IN THE COURT OF APPEAL OF BELIZE, A.D. 2022

CIVIL APPEAL NO 3 OF 2021

MARCO CARUSO **APPELLANTS**
MICHELA BARDINI
MADELEINE LOMONT
MAYAN LAGOON ESTATES LIMITED

v

BELLA GROUP, LLC
BRENT BORLAND
ALANA LATORRA BORLAND
COPPER LEAF LLC **RESPONDENTS**

BEFORE:

The Hon. Madam Justice Hafiz-Bertram	President (Ag)
The Hon Madam Justice Woodstock-Riley	Justice of Appeal
The Hon Mr. Justice Foster	Justice of Appeal

Rt. Hon. D O Barrow SC along with A Waight for the appellants.
E A Marshalleck SC along with A Jenkins for the respondents

16 March and 30 December 2022

JUDGMENT

HAFIZ-BERTRAM, P

[1] I had the opportunity of reading in draft, the judgment of my learned brother, Foster JA and I agree with the Order proposed by him for the Appeal to be dismissed, for the reasons stated, and with Costs to the Respondents as stated.

HAFIZ-BERTRAM, P

WOODSTOCK-RILEY, JA

[2] I have read the draft judgment prepared by Foster JA and I am in agreement with the order proposed.

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WOODSTOCK RILEY, JA

FOSTER, JA

[3] The appeal before this Court arises from a freezing order granted on the 16 November 2020 restraining the Appellants from transferring, disposing, otherwise alienating or encumbering any of their assets being certain parcels of land and shares in Mayan Lagoon Estates Limited and Palm Tree Holdings Limited.

[4] The parcels of land are held by the fourth Appellant, Mayan Lagoon Estates Limited ("Mayan") and the shares in Mayan and Palm Tree Holdings Limited are presently held directly and indirectly by the first to third Appellants.

[5] By Order made on 4 March 2021, the Learned trial judge ordered that the freezing orders made against the Appellants continue and remain in force until further order of the Court. The Respondents were further ordered to fortify their undertaking in damages and the parties invited to make written submissions regarding the scope and quantum as well as the manner in which fortification shall be effected.

[6] The Appellants being dissatisfied with the Order of the Learned Judge have appealed to this Court on eight grounds, that:

The learned trial judge:

a. Erred in law or misdirected herself as to the law and the facts when she premised the order in the terms "Upon the Claimant giving the usual undertaking as to damages" notwithstanding that:

    i. No undertaking as to damages had been given by all of the Claimants, whether orally or in writing:

    ii. There was no material before the learned trial judge to indicate a willingness and ability on the part of all the Claimants to give such an undertaking;

    iii. There was no material before the learned trial judge to enable her to assess whether the Claimants were in a position to satisfy the purported undertaking as to damages.

b. Erred in law or misdirected herself as to the law and facts in concluding that the Claimants applied for a continuation of the Freezing Injunction granted without notice when no such application was made by the Claimants;

c. Erred in law or misdirected herself as to the law and facts in her determination that the balance of convenience favoured the continuation of the Freezing Injunction when the continuation of the Freezing Injunction is tantamount to shutting down Mayan Lagoon Estates Limited's business;

d. Erred in law or misdirected herself as the law and facts in her determination that there was a good arguable case when there was no standing to bring any claim on behalf of the Mayan Lagoon Estates Limited and where Copper Leaf LLC has no direct interest in the assets of Mayan Lagoon Estates Limited;

e. Erred in law or misdirected herself as the law and facts in her determination that there was a real risk of dissipation when the matter the Claimants allege as grounding the risk of dissipation was known to the Claimants for at least a year prior to the filing of Claim No. 626 of 2020.

f. Erred in law or misdirected herself as to the law and facts by failing to give sufficient consideration to the evidence put forwards by the Defendants surrounding the material non-disclosure of the Claimants;

g. Erred in law or misdirected herself as the law and facts by failing to discharge the Freezing Injunction having found that there were instances of non-disclosure on the part of the Claimants in making the ex parte application; the

judge erred by not holding that her findings as to non-disclosure meant ineluctably that the freezing order had to be discharged;

h. Erred in law or misdirected herself as to the law and facts by not holding that the continuation of the Freezing Injunction was, in the round, obligatory having regard to the law, clear facts and circumstances of the case; and by not holding that the continuation of the freezing order is, on the entirety of the case, unsustainable in law.

[7] A substantive claim filed by the Respondents on 10 October 2020 sought several declarations and relief in relation to what they contend is an illegal forfeiture of shares in breach of the Articles of Association of Mayan, orders cancelling replacement land certificates and a transfer of title and orders restraining disposition of properties and shares or change to the registration of corporate documents without the approval of the Respondents.

Background

[8] Mayan is a company with a share allotment of 20,000. The First Respondent, Bella Group LLC was on 20 October 2009 allotted 10,000 shares with the remaining shares held by the First, Second and Third Appellants. Mayan was the holder of substantial lands on the Placencia Peninsula, Stann Creek District, Belize and up to August 2020 remained the proprietor of 107 parcels of land with an aggregate value of $42,307,200. The Respondents contend that during the period 2009 – 2018, the shareholders of Mayan including the First Respondent invested in excess of US$25,000,000 in improvements and development of the Mayan lands into residential lots and single family homes sold to purchasers. The Directors of Mayan were the First, Second and Third Appellants and the Second and Third Respondents.

[9] On 30 October 2009, by Special Resolution Mayan amended its Articles of Association to provide a requirement for an affirmative vote from one of each of the directors of Group 1 being the First and Second Appellant and Group 2 being the Second and Third Respondents to make any Board Resolution or decision effective.

[10] On 28 August 2018, without the knowledge of the Respondents, the First, Second and Third Appellants registered Resolutions at the Belize Companies and Corporate Affairs Registry:

(i) Resolution of the Directors of Mayan dated 01 December 2009 issuing a first call on the First Respondent's 10,000 shares, to be paid by 01 January 2020;

(ii) Resolution of the Directors of Mayan dated 02 January 2010 issuing a second and final call on the First Respondent's 10,000 shares to be paid by 01 February 2020;

(iii) Resolution of the Directors of Mayan dated 15 February 2010 resolving to forfeit the First Respondent's shares with immediate effect;

(iv) Resolution of the Directors of Mayan dated 01 September 2019 resolving to forfeit the 5,000 shares held by the First Appellant in Mayan with immediate effect.

[11] The Respondents contend that the meetings at which the Resolutions were made did not take place and were undertaken fraudulently. They further contend that they only became aware of the Resolutions in July-August 2020 when they conducted an asset search and search at the Registry of Companies.

[12] The Appellants contend that the documents allotting shares to the First Respondent, appointing the Second and Third Respondents as Directors and amending the Articles of Association to make the Second and Third Respondents permanent directors with an affirmative vote on decisions were unlawfully filed at the Belize Registry of Companies and ought to have been held in escrow by the Solicitors for the First, Second and Third Respondents pending the First Respondent's fulfillment of obligations under a Master Agreement. The parties are in dispute as to whether the obligations under the Master Agreement were fulfilled.

[13] The Appellants accept that they became aware of the filings at the Registry in September 2018 and took steps to correct the situation. In the Affidavit of Marco Caruso made on the January 15, 2021, he states at paragraphs 47 and 48 as follows:-

"47. In or around September 2018, while routinely requesting a certificate of good standing for Mayan Lagoon I was notified that a new rule was being effected requiring a company audit in order for the issuance of the good standing. At that point and ONLY at that point did I become aware of the fraudulent lodging by Borland of the documentation that was to have been held in escrow.

48. It was my duty as a director of Mayan lagoon to correct this situation and `I did so by filing requisite documents corrective of those improperly registered by Brent."

[14] The Appellants further contend that the claim by the Fourth Respondent is separate and apart from the claims by the First to Third Respondents and that the Fourth Respondent's claim for injunctive relief is to ensure the assets of Mayan are available for enforcement of a pending claim in the Belize courts against the First Appellant. The Fourth Respondent's claim is to rescind various dispositions of property by Mayan which were pledged to the Fourth Respondent and to restore the shareholding of the First Appellant in Mayan which it says were forfeited to avoid a liability under its claim.

The Decision of the Supreme Court Judge

[15] The Learned Judge delivered a written decision on 26 January 2021 continuing the freezing order and making certain orders for fortification of damages. The Learned Judge found among other things that:

(i) Whilst there were several issues to be tried between the parties, in particular allegations of fraud, the threshold test had been satisfied and that there was a good and arguable case put forward by the Respondents;

(ii) Fraud was a central issue in the claim and consequently there was an inference of a general risk of dissipation;

(iii) The balance of convenience lies in favour of the grant of a freezing order pending the trial of the proceedings;

(iv) The evidence put forward by the Appellants justified the exercise of a discretion for fortification of the undertaking of damages made by the Respondents in support of the freezing order;

(v) The Respondents made full and fair disclosure of all material facts necessary to grant the freezing order;

(vi) There was not inexcusable delay on the part of the Respondents in filing the injunction or instituting of the action;

(vii) It was just and convenient to maintain the freezing order.

The Grounds of Appeal

[16] Learned Counsel for the Appellants and the Respondents accept that the role of the appellate court on an appeal from an interlocutory injunction is one of review and the appellate court will only interfere with the discretion of a learned judge where the findings are based on a misunderstanding of the law or the evidence. This approach is reiterated in many legal authorities including a case of this court in ***Belize Water Services v The Attorney General of Belize, Civil Appeal No. 2 of 2005*** at paragraph 15 where the dicta of Lord Diplock in ***Hadmor Productions v Hamilton [1983] 1 AC 191 at p220*** was adopted.

[17] The Appellants contend that the decision of the Learned Judge was founded on a misunderstanding of the law and the evidence and should be set aside. I turn now to discuss the grounds on which this contention is based.

Ground 1 – Whether the Learned Judge erred in law and fact when she premised the order on an undertaking by the Respondents as to damages.

[18] The Appellants contend that the Respondents failed to provide a sufficient undertaking for their injunction and should have provided their financial position in the first instance to then allow the party challenging to show disproof.

[19] I agree with Learned Counsel for the Appellants that an applicant for an injunction must provide a sufficient undertaking in the first instance outlining their financial position and ability to pay damages in the event it is found that the court ought not to have made the injunction. The liability for damages is the price an applicant must pay for the imposition of an injunction. This is particularly necessary on the grant of an *ex parte* injunction when the court does not have the benefit of hearing a respondent in relation to the undertaking being given. Whilst ***CPR 17.4 (2)*** requires an undertaking to abide by any order as to damages, this requirement must be supported by cogent evidence of the applicant's ability to satisfy such an undertaking, when required by the court.

[20] Nevertheless, the *ex parte* order was made by the Court upon an undertaking by the Defendants. On the *inter partes* hearing of the freezing order, the Learned Judge considered the evidence of the Appellants in relation to the inadequacy of the undertaking and found it necessary to fortify the undertaking of the Respondents and the order was so made. This was within the purview and discretion of the Learned Judge as the undertaking as to damages was to the court and it was not necessary for the Appellants to have applied for fortification.

[21] I am of the view the Learned Judge properly considered the undertaking and the evidence before her in that regard and cannot be said to have unreasonably exercised her discretion in fortifying the undertaking. Indeed, it would have been unreasonable for the Learned Judge to discharge the injunction on that basis only, when it was open to her to request a fortification of damages. At the date of hearing, the parties informed the court that the undertaking had been fortified with a quantified sum and for that further reason, I see no reason to interfere with the Learned Judge's discretion.

Ground 2 – Whether the Learned Judge erred in law and in fact in concluding that the Claimants applied for a continuation of the freezing order when no such application was made.

[22] The Appellants contend that the Learned Judge continued the freezing injunction when there was no express application by the Respondents for the order and as such the court fell into error. The Appellant relies on the Eastern Caribbean Supreme Court decision of ***Manfre et al v Smith High Court Civil Claim No. ANUHCV 0135 of 2001***. However, this case does not appear to support the Appellants' contention in that the decision does not appear to suggest that an interim order could not continue without an application for extension.

[23] CPR 17.4 provides

> "(4) *The court may grant an interim order under this Rule on an application made without notice for a period of not more than 28 days (unless any of these Rules permits a longer period) if it is satisfied that*
>
> *(a) in a case of urgency, no notice is possible; or*
> *(b) that to give notice would defeat the purpose of the application.*
>
> *(5) On granting an order under paragraph (4) the court must –*
>
> *(a) fix a date for further consideration of the application;*
> *and*
> *(b) fix a date (which may be later than the date under paragraph (a)) on which the injunction will terminate unless a further order is made on the further consideration of the application.*

(6) When an order is made under paragraph (4), the applicant must serve the respondent personally with - (a) the application for an interim order; (b) the evidence on affidavit in support of the application; (c) any interim order made without notice; and (d) notice of the date and time on which the court will further consider the application under paragraph (5) (a); not less than seven (7) days before the date fixed for further consideration of the application.

(7) An application to extend an interim order under this Rule must be made on notice to the respondent unless the court otherwise orders."

[24] CPR 17.4 (4) and (5) essentially provide that the court may grant an interim order on *an application without notice* to an applicant in specific circumstances, but this interim order should not be for more than 28 days. When granting this order, the court must set a date for *further consideration of the application* and fix a date when the injunction will terminate unless a further order is made on *further consideration of the application*. CPR 17.4 (6) provides for the service of the application and date for further consideration of the application on the respondent for an *inter partes* hearing.

[25] It is clear from CPR 17.4 (4) and (5) that whilst the court may grant the application without notice and fix a date for the injunction to terminate (which may be later than the date of the *inter partes* hearing), the same application comes up for further consideration on the date next scheduled by the court. The application before the court at the without notice hearing remains live until such time as it is considered at the *inter p*artes hearing and the injunction will only terminate unless a further order is made by the court.

[26] It is therefore not necessary to apply for a continuation of an injunction. CPR 17.4 (7) which provides for an applicant to apply to continue an injunction is simply seeking to state that any application to continue an injunction must be made on notice to a respondent. It does not mean that an application to continue an injunction is necessary after an *ex parte* hearing or on the

date for further consideration of the application. There may be instances where the court would after an *inter partes* hearing order that an injunction should terminate within a certain time requiring an applicant to seek to continue the injunction, if necessary. CPR 17.4 (7) provides that any such application must be made on notice unless the court orders otherwise.

[27] It was therefore not necessary for the Learned Judge to provide for the Respondents to apply for a continuation of the order. It is also not clear as to whether she required such an application to be written or oral as it contemplated that the application would be made at the hearing on 11 December 2020. CPR 17.4 (5) required the Learned Judge to schedule the application for further consideration on the 11 December 2020 which was the date set for the further hearing of the matter. In any event, the Learned Judge scheduled the matter for further hearing on 11 December 2020 prior to the termination of the injunction which could only mean the original application without notice would be heard and dealt with at the further hearing. The Learned Judge then gave directions for the Appellants to file their discharge application and made orders for skeleton arguments which meant that the court properly considered that the application for the injunction was live and scheduled for further consideration.

[28] The Application without notice filed by the Respondents would have been up for further consideration at each subsequent hearing on 11 December 2020, 26 January 2021 and 4 March 2021 and 26 January 2021 and as such the Learned Judge did not err in continuing the freezing injunction.

Ground 3 – Whether the Learned Judge misdirected herself as to the law and facts in her determination that the balance of convenience favoured the continuation of the freezing injunction.

[29] The Appellants contend that the Learned Judge misdirected herself as to the law and facts when she determined that the balance of convenience favoured the continuation of the freezing injunction when this had the effect of shutting down Mayan's business of legitimate real estate dealings.

[30] At paragraph 55 of the Decision, the Learned Judge stated:

> *"Based on the same thorough review of the evidence, it is clear that the balance of convenience at this stage does lie in favour of the grant of the freezing order, and that in terms of both the shares in Mayan Lagoon and the properties in question which is the subject matter of the declarations and order being prayed in the Claim, it would be just and convenient to grant the freezing order at this stage of the proceedings"*

[31] In arriving at her decision, the Learned Judge gave consideration to her conclusions that fraud was a central issue in the case, at paragraph 46 of the Decision, that there was a risk of disposal regarding the shares of Mayan and at paragraph 50 and 51 that there was more than a generalized assertion or inference that the assets may be unjustifiably disposed of and that there was a real risk that a future judgment would not be met by unjustified dissipation of assets.

[32] The Learned Judge's decision was arrived at on consideration of the evidence before her and the exercise of her discretion on the balance of convenience and found in favour of the Respondents. It is clear that the Learned Judge was aware of the effect on the Appellants as this was considered when she made a decision to fortify the undertaking.

[33] I am of the view that the Learned Judge properly exercised her discretion when she considered the balance of convenience and I find no basis on which I should interfere with the exercise of her discretion.

Ground 4 – Whether the Learned Judge misdirected herself as to the law and facts in her determination that there was a good and arguable case when there was no standing to bring a claim on behalf of Mayan and where Copper Leaf LLC has no direct interest in the assets of Mayan

[34] The Appellants contend that the Learned Judge misdirected herself as to the law and facts when she determined that there was a good and arguable case when there was no standing to bring a claim on behalf of Mayan and where Copper Leaf LLC has no direct interest in the assets of Mayan.

[35] Learned Counsel for the Appellants agree that the standing to bring a claim against Mayan is the subject of proceedings before the High Court Judge and as such, did not pursue any submissions in that regard. In any event, it is noted that this is not an issue raised before the Learned Judge in her consideration as to whether there was a good and arguable case.

[36] In relation to Copper Leaf LLC, the Appellants contend that Copper Leaf LLC is an expectant creditor of Mayan and a creditor of the Second Respondent by virtue of a Judgment entered in Claim No. 141 of 2019 and therefore has no direct interest in Mayan and would have no right of enforcement against Mayan. They contend that the Learned Judge did not properly consider this issue in determining whether Copper Leaf LLC had a good and arguable case against the Appellants.

[37] The Respondents contend that Copper Field LLC is a creditor of the First Appellant and First Respondent by virtue of Guarantee Agreements dated 30 December 2016 guaranteeing the obligations of Belize Infrastructure Fund, LLC. The guarantee was secured by two parcels of land held by Mayan for which the First Appellant and Second Respondent had a beneficial interest and which Land Certificates were deposited in escrow, and that Mayan had agreed to pledge other specific parcels of land to secure the loan. Belize Infrastructure Fund, LLC defaulted on the loan and judgments were obtained against the First Appellant and First Respondent in the United States and are being pursued in Belize. The allegation against Mayan is that its Directors signed an application with the Registrar of Lands contending that the Certificates deposited in escrow were irrevocably lost causing a replacement certificate to be issued. The Respondents further contend that the Directors transferred the parcels that Mayan agreed to pledge to Copper Field LLC as security for the loan to Palm Tree Holdings Ltd. Various allegations of dishonesty are made against the Appellants.

[38] The Learned Judge considered this evidence at paragraphs 47 and 50 of her Decision and found that the allegations of dishonesty points to a generalized assertion or inference that the assets may be unjustifiably dissipated. She found that Copper Field LLC relied on the risk of dissipation established by the Claimants and it was not necessary that all of the Respondents establish risk and risk just needed to be established against all Appellants. The Learned Judge therefore did not think it necessary to address the standing of Copper Field LLC to seek injunctive relief.

[39] I do agree with Learned Counsel for the Appellants that Copper Field LLC's claim as a creditor against Mayan on the freezing injunction is far reaching as Copper Field LLCs claim as a creditor is against the shareholders of Mayan. However, Copper Field LLCs claim in these proceedings are for declarations in relation to the forfeiture of the First Appellants shares and orders cancelling replacement certificates and as such have standing to pursue a freezing order to restrain the dissipation of the assets. This would have been considered by the Learned Judge in assessing whether the Respondents had a good and arguable case and I find no basis to interfere with the Learned Judge's discretion.

Ground 5 – Whether the Learned Judge misdirected herself as to the law and facts in her determination that there was a real risk of dissipation when the matter the Claimants allege was known for at least a year prior to the filing of the claim

[40] The Appellants contend that there was no real risk of dissipation as the Respondents knew of the transfer of properties long before they applied for the freezing injunction. The Appellants refer to a transfer of properties that took place in 2019.

[41] The Learned Judge considered this contention by the Appellants at paragraphs 103 to 108. The Learned Judge considered the Respondents evidence that the Appellants actions came to their attention in July – August 2020 and referenced the dicta of Farara J in ***Hualon Corporation v Marty Limited BVIHC(COM) 2014/0090*** at para 76 where he stated that it is a substantive factor to be taken into account but not a bar to obtaining interim relief.

[42] The Learned Judge further considered the risk of dissipation extensively at paragraphs 34 to 58 of her Decision and found that fraud was a central issue in the claim which is an inference of a real risk of dissipation. The Respondents' claim against the Appellants is for relief arising out of allegations of fraud and dishonesty. The Appellants have disputed these allegations but admit that they back dated Resolutions to forfeit the First Respondent's shares and remove the Second and Third Respondents from the Board of Directors when they discovered what they considered to be fraudulent transfers. The allegations against the Appellants are that they dishonestly caused land certificates to be replaced knowing that they were held in escrow to secure loans and caused

properties to be transferred after their removal of the Second and Third Respondents from the Board. It is clear that the Learned Judge considered these issues before her and reasonably concluded that there was a real risk of dissipation pending trial. I see no basis on which her discretion could be said to have been exercised wrongly by a misunderstanding of the law and facts before her.

Grounds 6, 7 – Whether the Learned Judge misdirected herself as to the law and facts by failing to give sufficient consideration to the evidence put forward by the Defendants surrounding material non-disclosure of the Claimants

[43] The Appellants contend that the Learned Judge misdirected herself as to the law and facts by failing to give sufficient consideration to their evidence on material non-disclosure by the Claimants.

[44] The Learned Judge addressed the claims of material non-disclosure and the evidence presented by the parties at paragraphs 88 to 100 of her Decision and found that the Respondents had made full and fair disclosure of all material facts necessary for her to determine the freezing order.

[45] It is not every omission for non-disclosure that will result in the automatic discharge of an injunction. ***Brink's Mat Ltd. v Elcombe [1988] 3 All ER 188***. Whilst the Appellants have set out numerous documents and statements that the Respondents failed to disclose to the Court, none of these statements affect the Learned Judge's findings that the Respondents had an arguable case or that there was a real risk of dissipation of assets. The Learned Judge cannot be said to have been misdirected as to the facts and law in considering the effect and importance of the non-disclosure and evidence of the Appellants in the exercise of her discretion.

Conclusion

[46] The Appellants final ground of appeal appears to be a catch all ground set out by the Appellants where they reiterate the arguments put forward under grounds 1-8 and contend that in

all the circumstances, it was unreasonable to continue the injunction. For the reasons I have set out above, this ground of appeal cannot succeed.

[47] The Appellants have failed to show that the Learned Judge's Decision to continue the freezing order until further order was based on a misunderstanding of the law or the evidence and I therefore see no reason or basis to interfere with the exercise of her discretion.

[48] For those reasons, I propose the following Order:

> The Appellants' appeal is dismissed with costs to the Respondents to be assessed, if not agreed within 21 days.

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FOSTER JA