dissipated. Mr Blackett-Ord submitted that it has now become the practice for parties to bring ex parte applications seeking a freezing order by pointing to some dishonesty, and that, he says, is sufficient to enable this court to make a freezing order. I have to say that, if that has become the practice, then the practice should be reconsidered. It is appropriate in each case for the court to scrutinise with care whether what is alleged to have been the dishonesty of the person against whom the order is sought in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted.
>
> . . .
>
> I conclude, with all respect to the judge, that he was wrong to take the view that the application by Mr Tomlinson and Reyall should be dismissed. In particular, it seems to me that he has not given sufficient weight to the fact that in this case the application for the freezing order was made without notice to Mr Tomlinson and Reyall and that in

> contravention of the Practice Direction no evidence was produced as to why notice was not given to them. In consequence there was no evidence of the existence of a real risk of the dissipation of assets by them.

[74] Referring to that language of ***Peter Gibson LJ***, ***Patten J*** then stated:

> I have no difficulty in accepting the general principle, emphasized by ***Peter Gibson LJ***, that a mere unfocused finding of dishonesty is not, in itself, sufficient to ground an application for a freezing order. It is necessary to have regard to the particular respondents to the application and to ask oneself whether, in the light of the dishonest conduct which is asserted against them, there is a real risk of dissipation. As ***Peter Gibson LJ*** made clear in the passage I have already quoted, the court has to scrutinise with care whether what is alleged to have been dishonesty justifies the inference. That is not, therefore, a judgment to the effect that a finding of dishonesty (or, in this case, an allegation of dishonesty) is insufficient to found the necessary inference. It is merely a welcome reminder that in order to draw that inference it is necessary to have regard to the particular allegations of dishonesty and to consider them with some care.

[75] A recent case referred to by CIL and the JM, and which bears particular relevance to the instant case, is ***Madoff Securities International Ltd and Another v Raven and others***, ***[2012] 2 All ER (Comm) 634, [2011] EWHC 3102***. That case involved a consideration of the risk of dissipation arising from the dishonesty inherent in false invoices. The proceedings grew out of the massive fraud perpetrated by Bernard Madoff ("M") over a period of 20 years where clients' money had been used by M and his associates as their own. M controlled a New York company, Bernard L. Madoff Investment Services ("BLMIS"). The first claimant, Madoff Securities International Ltd ("MSIL") was an English company in which M owned 99% of the shares, with the remaining shares held by M's brother. MSIL had been used to

launder money and as a vehicle for making payments of stolen money. The ninth defendant, Mrs. Sonja Kohn ("K") was Austrian but lived and conducted her affairs internationally through a series of corporate vehicles including the tenth to thirteenth defendants ("the K defendants"). K introduced investors to M, and the K defendants received money directly from BLMIS and indirectly from the MSIL.

[76] Ostensibly, the payments were made in respect of invoices issued by the K companies which referred to, *inter alia*, "research" services provided by the K defendants. Perhaps, no better flavour can be gotten of the centrality of the invoices for "research" than in the statement of facts in the judgment of ***Flaux J*** in the ***Queens Bench Division (Commercial Court)***:

> According to the defences of the directors of MSIL, they did not know or believe that the payments MSIL made to the Kohn defendants were by way of commission for introductions. Rather, they say the payments were made on Mr. Madoff's instruction in respect of the research Mrs. Kohn provided. Box loads of purported research were delivered by her to MSIL in London and to BLMIS in New York, yet, save in a couple of isolated occasions, MSIL had not requested research from Mrs. Kohn. It is contended by the claimants that the research was either useless or at least went unused. Furthermore, the claimants point out that it is surprising, to say the least, given the volume of alleged research provided, that there was no formal contract between Mrs. Kohn and MSIL for the provision of research.
>
> The allegation that the research was some sort of sham to disguise the true nature of the payments is strenuously denied by Mrs. Kohn in her witness statements served in relation to the various applications which have been issued. She contends that she did provide valuable research to MSIL at its request, but then says in her third witness statement: 'Payments were not primarily for research but were commissions for introductions made.' Part of the difficulty with that explanation is that none of the invoices breaks

> down the amount demanded into 'research' and 'commission', indeed, commission is not mentioned at all. . .
>
> No real explanation is currently put forward by Mrs. Kohn as to why, if, as she contends, the payments were essentially legitimate payments of commission for the introduction of customers, the invoice did not simply say that the payments were for 'commission' and why it was necessary to adopt a whole series of descriptions, none of which made reference to commission. It seems to me that this is an area which cries out for a proper explanation from Mrs. Kohn, which has currently not been forthcoming.
>
> However, given the impossibility of deciding contested issues of fact at an interlocutory stage, I do not propose to deal in more detail with the underlying facts. For the purposes of these applications, I simply proceed on the basis that the claimants have an arguable case that Mr. Madoff and Mrs. Kohn disguised the true nature and purpose of the payments to the Kohn defendants.

[77] The claim before ***Flaux J*** against the Kohn defendants was that the payments for research and the like to the Kohn defendants were made by the directors and officers of BLMIS in breach of their fiduciary duty. It was argued that, as a matter of New York law, the Kohn defendants received and held the BLMIS payments as constructive trustees and/or were liable to make restitution on the basis that it was inequitable for them to retain the moneys. Two of the claimants applied before ***Flaux J*** for a proprietary injunction based on ***American Cyanamid v Ethicon***, while MSIL sought a ***Mareva*** injunction. ***Flaux J*** granted both applications but was careful to separate the underlying basis for each. As to the freezing injunction, he stated:

> In relation to a freezing injunction, three questions need to be addressed: (1) whether MSIL has shown a sufficiently arguable case for an injunction to be granted; (2) the delay in bringing the application and the extent to which it prejudices MSIL from bringing an application now; (3) whether MSIL has shown a sufficient risk of dissipation of assets if the injunction is not granted.
>
> To justify a freezing injunction, a claimant has to show a good arguable case on the merits. In ***Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG, The Niedersachsen [1984] 1 All ER 398 at 404, Mustill J*** (as he then was) described a good arguable case for these purposes as one 'which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have better than 50% chance of success'. It can immediately be seen that this either is the same test as 'serious issue to be tried' for the purpose of resisting a strike out application or, if there is any difference between the two tests, it is an imperceptible one.

[78] ***Flaux J*** considered the impact of evidence of dishonesty on the perception of the risk of dissipation of assets. In the case before him, there had been some evidence that Mrs. Kohn had cooperated with the authorities after the unmasking of the fraud. His Lordship was not convinced of the absence of the risk, however. He stated:

> I do not find her subsequent conduct after the dishonesty was discovered a very convincing answer to Mr. Weekes's point about prior conduct. As I have said earlier in the judgment, the false description on the invoices over many years cries out for a proper explanation from Mrs. Kohn which, bluntly, has not, in my judgment, been provided by the evidence she has put before the court. It seems to me that what emerges is as sufficiently arguable case of deliberate wrongdoing, the issuing of sham invoices and the disguising of the true nature of the payments of millions of dollars made to the Kohn defendants over many years. This demonstrates in itself a serious risk of dissipation.

[79] When the above principles are applied to the case at bar, I must agree with the claimant that, while LCP appears to have disclosed assets worth over $11 million, the following considerations are still relevant: (1) LCP has never

addressed the issue of his approval of a false invoice which was prepared as a request for legal fees and which was clearly designed to procure funds from the claimant by artifice; (2) what amounts to the same thing, he has not denied knowledge of the fact that the invoice was false or that no such services had been performed for the benefit of CIL or CHBL; (3) LCP's receipt of the funds and subsequent moving of the funds through various bank accounts; (4) LCP's continued simple assertion that the moneys were paid to him in performance of a contract with CHBL to pay him a gratuity; (5) the request by both LCP and BCS for access to this $3.33 million while LCP simultaneously states, in his affidavit opposing the risk of dissipation, that the defendants have access to more than $11 million in cash assets.

[80] In my view, the above considerations, when examined as a whole, satisfy ***Lord Mustill's*** formulation in ***Ninemia Maritime Corp*** of the considerations relevant to determining the risk of dissipation and their practical application by ***Flaux J*** in ***Madoff Securities***, and it justifies dismissal of the application seeking discharge of the injunction.

[81] Another major issue argued before this Court was the issue of non-disclosure. Before me, Mr. Gollop QC contended that there had been no full and fair disclosure to either the Court or the defendants. He maintained that the JM had issued a report in which he had stated that CIL was being

considered for liquidation but that neither the Court nor the defendant was informed. In his affidavit in support of the application to discharge the injunction, LCP deposed, and in argument Mr. Gollop QC asserted, that this affected the ability of CIL to give an undertaking in damages which is a *sine qua non* to the grant of interlocutory injunctive relief.

[82] It is trite law that there has to be full and fair disclosure of all material facts and the relevant factors were quite succinctly set out in ***Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350***. CIL's application refers to an asset which it claims is in the control and possession of LCP and BCS. This consideration will assist the court in determining what information is thus material to the matter at hand. LCP contends that CIL should have disclosed that he was the holder of an Executive Flexible premium policies with CIL; that he had law suits against CIL; that he purchased policies for his children with the claimant; and that he instituted an action against CIBC First Caribbean in respect of the closure of his bank accounts. Whilst these are interesting disclosures, this Court does not agree that they were material to the application at hand. There are however two issues which in this court's view are material to this matter; the claimant's financial position and the findings of the Forensic audit.

[83] CIL argues that the fact that it may be unable to satisfy the undertaking in damages should not prevent the continuation of the injunction. Impecuniosity is not by itself a sufficient basis to deny the claimant the benefit of injunctive relief. It cites ***Allen and Other v Jambo Holdings and Others [1980] 2 All ER 502, 50***, which was a personal injury action brought by the widow of a deceased husband killed when he was decapitated by an airplane propeller. The widow, who was legally aided, sought the injunction when it was learned that Jambo Holdings, the defendant-owner of the airplane, was about to fly the airplane to Nigeria. Responding to the argument that she could not obtain the ***Mareva*** injunction because she was unable to give an undertaking in damages, ***Lord Denning MR*** observed that "I do not see why a poor plaintiff should be denied a ***Mareva*** injunction just because he is poor, whereas a rich plaintiff would get it." In ***Pettigrew v Channer JM 2012 SC 2*** the Jamaican Supreme Court (***Anderson J***) waived the required undertaking as to damages in circumstances where the claimant was of limited economic means and the likelihood of there being significant economic loss to the defendant arising on the grant of the order was non-existent or minimal.

[84] The Court notes that this matter arises out of a very serious issue. A company under judicial management has sought the Court's assistance to seek and to secure assets for the benefit of thousands of Barbadian and Caribbean policyholders and investors. In my judgment, therefore, this matter is an appropriate one to relax the requirements for security to be provided. It is noteworthy, in coming to this conclusion, that LCP's affidavit asserts that he has access to some $11 million worth of cash assets and accordingly, without some idea of his statements of expenditure it is difficult to understand the level of prejudice accruing to him.

[85] It may be considered whether the absence of provisions for the living, business and legal expenses of the first and second defendants undoubtedly leads to the discharge of the freezing injunction. There are a number of salient points to note here. First, the frozen asset is a fixed term deposit and not an operating account. Secondly, the defendants aver to some $11,000,000.00 of cash assets which equates to over $6,000,000.00 in cash available. Thirdly, no evidence has been submitted to inform the court of the day to day expenses of the second defendant company or indeed of the first defendant.

[86] Bearing these considerations in mind, the onus is on the defendants to establish on proper evidence that they have no other assets available to them to pay their expenses. This has not been done in this matter. No evidence has been provided to assist the court with such a determination. (see, ***CIBC v Credit Valley Institute of Business and Technology 2003 CanLii 12916 (ON SC)***.

Separate Legal Personality and Corporate Groups

[87] Mr. Gollop QC for LCP, and Mr. Gollop for BCS contend that, since CIL was a subsidiary of, and related to, CHBL, that there was nothing wrong with the subsidiary being used to pay the outgoings of the parent company. Mr. Alleyne for CIL responded that there was no resolution of CIL acknowledging the payment from its account to LCP of the $3 million.

[88] At p. 89 of his text **Commonwealth Caribbean Company Law**, ***Justice of Appeal Andrew D. Burgess*** discusses the well-known concept of the separate legal personality of a company as established in the *locus classicus* of ***Salomon v A. Salomon & Co Ltd***, ***[1897] AC 22***. He notes that the concept was applied to the 'one-man company' in the case of ***Macaura v Northern Assurance Ltd [1925] AC 619*** where the House of Lords held that only the company, not its sole shareholder, had an insurable interest in the

timber, and that since the policies had not been assigned to the company, neither the shareholder nor the company could recover on the policies.

[89] The same conclusion obtains in relation to corporate groups. Again to quote ***Burgess***, *op cit*., at 90:

> Another application of the ***Salomon*** principle which is of some interest is in the area of corporate groups. Typically, a corporate group is made up of a holding company and its subsidiaries. A holding company is defined in Commonwealth Caribbean Companies Acts as one which controls its subsidiary. This control is usually achieved and expressed by the holding company owning sufficient shares in its subsidiary to determine who are the directors of the subsidiary and how the affairs of the subsidiary is [*sic*] conducted. Often, the holding company controls a number of subsidiaries and the respective business of the companies within the group are managed as an integrated whole and in economic reality constitute one economic unit. These are referred to as affiliated companies in Commonwealth Caribbean Companies Acts.

[90] ***Burgess*** notes, at p. 90, citing ***Adams v Cape Industries plc [1990] Ch. 433*** "that English law has not developed any distinct body of rules applicable to groups and that the ***Salomon*** principle applies equally to companies within a corporate group." In ***The Albezero [1975] 3 All ER 21, 28-29***, ***Roskill LJ*** (as he then was) observed that:

> [E]ach company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would enure beneficially to the same person or corporate body irrespective of the person or body in whom those rights were vested in law. It is perhaps permissible under modern commercial conditions to regret the existence of these principles. But it is impossible to deny, ignore or disobey them.

[91] In ***Adams v Cape Industries plc***, *supra*, the facts were that, until 1979, Cape Industries, an English company and the first defendant, presided over a group of subsidiary companies engaged in the mining of asbestos in South Africa, and the marketing of that asbestos. Its marketing arm in the USA was a wholly owned subsidiary, N.A.A.C., incorporated in Illinois in 1953. There was also a worldwide marketing subsidiary, second defendant Capasco, a wholly owned English company. In 1974, some 462 plaintiffs, mainly employees or ex-employees at an asbestos factory in Owentown, Texas, brought actions against several defendants, including the US Government, in the United States District Court at Tyler, Texas, ("Tyler 1") for damages for personal injuries resulting from exposure to asbestos dust. Those actions were settled in September 1977 for US$20 million of which Cape Industries and its subsidiaries were to bear over US$5 million.

[92] Between April 1978 and November 1979, a further 206 plaintiffs commenced actions in the Tyler court against the same defendants ("Tyler 2"). Cape and Capasco took no part in the Tyler 2 actions, maintaining that the court lacked jurisdiction over them. They were prepared to let default judgments be entered against them but to resist enforcement in England. Cape decided to put N.A.A.C. in liquidation and promoted the incorporation of a new Illinois corporation, CPC. The plaintiffs sought to enforce the

judgment in England and submitted, *inter alia*, that the court was entitled to take jurisdiction over Cape and Capasco, since the presence in Illinois of their subsidiaries N.A.A.C. and C.P.C. was tantamount to the parent companies' presence in Illinois.

[93] ***Scott J*** dismissed the actions holding that the presence of NAAC and CPC in Illinois and the business carried on from their respective office in Illinois did not constitute the presence of Cape or Capasco in Illinois. The plaintiffs' appeal was dismissed. ***Slade LJ***, delivering the judgment of the Court of Appeal, observed, at pp 532, 536:

> There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that "each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities:" ***The Albezero [1977] AC 774, 807*** per ***Roskill LJ***.
>
> It is thus indisputable that each of Cape, Capasco, NAAC and CPC were in law separate legal entities. . .
>
> [S]ave in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of ***Salomon v A. Salomon & Co. Ltd. [1897] AC 22*** merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities."

[94] Summing up his conclusions on ***Adams v Cape Industries plc***, ***Burgess*** writes that "[g]enerally speaking, there is nothing in Commonwealth Caribbean company legislation to displace the law as stated by ***Slade LJ*** that

companies in a corporate group are to be treated as separate legal entities. The provisions in the Act[s] in . . . Barbados. . .which allow a holding company to consolidate in its financial statements the accounts of each of its subsidiaries are not intended to in any way subvert the ***Salomon*** principle." (*op cit*. at 91).

[95] Applying the law to the facts of this case, it will be recalled that the 2005 agreement to pay the gratuity was made between LCP and CHBL, the parent company of CIL. The only resolution in evidence was that signed by the Board of Directors of CHBL and the only reference to CIL was in the definition of "employer" which was expressed to include a number of subsidiary companies, including CIL. There is no resolution of the Board of CIL to act as the paying agent for CHBL. Hence, the assertion that "there is no issue with a subsidiary being asked to pay the debts of a parent company" finds no place in our law without the agreement of the subsidiary as a separate legal entity.

[96] Moreover, it is inconceivable that an insurance company such as CIL could, without any written evidence of a vote by shareholders or a resolution in writing as contemplated by **section 128** of the **Companies Act, Cap 308 of the Laws of Barbados**, authorise the payment of a large sum in excess of $3.333 million out of a bank account held in its name on a contract to which

it was not a party and to which it was accordingly not bound, simply on the vote of the board of directors of its parent company. No record, indeed not a shred of paper has been presented to this Court which shows that CIL, as a separate legal entity, was even aware of the agreement made between CHBL and PFS to pay a gratuity to LCP.

[97] In my judgment, while the grant of the injunction was based on ***Mareva***, I would have preferred the ***Toojays v Westhaven Ltd - American Cyanamid v Ethicon*** "proprietary" or "interlocutory" injunction, where the two requirements are (1) a serious issue to be tried; and (2) where does the balance of justice lie or, more poignantly, where does the risk of injustice lie. Applying ***Toojays*** to this application seeking the discharge of an injunction, the balance of justice must lead in favour of dismissing the application and retaining the injunction in place.

[98] On these facts, in the absence of some action by the subsidiary CIL to indicate agreement to make the payment, there is no basis upon which the substantial sum of $3.333 million could justifiably have been paid out of the funds of CIL. CIL is, therefore, entitled to the $3.333 million which never legally left its funds and, in my judgment, this is a stronger basis upon which the conclusion can be reached. The ***Toojays'*** balance of justice favours the

dismissal of the application seeking discharge of the interim injunction, whether initially termed ***Mareva*** or ***Toojays-American Cyanimid***.

[99] The application seeking discharge of the interlocutory injunction granted by ***Chandler J*** is therefore dismissed and the Bank of Nova Scotia is directed, until further Order, to maintain the funds in the fixed deposit account.

[100] This suffices to dispose of the discharge application. However, Mr. Gollop QC raised some other points which, in my judgment, while not determinative of the application filed by him, nonetheless, deserve discussion.

Judicial Management Disability/Failure to Inform FSC

[101] The defendants argue on the basis of **section 59 (7)** of the **Insurance Act Cap 310** that the claimant failed to notify the FSC of its intention to apply to the court for an injunction. **Section 59 (7)** provides that the judicial manager should notify the FSC when it intends to seek instructions from the court. This application is an application for the grant of an interim remedy and accordingly, the court fails to see how **section 59 (7)** is applicable to it.

[102] Mr Gollop QC contends that the wrong party commenced the action before the Court. He stated that the applicant for the original interlocutory injunction, CIL, ought to have been named as "Clico International Life Insurance Ltd – Under Judicial Management." As I understand it, the

contention is that a company under judicial management is under such a disability as to be unable to commence a proceeding without being named as under judicial management. Apart from a reference to a passage in Blackstone concerning receivers, Mr. Gollop QC cited no authority dealing with judicial management. Mr. Alleyne responded that a receiver was not a judicial manager and that the concept of judicial management was Australian in origin. However, he, too, referred to no authority.

[103] First, it is notable that Mr Gollop QC's reference to companies under receivership as having a disability finds no support in the law. ***Burgess Commonwealth Caribbean Company Law***, at 460 under the rubric "Effect of Appointment of Receivers and Receiver-Managers – Effect upon company's personality", states:

> The appointment of a receiver and receiver-manager out of court does not interfere with the legal persona of the company. This principle was recognised [in] the English House of Lords by ***Lord Atkinson*** in ***Moss Steamship Co Ltd v Whinney ([1912] AC 254, 263)***, where he stated:
>
> > [The] appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company.
>
> The only event which can destroy the legal personality of a company is a liquidation or dissolution of the company. In the absence of this, the company's legal personality remains fully intact.

See, further, ***Parsons v Sovereign Bank of Canada [1913] AC 160***.

[104] Secondly, there is some Barbadian authority on the issue of judicial management. ***Financial Services Commission ("FSC") and BIPA Inc v British American Insurance Co Ltd ("BAICO")***, ***No. 4/2012*** (decided 31 October 2012), involved an application seeking leave to appeal against the oral Order of ***Beckles J (Ag.)*** denying BIPA's application to join in the judicial management proceedings initiated by the FSC against BAICO. In the course of his judgment, ***Burgess JA***, sitting as a single Justice of Appeal, discussed the concept of judicial management:

> [17] Determination of whether ***Beckles J (Ag)*** correctly applied the joinder tests to the facts of this case is predicated on a proper understanding of the juridical nature of judicial management. It is apparent from the provisions of **Cap 310** that judicial management is a management procedure on behalf the Court aimed at saving insurance companies, like BAICO, from liquidation. **Cap 310** established a statutory regime for a petition for an order that an insurance company be placed under the management of the court.
>
> [18] The process is initiated by a petition to the Court by the Supervisor of Insurance or by the insurance company itself for the appointment of a judicial manager. The judicial manager is at the heart of judicial management. Broadly speaking, the role and function of the judicial manager is to manage the business of the insurance company under the court order and ultimately to produce a report setting out its recommendation to the court as to how the company should be dealt with. It is to be stressed that a judicial manager enjoys only such powers and has such duties as the court deems desirable and must always act under the control of the Court. Judicial management is therefore a management process on behalf the Court and is not aimed at resolving disputes.
>
> [19] This understanding of judicial management accords with the understanding adumbrated, after extensive review and analysis, in the Australian case of ***Australian Prudential Regulation Authority v ACN 000 007 492 (Under Judicial Management) (Subject to Deed of Company Arrangement) [2010] FCA 912.*** This case is important in assisting in understanding judicial management since the judicial management procedure is an importation into **Cap. 310** from ***Division 8 of Part III*** of the Australian ***Life Insurance Act 1945 (Cth)*** and ***Part VB*** of their ***Insurance Act 1973 (Cth)***. It is also worthwhile noting that the same

> understanding of judicial management is to be found in the Supreme Court of Singapore High Court case of ***Re Wan Soon Construction Pte Ltd [2005] SGHC 102.***

[105] A perusal of the judgment of ***Burgess JA*** and the cases there cited shows no support for the proposition advanced by Mr. Gollop QC. Indeed, in the segment of the **Insurance Act** entitled "Judicial Management and Winding Up" (**sections 56** through **70**), there are frequent references to the provisions in the **Companies Act** as well as to the regulations under that **Act** relating to winding up of insurance companies. In this regard, apart from the application of the Australian concept of judicial management, an insurance company is in no different a position than any other company which does not lose its separate juridical persona except upon liquidation. The insurance company is under no "disability" apart from the requirement to apply to the court prior to taking certain steps; see, for example, **section 59(7)**. Accordingly, the contention of Mr. Gollop QC regarding the effect of judicial management on an insurance company has no merit and must fail.

[106] In their written submissions, and in the argument before me, CIL and the JM referred to the doctrine of piercing the corporate veil. Much has been said about the principle. In ***Brest v Petrodel Resources Ltd and Others, [2013] UKSC 34, Lord Sumption*** observed that "the first systematic analysis of the large and disparate body of English case law was undertaken by a strong

Court of Appeal in ***Adams v Cape Industries plc [1990] Ch 433*** (***Slade, Mustill and Ralph Gibson LJJ***)." But neither in ***Brest*** nor in commentaries does there appear to be an umbrella under which all the cases can be subsumed or by which they can be explained. In ***Commonwealth Caribbean Company Law***, at p. 93, ***Burgess*** cites dicta in ***Briggs v James Hardie & Co Pty Ltd (1989) NSWLR 549, 567***, "that there is no common, unifying principle, which underlies the occasional decision of courts to pierce the corporate veil." And in ***Brest v Petrodel***, *supra*, ***Lord Neuberger*** quoted the quip of **Easterbrook and Fischel** *Limited Liability and the Corporation* (1985) 52 Univ Chicago L. Rev 89 that "[p]iercing seems to happen freakishly. Like lightning, it is rare, severe and unprincipled."

[107] In my judgment, there is no need to pierce the corporate veil of CIL since CIL has done nothing, *qua* corporation, which requires the court to look behind the protection it derives from ***Salomon v Salomon***. Indeed, it never acted and never authorised the deduction from its accounts of the $3,333,000.00 payment to LCP. Any such authority was, as CIL and the JM properly contend, exercised by the directors in violation of their fiduciary duty.

DISPOSAL

[108] In light of the foregoing, this court makes the following orders:

a) The application of the first and second defendants to discharge the freezing order granted by ***Chandler J*** is dismissed, with costs;

b) The application of the third defendant to strike out the case as filed against it is granted; and

c) The Bank of Nova Scotia is directed, until the further order of the Court, to maintain the $4,500,000.00 in Term Deposit No. 12203742 held in the name of Branlee Consulting Services Inc.

[109] Costs to the Claimant and the Third Defendant against the First and Second Defendants, to be agreed or assessed.

Chief Justice