COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2020/CLE/gen/00614

IN THE MATTER of the Banks and Trust Companies Regulation Act, Chapter 316

AND

IN THE MATTER of an Application by the Commissioner of Police for a Property Freezing Order pursuant to section 51(1) & (2) of the Proceeds of Crime Act, 2018.

BETWEEN

THE COMMISSIONER OF POLICE

Applicant

AND

HENRIQUE JOSE RODRIQUEZ GUILLEN

First Respondent

AND

SUELOPETROL ENERGY FUND LIMITED

Second Respondent

AND

SUELOPETROL EXPLORACION Y PRODUCCION, S.L.

Third Respondent

AND

RUVE BERATUNG & TREUHAND AG

Fourth Respondent

AND

PRIVATE INVESTMENT BANK LIMITED

Fifth Respondent

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Sean Moree and Ms. D'Andra Johnson of McKinney Bancroft & Hughes for FC Capital Investments Limited, an Interested Party
Ms. Kendra Kelly for the Applicant, the Commissioner of Police

Hearing Dates: 13 July, 14 July, 16 July, 17 July 2020

Proceeds of crime – Property Freezing Order - Property reasonably believed to be the proceeds of criminal conduct – Application made ex parte and order granted by a judge – No court reporter or transcript of proceedings - Judge's notes provided to court - Whether there were procedural irregularities – Whether Applicant has good arguable case – Risk of dissipation of assets

Application to revoke by interested party – Relevance of ability of interested party to show that property is not unlawfully obtained - Full and frank disclosure – Materiality - Whether there were failings in disclosure – Whether the Court should discharge order

Free-standing freezing orders under Proceeds of Crime Act - Whether there needs to be a substantive claim – Statute versus common law principles on Mareva Injunctions - Undertaking as to damages – Certificate of urgency - Proceeds of Crime Act, 2018, Ch. 4 of 2018, sections, 3, 51 and 52

On 12 May 2020, the Commissioner of Police ("the Applicant") filed an *ex parte* Summons seeking a Property Freezing Order with respect to five (5) Share Certificates valued in excess of €1.3 billion held by the 5th Respondent and a Promissory Note valued in excess of USD $33 million held by the 4th Respondent in an account held at the 5th Respondent ("PIBL") situated at New Providence, Bahamas ("the Ex Parte Summons"). The Affidavit of D/Supt. Thompson supported the Ex Parte Summons ("Thompson Affidavit No. 1"). On 14 May 2020, a judge granted a Property Freezing Order ("PFO").

By Summons filed on 30 June 2020, an interested party ("FC Capital") sought to revoke the PFO. The Summons to revoke is supported by two Affidavits of the Manager of FC Capital sworn to on 6 July and 13 July 2020 respectively. FC Capital alleges that (i) there was insufficient evidence before the Court on the *ex parte* application by the Applicant on the grant of the PFO and (ii) there were various misrepresentations and/or non-disclosure in Thompson Affidavit No. 1 (including the fact that the Promissory Note had expired) in support of the application to secure the PFO.

The Applicant submits that (i) the fact that the Promissory Note has expired is not relevant. The Promissory Note is currently still held in the vault at PIBL and it shows a nexus between the 1st and 2nd Respondents and PDVSA; indicating that the source of the funds in the account are derived from the Venezuelan state owned oil company ("PDVSA"), which has been sanctioned globally for allegations of corruption, mismanagement, embezzlement and bribery, among other offences; (ii) the arrangements between the Respondents were deemed suspicious by reputable regulatory bodies and organizations that oversee and regulate financial institutions and

transactions in The Bahamas and; (iii) all the Applicant must do is to satisfy the minimum requirements of the Proceeds of Crime Act, 2018 which it has done.

HELD: continuing the Property Freezing Order with minor amendments to it and reserving the issue of costs;

1. The Proceeds of Crime Act, 2018 ("POCA") is not a penal statute. It does not possess the commonly known aspects of a criminal legislation in that no offence is created. No one is charged with an offence nor is anyone tried for an offence. The Respondents or the Interested Party are not on trial. What it does is to enable the Court to grant orders, such as property freezing orders, if there is a reasonable ground for believing that the property is derived from the proceeds of criminal conduct. Its thrust is to deprive ownership, possession and control of those properties from those who hold them at the time of initiating proceedings under POCA. The proceedings are *in rem* and even hearsay evidence may be admissible. The proceedings are entirely civil in nature though not governed by the Rules of the Supreme Court.

2. In order to support an application for a PFO, the requirement is that an applicant has to establish a good arguable case that a certain kind of unlawful conduct had occurred and then a good arguable case that property was obtained through that kind of unlawful conduct: see Waller LJ in **Assets Recovery Agency v Szepietowski and others** [2007] EWCA Civ 766 at para. 28.

3. Although the burden of proof is on an applicant to show, on a balance of probabilities, that the property in question was obtained by or in return for unlawful conduct, the defendant's ability to show that the property in question was obtained lawfully is likely to be relevant: see **Serious Organised Crime Agency v. Bosworth** [2010] EWHC 645 (QB) at para. 56 and **National Crime Agency and National Westminster Bank Plc vs. Odewale and Yadav** [2020] EWHC 1609 at para. 28.

4. The consideration for the court is not limited to what transpired before the court in the first instance when the order was granted but this court must also consider what is appropriate in the interests of justice and may vary, discharge, continue or grant a new injunction if it is so satisfied: **National Crime Agency v Simkus and others; National Crime Agency v Khan and others; National Crime Agency v Jardine and others** [2016] 1 WLR 3481 applied.

5. The threshold for obtaining a PFO appears to be somewhat low. It is based the "reasonable belief" by the enforcement authority. The test of "reasonableness" is an objective one. The Court must look at the evidence which was in the possession of the enforcement officer at the date that he/she reached his/her judgment. The evidence and circumstances of the enforcement officer must be looked at holistically by the Court in determining whether there was evidence upon which, a reasonable investigator having regard to this and exercising his mind accordingly, would have entertained a belief that

some crime has been committed of which the property in question were proceeds therefrom.

6. On a balance of probabilities, the Applicant has provided ample and sufficient evidence to satisfy the Court that there were, and still are, reasonable grounds to believe that the subject property is the proceeds of crime. The affidavit of Supt. Thompson sets out the grounds for such belief, which included the suspicions transaction report by the FIU, the large amount of shares in Venezuelan oil, the link to a notoriously and criminally sanctioned company, PDVSA, the fact that Venezuelan assets are considered high risk in the financial sector regulators and raise red flags as well as the fact that the freezing order was necessary to preserve the funds so that an investigation could be conducted into its derivation and legitimacy.

7. There is a general duty in civil proceedings on a party applying for an *ex parte* notice order to make full and candid disclosure of all material facts: **National Crime Agency v Simkus and others; National Crime Agency v Khan and others; National Crime Agency v Jardine and others** [2016] 1 WLR 3481. The duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made inquiries. The extent of the inquiries that will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application and (b) the order for which the application is made and the probable effect of the order on the defendant.

8. In deciding in a case where there has been non-disclosure whether or not there should be a discharge of an existing injunction and a re-grant of a fresh injunction, it is important that the Court assesses the degree and extent of culpability with regard to the non-disclosure, and the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the Court. If the duty to disclose is not observed, the Court may discharge the injunction.

9. Analysing the law and the facts of the instant application, in my opinion, the fact that there was non-disclosure of the Promissory Note at the *ex parte* hearing is not material enough to result in a discharge of the Property Freezing Order. The Interested Party has not advanced any evidence to show that they were prejudiced by that non-disclosure. In any event, the Promissory Note was provided to FC Capital during this hearing.

10. Although the burden of proof rests with the enforcement authority, it appears to me that under POCA, if you cannot prove that the origins of the property were gainfully obtained, you may lose the property. These new powers permit the enforcement authority to apply to the Court to freeze bank accounts and to apply for forfeiture orders. The threshold is low: reasonable belief. On a balance of probabilities, the Applicant has met the threshold requirement. The Applicant has shown a connection with the Respondents and PFVSA. The letter of Mr. Charles Littrell is very detailed.

11. The regime under POCA is different from Mareva freezing orders. POCA specifically makes provisions for the enforcement authority to obtain property freezing orders as a means to preserve certain property where the requirements for making such an application are met. There is no requirement in the Act that the application for a freezing order must be precipitated by any claim/cause of action. The purpose of POCA is to consolidate and strengthen measures to recover the proceeds and instrumentalities of crime and to combat identified risks: **Dramiston Ltd. and others v. Financial Intelligence Unit** [2018] 1 BHS J. No. 147 distinguished.

12. There is no need for a certificate of urgency in applications made pursuant to POCA.

RULING

Charles J:

Introduction

[1] This is an application by an Interested Party, FC Capital Investments Limited ("FC Capital") to revoke a Property Freezing Order ("PFO") made *ex parte* by Bethell J on 14 May 2020 on the grounds that:

a. there was insufficient evidence before the Court on the *ex parte* application by the Commissioner of Police ("the Applicant") on the granting of the PFO;

b. the Applicant made various misrepresentations and/or non-disclosure in the Affidavit of Debra Thompson, Detective Superintendent of Police ("Thompson Affidavit No. 1") in support of the application to secure the PFO; and/or

c. in the circumstances it would be unjust for the continuance of the PFO.

[2] The application is supported by two affidavits of Tiffany Jones-Williams, Manager of FC Capital, sworn to on 6 July 2020 and 13 July 2020 respectively.

[3] The Applicant opposes the application to revoke. In a nutshell, Ms. Kelly of the DPP who appears for the Applicant submits that, at the *ex parte* hearing, the Court was presented with sufficient evidence to justify the grant of the PFO and there were, and still are, reasonable grounds to believe that five (5) Share Certificates

#001, #002, #003, #004 & #005 (Fund License Number: 10-P-206; ISIN: BSP879061062) valued at €1,342,228,700.00 and a Promissory Note valued at USD $33,296,552.69 held by the 4th Respondent in Account #13640666.1008 at the 5th Respondent, Private Investment Bank Limited ("PIBL") ("the subject property") is the proceeds of crime.

[4] Ms. Kelly further submits that Thompson Affidavit No. 1 sets out the foundation for such belief which included the suspicious transaction report to the Financial Intelligence Unit ("FIU"), the large amount of shares in Venezuelan oil, the link to a notoriously and criminally sanctioned company, Petroleos de Venezuela S.A. ("PDVSA"), the fact that Venezuelan assets are considered high risk in the financial sector regulators and raise red flags as well as the fact that the PFO was necessary to preserve the funds so that an investigation could be properly conducted into its derivation and legitimacy.

[5] Additionally, Ms. Kelly submits that even if there were any non-disclosure to the fact that the Promissory Note has expired, as complained by FC Capital, it is not material to warrant a revocation of the PFO as the Promissory Note is still currently being held in the vault at PIBL and it demonstrates a nexus between the 1st and 2nd Respondents and PDVSA. Ms. Kelly also submits that this nexus is relevant as it relates to evidence of the source of the funds in the account at PIBL and the reason for the suspicions on behalf of PIBL, the Central Bank, the FIU and the Applicant.

Background

[6] On 22 March 2019, the 2nd Respondent was incorporated as an International Business Company ("IBC") pursuant to the International Business Companies Act, 2000.

[7] On 2 May 2019, a Custodian Agreement was executed between the 2nd Respondent and PIBL: Exhibit TJW 1.

[8] On 9 September 2019, the Securities Commission of The Bahamas issued an Investment Fund Licence # 10-P-206 to the 2nd Respondent effective from 16 May 2019: Exhibit TJW 2.

[9] On 24 May 2019, PIBL officially welcomed the 2nd Respondent to their bank and advised that an account No. 13887122 was opened: Exhibit TJW 3.

[10] In February 2020, an investigation was commenced into the Respondents. A five-day Freezing Order was placed on the accounts of the 1st Respondent which FC Capital was unaware of.

[11] On 12 May 2020, the Applicant filed an *ex parte* Summons seeking a PFO of the subject property. Thompson Affidavit No. 1 supported the *ex parte* Summons. Supt. Thompson deposed, among other things, that:

1. The 1st Respondent is the beneficial owner of two entities namely Suelopetrol Energy Fund Limited ("the 2nd Respondent") which is registered in The Bahamas and Suelopetrol Exploracion y Produccion, S.L. ("the 3rd Respondent") which is registered in Madrid, Spain: para. 4.

2. Information revealed that the 1st Respondent currently has a number of bank accounts in the names of both the 2nd and 3rd Respondents held at the Private Investment Bank Limited ("PIBL"). Additionally, it was revealed that the assets of the 1st Respondent are purported to be Venezuelan and associated with Petroleos de Venezuela S.A. ("PDVSA"), the Venezuelan oil company which is well-known globally for ill repute: para. 5. [Emphasis added]

3. Based on our intelligence, PIBL's balance sheet is approximately $600 million. Further, on obtaining the 1st, 2nd and 3rd Respondents as its new customer with the bank, PIBL is now holding assets valued two and one-half times their current balance sheet. And what was apparently a custody arrangement is highly unusual: para. 6 [Emphasis added]

4. The 1st Respondent currently holds 134,222.87 shares purchased at $10,000.00 per share which values €1,342,228,700.00. These shares are held in the name of the 2nd Respondent through FC Capital. However, PIBL is in possession of the five share certificates #001, #002, #003, #004 and #005: para.7.

5. Information revealed that, on Monday 5 August 2019, the 3rd Respondent (owned by the 1st Respondent) requested a transfer of custody for a Promissory Note for which they possess. Further, the 3rd Respondent requested to move the Promissory Note valued US$33,296,552.69 from their bank account into the bank account of Ruve Beratung & Treuhand A.G. ("the 4th Respondent") which is located at PIBL. Moreover, the promisor for this Promissory Note is PDVSA, globally known for ill repute: para. 8. [Emphasis added]

6. The 4th Respondent is a Fiduciary Service which is owned and operated by Mr. Jan-Hendrik Rottmann, born 25 February 1980, of Buende, Germany.

7. I [Supt. Thompson] am overseeing this investigation and **reasonably believe** that the **property of the 1st, 2nd, 3rd and 4th Respondents may be the proceeds of criminal conduct due to their relationships with PDVSA**. **I also suspect that the five Share Certificates and the promissory note may represent proceeds of criminal conduct; maybe intended to be used to facilitate criminal conduct or future criminal conduct**: para. 11.[Emphasis added]

8. The Applicant seeks a PFO pursuant to section 51(1) and (2) of the Proceeds of Crime Act, 2018.

[12] It is upon this evidence and some brief oral submissions of Ms. Kelly as evidenced in the Judge's notes that Bethell J. granted the PFO on 14 May 2020. The Order reads (in part):

"AND UPON BEING SATISIFED that the five (5) share certificates #001, #002, #003, #004 & #005 (Fund License Number: 10-P-206; ISIN: BSP879061062) valued at €1,342,228,700.00 held by the 2nd Respondent and the Promissory Note valued at USD $33,296,552.69 held by the 4th Respondent held in Account #13640666.1008 at Private Investment Bank Limited ("the 5th Respondent") situated at New Providence, Bahamas are the 1st Respondent's or another's proceeds derived from crime or was intended to be used in criminal conduct and needs to be freeze (sic) while an intelligence led investigation continues:

IN EXERCISE of the powers conferred on me by Section 51(1) & (2) of the Proceeds of Crime Act, 2018;

IT IS ORDERED: Henrique Jose Rodriguez Guillen, Suelopetrol Energy Funds Limited, Suelopetrol Exploracion y Produccion, S.L. and Ruve Beratung & Treuhand AG or any other person is prohibited from dealing with the Share Certificates, Promissory Note and monies held in any accounts in Private Investment Bank Limited, situated at New Providence, The Bahamas (hereinafter "the Bank") in the name of Henrique Jose Rodriquez Guillen; Suelopetrol Energy Funds Limited, Suelopetrol Exploracion y Produccion, S.L. and Ruve Beratung & Treuhand AG;

AND IT IS FURTHER ORDERED that:

1. **A copy of this Property Freezing Order ("PFO") is to be served on the Respondents herein; and**

2. **Any persons affected by this Property Freezing Order may make provisions for an appeal for this Property Freezing Order in accordance with section 57(1) of the Proceeds of Crime Act, 2018."**

Some events after the PFO was obtained

[13] The Order states that a copy of the PFO is to be served on the Respondents.

[14] The day after it was granted, Supt. Thompson emailed a copy of the PFO to Mr. Amaechie Azikiwe, Head of Compliance, PIBL. On that same day, Mr. Azikiwe confirmed receiving the PFO.

[15] FC Capital first became aware of the PFO on 16 June 2020 (over a month after it was granted) when it was blind copied on an email from the Financial Crimes Investigation Branch to the office of the 4th Respondent. FC Capital responded

immediately correcting certain inaccuracies in the PFO and requesting Thompson Affidavit No. 1. There was no response by the Director of Public Prosecutions ("the DPP") to the said letter.

[16] On 19 June 2020, Mr. Moree, Counsel for FC Capital, wrote to Ms. Kelly reiterating FC Capital's request for a copy of Thompson Affidavit No. 1.

[17] On 23 June 2020, Ms. Kelly responded via email attaching a copy of Thompson Affidavit No. 1.

[18] On 24 June 2020, a Request was made to Interpol. On the same day, Mr. Moree wrote to Ms. Kelly setting out his concerns with Thompson Affidavit No. 1 and the basis for the PFO. Again, there was no response by the DPP.

[19] On 26 June 2020, a Request was made to ARIN-CARIB and, on 7 July 2020, a Request was made to the US Embassy.

[20] On 13 July 2020, Supt. Thompson swore a Supplemental Affidavit ("Thompson Affidavit No. 2"). In it, she deposed that, on Friday 15 May 2020, attempts were made to deliver the PFO to the Bank. However, the Bank was prohibited from opening due to The Bahamas being placed under a COVID 19 Emergency Order.

[21] As already indicated, on 15 May 2020, Supt. Thompson emailed a copy of the PFO to Mr. Azikiwe who, on the same day, confirmed receipt of the PFO.

[22] Supt. Thompson further stated that she was informed by W/Cpl. 3733 Tianna Munnings that she was unable to email a copy of the PFO to the 1st to 4th Respondents because PIBL was closed and she was unable to ascertain their email addresses.

[23] On Tuesday, 16 June 2020, Mr. Azikiwe provided the email contacts for the 1st to 4th Respondents and, on the same day, she emailed the PFO to them.

[24] Supt. Thompson averred that the investigation into the source of the funding and

the authenticity of the Share Certificates and Promissory Note is ongoing. She reiterated, in paragraph 15 of Thompson Affidavit No. 2, that PDVSA has long been the subject of criticism and allegations of mismanagement, corruption and embezzlement from both Venezuelan and international observers and the 1st Respondent was close to government actors including Hugo Chavez.

[25] In paragraph 16, Supt. Thompson deposed that she has information that Suelopetrol CA, in partnership with PDVSA, holds shares in the following companies: Suelopetrol Exploration & Produccion CA ("SEPCA") (100%), Pretocabimas AS (40%), Petroindependencia SA (1%). She also averred that information regarding Suelopetrol CA financing was published in an article on "Komzapata.com" expressing doubts as to how such a previously modest company like Suelopetrol CA could obtain such a large financing agreement.

[26] In paragraph 18, Supt. Thompson alleged that the preliminary investigation shows the ties between the 1st and 2nd Respondents with PDVSA and their arrangement is high risk and suspicious.

[27] In paragraphs 19 to 21, she detailed the requests which were made to various law enforcement agencies in the USA and Venezuela to ascertain whether the five Share Certificates and the Promissory Note are the proceeds of criminal conduct. She is awaiting a response from all of the agencies.

Affidavits of Mrs. Tiffany Jones-Williams

[28] As already stated, FC Capital, an interested party seeks the revocation of the PFO. In doing so, it relied on two affidavits filed by Mrs. Jones-Williams. The first affidavit, sworn to on 6 July 2020 asserted that FC Capital is the Manager of the 2nd Respondent, a Bahamian Fund, duly regulated by the Securities Commission of The Bahamas.

[29] In paragraph 4, Mrs. Jones-Williams stated that, in March 2019, FC Capital received a referral for a prospective investment fund client from reputable legal professionals in The Bahamas and subsequently undertook standard and

enhanced due diligence measures on the 1st Respondent which involved collection of valid identification, compliance checks on World Check and Lexis Nexis, independent compliance review from Kroll and legal opinions from Bahamian and United States law firms. There was also a review of the Office of Foreign Assets Control sanction list which confirmed that neither the 1st nor 3rd Respondent were listed (and are still not listed).

[30] According to Mrs. Jones-Williams, "the results of the due diligence were clean and contained nothing which would alert us to any impropriety or sanction". Accordingly, FC Capital agreed to manage the 2nd Respondent which was established by the 1st Respondent.

[31] In paragraph 15, Mrs. Jones-Williams stated that Thompson Affidavit No. 1 makes various misrepresentation and /or non-disclosures which are all detailed on the letter from McKinney, Bancroft & Hughes dated 24 June 2020: "Exhibit TJW 5".

[32] In paragraph 16, Mrs. Jones-Williams insisted that FC Capital conducted all necessary due diligence as required by the laws of The Bahamas with respect to its engagement as Manager of the 2nd Respondent and is unaware of any criminal conduct relating to the 2nd Respondent or any proceeds which would have enabled or led to its incorporation.

[33] In her Supplemental Affidavit sworn to on 13 July 2020, Mrs. Jones-Williams asserted, in paragraph 3, that the PFO specifically referred to "*the promissory note valued at USD33,296,552.69 held by the 4th Respondent.*" No other information or details relating to the Promissory Note were provided by the Applicant and Thompson Affidavit No. 1 fails to exhibit a copy of the Promissory Note. She stated in paragraph 4 that after receiving a copy of the PFO and Thompson Affidavit No. 1, the 1st Respondent advised FC Capital that the Promissory Note in question had expired. Subsequently, she received a copy of the Promissory Note –"Exhibit TJW 6" which has in fact expired. That fact was not mentioned in Thompson Affidavit No. 1.

The legislation: The Proceeds of Crime Act, 2018

[34] On 15 May 2018, The Bahamas passed the Proceeds of Crime Act, Ch. 4 of 2018 ("POCA"). Broadly speaking, it consolidated and strengthened measures to recover the proceeds and instrumentalities of crime and to combat identified risks. Section 3 deals with the Objectives. It provides:

> **"(1) The objectives of this Act are:**
>
> **"(a) to consolidate and strengthen provisions relating to –**
>
> **(i) preventative and investigative measures against money laundering, terrorism financing, terrorism, corruption, proliferation of weapons of mass destruction, human trafficking, and related offences;**
>
> **(ii) the recovery of the proceeds and instrumentalities of crime including providing for civil forfeiture of the proceeds of criminal conduct and illicit cash; and**
>
> **(b) to introduce powers relating to unexplained wealth, investigative orders; the confiscated assets fund and a confiscated assets committee.**
>
> **(2) This Act applies notwithstanding any other law."**

[35] Pursuant to POCA, the Court has jurisdiction to grant a property freezing order on an application of the enforcement authority. Section 51 of POCA provides:

> "**51. Property Freezing Order.**
>
> **(1) Where the enforcement authority reasonably believes that property is proceeds or instrumentalities or terrorist property, the enforcement authority may apply to the Court for a property freezing order in respect of such property.**
>
> **(2) Where the enforcement authority applies to the Court for an Order in accordance with this section, and the Court is satisfied having regard to the facts and beliefs set out in an affidavit in support of the application, and any other relevant matter, that there are reasonable grounds to believe that the property the subject of the application is proceeds of crime, or instrumentalities, or terrorist property it may make the order.**
>
> **(3) An application for a property freezing order may be –**

(a) made *ex parte* and without notice;

(b) heard *in camera*.

(4) The Court may make a property freezing order to preserve the property the subject of the application where it is satisfied that there are reasonable grounds to believe that the property, or part of it, is proceeds, or instrumentalities, or terrorist property. [Emphasis added]

(5) Within seven days of a property freezing order being granted or such other period as the Court may direct, notice of the order shall be served on all persons known to the enforcement authority to have an interest in the property affected by the order, and such other persons as the Court may direct."

[36] In order to support an application for a PFO, the threshold requirement is that an applicant has to establish a good arguable case that a certain kind of unlawful conduct had occurred and then a good arguable case that the property was obtained through that kind of unlawful conduct.

[37] What is "a good arguable case" was explained by Waller LJ in **Assets Recovery Agency v Szepietowski and others** [2007] EWCA Civ 766. Waller LJ stated at para. 28:

> **"In this case, in considering whether a good arguable case has been established, it will be necessary to examine first whether it is arguable on the evidence that unlawful conduct of the kind asserted by the ARA has taken place, ie mortgage fraud. Next needs to be considered whether it is arguable that the property sought to be frozen represents property originally obtained through such unlawful conduct, but not necessarily through specific examples of that conduct; and finally, if there is some evidence that property was obtained though unlawful conduct, consideration needs to be given to any untruthful explanation or a lack of explanation where opportunity has been given to provide it. An untruthful explanation or a failure to offer an explanation may add strength to the arguability of the case".**

[38] Then, at para. 111, Moore-Bick LJ added:

> **"For the purposes of disposing of the application before him the judge only had to decide whether the Director had a good arguable**

> **case, not whether she would ultimately succeed at trial or even whether it was more likely than not that she would do so. The expression "good arguable case" is found in many different contexts; as Waller LJ observed in another context in *Canada Trust v Stolzenberg* [1998] 1 All ER 318, [1998] 1 WLR 547, it is a flexible test and one that is susceptible of various shades of meaning. In the context of applications for freezing orders and interim relief of a similar kind it clearly requires something more than a case capable of being taken seriously, but not necessarily much more and does not mean a case which, on the evidence before the court, is more likely to succeed than to fail. In cases such as the present, where the claim is based on allegations of fraud or other serious impropriety, it is sufficient in my view for the applicant to show that there is a good prospect of succeeding at trial. A case which is merely speculative, however, will obviously not do".** [Emphasis added]

[39] Other factors which may fortify an applicant's case is if he can show that (i) there is a real risk of dissipation and (ii) the assets concerned are within the jurisdiction of the Court. The Court should also take into consideration relevant factors in relation to the defendant, including:

- The defendant's conduct. Has the defendant acted in a discreditable way or is he being evasive?
- The type of assets and how they are held. Moveable or liquid assets can be more easily dissipated, taken out of reach and held in complex company structures.
- The length of time the defendant has been in business, the type of business and its financial position. A new company or one with questionable accounting practices or an unclear financial position can represent a risk.
- The defendant's cross-border connections. If the defendant has associates abroad or is capable of moving assets to another jurisdiction, this can be seen as a risk.

[40] Although the burden of proof is on an applicant to show that, on a balance of probabilities, that the property in question was obtained by or in return for unlawful

conduct, the defendant's ability to show that the property in question was obtained lawfully is likely to be a relevant factor: see the cases of **Serious Organised Crime Agency v. Bosworth** [2010] EWHC 645 (QB) at para. 56 and **National Crime Agency and National Westminster Bank Plc vs. Odewale and Yadav** [2020] EWHC 1609. In **Odewale,** McGowan J had this to say at para. 28:

> **"While the burden of proof is on the enforcement authority to show that (on the balance of probabilities) the property in question was obtained by or in return for unlawful conduct, and not for the defendant to show that the property was obtained lawfully, the ability or not of a person to show that the source was not unlawful conduct is likely to be relevant: *Serious Organised Crime Agency v Bosworth* [2010] EWHC 645 (QB) at [56].** [Emphasis added]

Jurisdiction to set aside

[41] It is beyond dispute that the Court may set aside and discharge an order made *ex parte.* Normally, the application to set aside is heard by the judge who granted the *ex parte* order. For reasons which are nor germane to this application, the matter came before me as the duty judge.

[42] Anyone affected by a property freezing order may apply to vary or revoke the said order and the Court has a wide discretion to do just that when it is in the interest of justice to do so. Section 52 (1) and (7) of POCA provides:

> **"52. Additional property Freezing Orders.**
>
> **(1) Where the Court makes a property freezing order, the Court may, at the time when it makes the order, or at any later time, make any further orders that it considers appropriate upon the application of the enforcement authority or any person affected by the order.**
> **…**
>
> **(7) Where a Court has made a property freezing order, it may upon application by anyone with an interest in the property or by the enforcement authority and at any time make any further order or orders in respect of the property including an order to revoke the freezing order or to vary the order, where it appears to the Court to be in the interest of justice to do so."**

[43] Section 52 (7) gives the court a wide discretion in this regard to make any further

order or…to revoke the property freezing order. In **Director of the Assets Recovery Agency v Kean** [2007] EWHC 112 (Admin), at para. 31, Stanley Burnton J (as he then was) explained:

> **"I do not accept that, on an application under section 245B to vary or to discharge a property freezing order so as to exclude from it identified property, it is necessary for the Applicant to prove on the balance of probabilities that that property is neither recoverable property nor associated property. Section 245B(1) confers a general discretion on the court to vary or to set aside the order. In my judgment, that discretion is to be exercised on familiar grounds applicable to interlocutory injunction, including non-disclosure, although the exercise of that discretion will be affected by the fact that the ARA is a public authority exercising its functions in the public interest…**[Emphasis Added]"

[44] In exercising this unfettered discretion, the Court considers, among other things, whether the applicant made full and frank disclosure. The duty to make such disclosure is exceptionally high on *ex parte* applications. Munby J emphasized this in **R and Restormel Borough Council** [2007] EWHC 2299 stating that:

> **"Those who seek relief ex parte are under a duty to make a full and frank disclosure. There is a heavy burden on anyone who seeks ex parte relief. In Re S (a Child) Family Division: Without Notice Orders 2001 1 Weekly Law 211 at page 216: "the burden on those who apply for an ex parte relief is, as indicated in Memory Cooperation PLC v Sidhu No. 2 2001 Weekly Law Reports 1443 a heavy one, and, as the same case shows a duty of full and frank disclosure is not confined to the material facts: it extends to all relevant matters, whether matters of fact or of law."**

[45] Equally, the importance of the Applicant satisfying this duty was emphasized by Lord Donaldson MR in **Re M and N (Minors) (Wardships: Publication of Information)** 1990 Family page 229:

> **"Applications for prior restraint orders will normally be made ex parte in the first instance and it cannot be too strongly emphasised that those who seek them are under an obligation to make the fullest and most candid disclosure of all relevant circumstances known to them…"**

Discussion

Lack of evidence

[46] It is not disputed that the Applicant must prove, on the balance of probabilities, that it has reasonable grounds to believe that the property which is the subject of the PFO is the proceeds of crime.

[47] Learned Counsel Mr. Moree submits that Thompson Affidavit No. 1 fell woefully short of discharging the legal and evidential burden of proof required to secure the PFO as it makes grave contentions without any evidential support, specifically:

a. Paragraphs 5 and 8 refer to an association of the 1st, 3rd, 4th and 5th Respondents with PDVSA, a Venezuelan oil company "well known globally for ill repute". According to him, considering PDVSA's alleged 'well known' reputation, one would have expected the Applicant to provide the Court with a litany of evidence in support of this contention. However, the Applicant failed to provide the Court with any evidence to support this contention of ill repute. Furthermore, the test is one of criminality and not one of ill-repute. In this instance, the enforcement authority has provided no evidence in relation to either and the Court must require an assertion of this nature to be substantiated, failing which the PFO must be revoked.

b. The custody arrangement is described, in paragraph 6, as "highly unusual" without providing any details of the nature of the relationship or explanation of its unusualness. Mr. Moree argues that there is nothing unusual about the custodial relationship. Furthermore, Thompson Affidavit No. 1 fails to indicate any connection between the custodial relationship and any proceeds of crime. It is difficult to understand how this baseless contention supports or in any way substantiates the granting of the PFO.

[48] According to Counsel, considering the complete absence of any evidence (documentary or otherwise) to substantiate any of the contentions made by the Applicant, FC Capital submits that there was insufficient evidence before the Court

to justify the granting of the PFO. The Applicant has failed to set out reasonable grounds to believe that the property which is the subject of the PFO were proceeds of crime.

[49] On the other hand, Ms. Kelly contends that the Applicant has presented the Court with sufficiently cogent evidence to establish alleged unlawful conduct justifying the grant of the PFO. She also submits that the Applicant has satisfied the Court that there were and still are, reasonable grounds to believe that the subject property is the proceeds of crime. Thompson Affidavit No. 1 sets out the grounds for such reasonable relief which included the suspicious transaction report by the FIU, the large amount of shares in Venezuelan oil, the link to a notoriously and criminally sanctioned company, PDVSA and the fact that Venezuelan assets are considered high risk in the financial sector regulators and raise red flags.

[50] Ms. Kelly further submits that on, 20 March 2020, Mr. Charles Littrell, the Inspector of Banks and Trust Companies, wrote to Supt. Matthew Edgecombe and Supt. Thompson requesting that the assets of the 1st Respondent be frozen until a thorough investigation of their provenance had been investigated and concluded. In the letter, Mr. Littrell stated his reasonable belief that the source of the funds is suspicious and that they may constitute illicit assets. He relied on the following facts to support that suspicion:

> "(a) they were introduced to the firm via a client arranged by Mr. Molina, who we do not view as honest;
>
> (b) The assets are purported to be Venezuelan, and associated with PDVSA, the Venezuelan oil company. PDVSA's ill repute is well known globally;
>
> (c) The balance sheet of PIBL is approximately $600 million. For them to hold assets two and one-half times their balance sheet, from a new customer, in what is apparently a custody arrangement, is highly unusual; and

(d) The executives of PIBL filed a suspicious transaction report on this matter with the FIU on 24 January 2020. We understand that the FIU placed a freeze on the Venezuelan assets, which has since expired on 29 February 2020, and that the FIU has also referred this matter to you."

[51] In his letter, Mr. Littrell also advised that an investigation into this matter by the Applicant was in the best interest of protecting the reputation of The Bahamas, and would possibly uncover a large cache of illicit assets if these suspicions were verified.

[52] With respect to Mr. Moree's query as to what makes the custody arrangement between the 1st to 4th Respondents and PIBL "highly unusual", the Applicant emphasized that these arrangements were deemed suspicious by the Central Bank of the Bahamas, the FIU and, interestingly, the 2nd Respondent as well. According to Ms. Kelly, these concerns should not be viewed lightly based on the expertise, experience and authority of these regulatory bodies and organizations that oversee and regulate financial institutions and transactions in The Bahamas.

[53] Ms. Kelly further argues that Mr. Littrell's letter shows a clear connection between the five Share Certificates valued at €1,342,228,700.00 held at PIBL and the Promissory Note valued at USD $33,296,552.69, which, despite its expiration, is still relevant as it is still being held at PIBL and is of value and concern.

[54] The Applicant also argues that since the Promissory Note and Share Certificates relate to Venezuelan assets and are associated with PDVSA, it is pellucidly clear why the fact that PDVSA has been subject to United States Sanctions and Executive Orders is relevant to the investigation into the derivation of the funds by the Applicant and to the necessity of the PFO.

[55] The Applicant submits that Mr. Moree states that the 2nd and 3rd Respondents have not been sanctioned and so anything regarding PDVSA is not relevant. According to Ms. Kelly, that contention is clearly misleading and completely ignores the import of such proven connections. She contends that, in the affidavit of Mrs. Jones-

Williams dated 6 July 2020, Mrs. Jones-Williams states, at paragraph 14, that "Learning of the existence of the PFO was quite surprising to FC Capital. FC Capital takes very seriously its KYC requirements and has always discharged its duty to the Securities Commission of The Bahamas in ensuring that all of its clients provide comprehensive information as to the source of funding managed by it." According to Ms. Kelly since FC Capital takes its job so seriously, it should support the PFO as well as the ongoing investigation by the Applicant especially since it values its reputation and adherence to standards of practice in finance. In that vein, several of the parties to the PFO have been served however the 2nd Respondent is the only party which made an application to revoke the Order thus far.

[56] The evidence before Bethell J was that summarized in Thompson Affidavit No. 1. It reflected, in an expanded way, the observations of Mr. Littrell.

Judge's Notes

[57] Mr. Moree correctly submits that the law requires parties making an *ex parte* application to secure and distribute to the parties to the action comprehensive notes of the hearing. He next submits that the Applicant failed to discharge its duty in this regard, much like it failed to (i) serve the application within the time period ordered by the Judge and mandated by POCA, (ii) provide an undertaking in damages; or (iii) secure a return date. He observed that were it not for the Court's industry and diligence, we would not have any record of the hearing of the Applicant's *ex parte* application on 14 May 2020.

[58] According to Mr. Moree, the two (2) sets of notes provided by the Court via email on 16 July 2020, support his contention that there was no evidence tendered by the Applicant to support an arguable case in favour of any activity of the 1st or 2nd Respondent being deemed criminal. On the initial application, the Court seemed to blindly accept the allegations contained in Thompson Affidavit No. 1, without requiring any corroborating evidence to support the contentions. He opines that this would be a dangerous precedent for the Courts to set and would be at odds with the requirements set out in decided authorities.

[59] Mr. Moree references the first note (which is headed Notebook #20 14/5/20) provided the following as the only basis for the granting of the order:

> "Re para.5. – Globally known of ill repute- linked with money laundering and other acts of corruption and linked with P.E.P.
>
> Para. 10 – F.I.U. got freezing order for 5 days pursuant to 4(2)(c) of FIU Act, Ch. 367 on 20.2.20 to 24.2.20."

[60] According to Counsel, this is startling considering the nature of the relief being sought. Bethell J. seems to accept without any evidence in support, a link with money laundering and other acts of corruption and the Respondents. There is absolutely no evidence of any connection with any such activity relating to the Respondents in evidence before this Court. If the PFO is allowed to stand, this would commend a practice of freezing assets and possibly causing irreparable damage to individuals on the mere statement of an affiant from a law enforcement agency. This would be completely inconsistent with the authorities and render the evidential burden in such applications nugatory.

[61] Mr. Moree argues that the reference to the previously ordered Freezing Order only demonstrates that the Applicant has been unable to find any evidence to support its claims despite investigating the same since February, 2020.

[62] The second note (which is headed Judge's Notes 14/5/20) raises various issues which FC Capital has only now become aware of and which were not raised by Ms. Kelly during the hearing of the Summons:

- "MS. KELLY ASSURES THE COURT THAT THE RESPONDENT BANK IS FULLY AWARE OF THE APPLICATION AND IS NOT CHALLENGING SAME." This is not in evidence and was not raised by Ms. Kelly during submissions at the hearing of the Summons. This is yet another, in what is a long list of non-disclosures, by the Applicant.

- “REQUEST THE FREEZING ORDER URGENTLY ON THE 1,2, 3 AND 4 RESPONDENTS HAVE SOUGHT TO REMOVE FUNDS OUT OF COUNTRY.” There is no evidence of this before the Court and this was not raised by the Applicant in any of its papers or in Ms. Kelly’s oral submissions during the hearing of the Summons. FC Capital finds it remarkable that if this was in fact true, this would not have been included in Thompson Affidavit No. 1 with evidence to support this contention.

- “MS. KELLY STATES IN RESPECT TO PARA 5 OF AFFIDAVIT WHAT SHE MEANS BY GLOBALLY KNOWN FOR ILL REPUTE NAMELY MONEY LAUNDERING AND OTHER ACTS OF CORRUPTION AND LINKED WITH P.E.P.” Mr. Moree reiterates that not one shred of evidence was led in support of this allegation.

- “THE COURT FURTHER ORDERS THAT WITHIN 7 DAYS OF TODAY’S DATE EACH OF THE PARTIES AFFECTED BY THIS ORDER BE SERVED WITH NOTICE OF THE SAME.” This was not included in the Order and did not happen.

[63] Mr. Moree submits that the procedural missteps of the Applicant and the failure of the Court to properly consider the application being made are only more apparent when considering the Judge’s notes.

Analysis and conclusion

[64] The threshold for obtaining a PFO appears to be somewhat low. It is based the “reasonable belief” by the enforcement authority. The test of “reasonableness” is an objective one. The Court must look at the evidence which was in the possession of the enforcement officer at the date that he/she reached his/her judgment. The evidence and circumstances of the enforcement officer must be looked at holistically by the Court in determining whether there was evidence upon which a reasonable investigator having regard to this and exercising his/her mind

accordingly would have entertained a belief that some crime has been committed of which the property in question were proceeds therefrom.

[65] To make a successful application for a Property Freezing Order, the enforcement officer must be confident that there are reasonable grounds for believing that the property in question is proceeds of criminal activities. The legal burden at this stage appears to be far lower that the balance of probabilities because of ongoing investigations.

[66] The investigation commenced in March 2020 when Mr. Littrell, the Inspector of Banks and Trust Companies, wrote to Supt. Matthew Edgecombe and Supt. Thompson requesting that the assets of the 1st Respondent valued in excess of €1.3 billion in Share Certificates and a Promissory Note of $US33 million be frozen until a thorough investigation of their provenance has been established and concluded. He relied on the following facts to ground his suspicion namely:

1. The 1st Respondent was introduced to the firm via a client arranged by Mr. Molina, whose honesty is questionable;

2. The assets are purported to be Venezuelan, and associated with PDVSA, the Venezuelan oil company, well known globally for its ill repute;

3. The PIBL balance sheet is approximately $600 million. For them to hold assets two and one-half times their balance sheet, from a new customer, in what is apparently a custody arrangement, is highly unusual; and

4. The executives of PIBL filed a suspicious transaction report on this matter with the FIU on 24 January 2020. We understand that the FIU placed a freeze on the Venezuelan assets, which has since expired on 29 February 2020, and that the FIU has also referred this matter to you."

[67] In my judgment, on a balance of probabilities, the Applicant has made out a good arguable case for the continuation of the PFO despite the fact that there has been some non-disclosure, not material, in my view. This is comprehensively discussed below.

Non-disclosure: the law

[68] Section 51 of POCA (similar to section 245A of the Proceeds of Crime Act, 2002 (UK)) confers the jurisdiction on the Court to make a property freezing order pursuant to an application by the Enforcement Authority which satisfies the Court that there is a good arguable case that the property is or includes recoverable property or is associated property: **National Crime Agency v Leahy and others** [2020] EWHC 1242 (QB) at para 4.

[69] The learned authors of Gee on **Commercial Injunctions,** 5th ed. (2004), para. 9.001.state:

> **"Any applicant to the court for relief without notice must act in the utmost good faith and disclose to the court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice, and if so, on what terms. This is a general principle which applies to all applications for relief to be granted on an application made without notice. It applies not just to disclosure of facts but to absolutely anything which the judge should consider."** [Emphasis added]

[70] In **National Crime Agency v Simkus and others; National Crime Agency v Khan and others; National Crime Agency v Jardine and others** [2016] 1 WLR 3481, the Court expressed that the duty of disclosure remains the same as the general duty in civil proceedings on an *ex parte* application. Edis J at para, 27 stated:

> **"The duty of disclosure generally and in its impact on the need for a hearing**
>
> **27 There is a general duty in civil proceedings on a party applying for a without notice order to make full and candid disclosure of all material facts. This applies to paper applications and is an important safeguard in all without notice applications. A litigant pursuing a purely private interest in litigation is required to fulfil this duty, and the obligation is no less on a**

public authority such as the NCA pursuing the public interest. The principles applicable in ordinary litigation were explained in Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350, 1356–1357, per Ralph Gibson LJ (omitting his references to authority):

> **"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.**
>
> **"(1) The duty of the applicant is to make a 'full and fair disclosure of all the material facts' …**
>
> **"(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers …**
>
> **"(3) The applicant must make proper inquiries before making the application … The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.**
>
> **"(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant …**
>
> **"(5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty' …**
>
> **"(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.**
>
> **"(7) Finally, <u>it 'is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded' … The court has a discretion,</u>**

> **notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms 'when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed' …"** [Emphasis added]

[71] Further, at para 30, Edis J, referred to **In re Stanford International Bank** [2011] Ch 33 , para 191 where Hughes LJ gave a classic account of the duty of disclosure stating:

> **"Whilst I respectfully agree with the view expressed by Slade LJ in Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350 that it can be all too easy for an objector to a freezing order to fall into the belief that almost any failure of disclosure is a passport to setting aside, it is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. It consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. That duty applies to an applicant for a restraint order under POCA in exactly the same way as to any other applicant for an order without notice. Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal dealings is considerable. The prosecutor may believe that the defendant is a criminal, and he may turn out to be right, but that has yet to be proved. An application for a restraint order is emphatically not a routine matter of form, with the expectation that it will routinely be granted. The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously. In effect a prosecutor seeking an ex parte order must put on his defence hat and ask himself what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge. This application is a clear example of the duty either being ignored, or at least simply not being understood. This application came close to being treated as routine and to taking the court for granted. It may well not be the only example."** [Emphasis added]

[72] In addition, at para. 31, the learned judge cited the case of **Director of the Assets Recovery Agency v Kean** [2007] EWHC 112 (Admin) where a property freezing

order obtained by the Asset Recovery Agency was not discharged despite it having been obtained by non-disclosure and innocent misrepresentation at a without notice hearing, because the Agency's misjudgment had not been serious.

Discussion and conclusion

[73] Learned Counsel Mr. Moree submits that, in addition to the complete lack of evidence in support of the *ex-parte* Summons, the Applicant made various misrepresentations and/or non-disclosures in Thompson Affidavit No. 1 completely failing to satisfy the high threshold for the duty of full and frank disclosure.

[74] He next submits that paragraph 8 of Thompson Affidavit No. 1 refers to a Promissory Note but fails to exhibit a copy of same. The Promissory Note is expired and was expired on the date of the *ex parte* application. This was not identified to the Presiding Judge and he submits that this represents a material non-disclosure. This is clearly a fact that should have been disclosed to the Court and the Applicant ought to have sought to substantiate this fact (among others) in Thompson Affidavit No. 1.

[75] Further, Thompson Affidavit No. 1 is completely misleading as to FC Capital's involvement in the overall Fund structure. Paragraph 7 states that the 1st Respondent holds shares in the name of FC Capital. This is wholly inaccurate as FC Capital has no involvement in the ownership of the shares in question. The only involvement of FC Capital is as the Fund manager. This must have been known to the Applicant, yet it was misrepresented to the Court in Thompson Affidavit No. 1.

[76] It is a fact that the Promissory Note, referred to in paragraph 8 of Thompson Affidavit No. 1, was not before Bethell J but it was forwarded to this Court via email with other documents. These documents show a transfer of the Promissory Note from the 3rd Respondent to the account of the 4th Respondent, which is held by PIBL. I agree with Ms. Kelly that the fact that the Promissory Note has expired is not relevant. It is still being held in the vault at PIBL. It shows a nexus between the

1st and 2nd Respondents with PDVSA. This connection is relevant as it relates to the source of the funds in the account situate at PIBL and the reasons for the suspicions by the Central Bank, the FIU and the Applicant. As Ms. Kelly points out, the date of maturity of the Promissory Note requires that payments must be made to satisfy the debt owed. So, the only possible effect of the expiration would mean that PDVSA would have settled its debt with the 3rd Respondent, which is owned by the 1st Respondent, again pointing to the source of the funds in the account being derived from PDVSA, which has been sanctioned globally for allegations of corruption, mismanagement, embezzlement, bribery among other offences. To my mind, the expiration of the Promissory Note does not advance the position of FC Capital but supports the Applicant's contentions.

[77] As reiterated, it is common ground that an injunction could be discharged if there is material non-disclosure. A consequence of applications for interim injunctions being made without notice is that the applicant who seeks the injunction is under a duty to give full and frank disclosure of any defence or other fact going against the grant of the relief sought. The case of **Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac** [1917] 1 K.B. 486, 514, per Scrutton LJ. is supportive of the point that the applicant has a duty to make "a full and fair disclosure of all the material facts." The duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made inquiries. *The extent of the inquiries that will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application and (b) the order for which the application is made and the probable effect of the order on the defendant*.[Emphasis added]

[78] *In deciding in a case where there has been non-disclosure whether or not there should be a discharge of an existing injunction and a re-grant of a fresh injunction, it is important that the Court assesses the degree and extent of culpability with regard to the non-disclosure, and the importance and significance to the outcome*

of the application for an injunction of the matters which were not disclosed to the Court. If the duty to disclose is not observed, the Court may discharge the injunction.[Emphasis added]

[79] In addition, a Court must take all the relevant circumstances into account when it is determining the consequences for the breach of the duty to make full and frank disclosure. The circumstances should include the gravity of the breach. It should also include the excuse or explanation offered and the severity and duration of the prejudice occasioned to the defendant. This latter should involve the consideration whether the consequences of the breach were remediable and were in fact remedied.

[80] Suffice it to say, the discharge of the order is not automatic on a finding of any material non-disclosure. The Court has a discretion to discharge the order or not to discharge it. It may also decide to grant fresh injunctive relief if it determines that justice requires it to protect the applicant. The Court should note that, by its very nature, an application without notice usually requires a lawyer to take instructions and prepare drafts and pleadings in some haste. The Court should weigh this against the need to uphold and enforce the duty to disclose as a deterrent to those who withhold material facts. Ultimately, an interlocutory injunction may be discharged for serious and culpable non-disclosure.

[81] Juxtaposing the law to the facts of the instant application, I am of the considered opinion that the non-disclosure of the Promissory Note is not material enough to result in a discharge of the PFO. FC Capital has not advanced any evidence to show that they were prejudiced by the non-disclosure of the Promissory Note at the ex *parte hearing.* In any event, FC Capital was provided with the Promissory Note at this hearing.

[82] As the cases show, the Court has a discretion, notwithstanding proof of material non-disclosure, whether or not to discharge or continue the order, or to make a

new order on terms “when the whole of the facts, including that of the original non-disclosure, are before it” [the court].

[83] In my opinion, the complaints by FC Capital on material non-disclosure do not warrant a discharge of the PFO.

Requests and sanctions

[84] The Court asked the Applicant to provide the Requests for assistance referred to in paragraph 19 of Thompson Affidavit No. 2. The Applicant provided them on 13 and 14 July 2020 respectively.

[85] Mr. Moree submits that the Applicant has provided no good reason why these documents could not have been placed before Bethell J. on 14 May 2020 when the PFO was granted or prior to the substantive hearing of the Summons. According to him, the Applicant’s continuous failure to provide the Court and the Respondents with documentation in support of their application is disturbing and contrary to the conduct which the authorities require from parties seeking injunctive relief of this kind. He argues that the Applicant is burdened with providing the Court with any and all documentation which may be relevant to the application and it has failed to do so at every juncture of these proceedings.

[86] In addition, Mr. Moree next submits that it is most unusual for documents to be provided to the Court after the fact. For obvious reasons, the Court requires all documentation which the parties intend to rely upon to be before it at the date of the hearing. This allows the Court to fully consider them within the context of the submissions made. FC Capital submits that the flippant approach of the Applicant amounts to an abuse of process, especially when considering the nature of the application and the weight given (if any) to these documents should reflect this.

[87] FC Capital also contends that the dates of the Requests are troubling. On the Applicant’s own evidence, the investigation into the Respondents commenced in February 2020 (see paras 2 & 10 of Thompson Affidavit No. 1). The Requests to the Director of Interpol, ARIN-CARIB and the US Embassy are dated 24 June, 26

June and 7 July 2020 respectively. Accordingly, these Requests were only made after FC Capital would have written to the DPP expressing its concerns as to the complete lack of evidence to support the granting of the PFO.

[88] FC Capital further asserts that during the hearing of the Summons, it was insinuated that an active investigation was being diligently pursued. The evidence shows that it took the Applicant four months from the commencement of the investigation to make these Requests and appears to have only done so after correspondence was sent to the Applicant alerting it of the complete lack of evidence to sustain the PFO. The Applicant is expected to move expeditiously with its investigations but it is clear from the evidence that it has failed to do so. FC Capital submits that the Applicant's conduct demonstrates a complete lack of urgency and supports their contention that there is no serious fear of wrong doing which would require urgent injunctive relief.

[89] I agree that the investigation into the Respondents and the Requests made to Interpol, ARIN-CARIB and the US Embassy seemed to have been propelled only after FC Capital intervened as an Interested Party in these proceedings. That said, the Court takes judicial notice of the fact that the PFO was obtained in the midst of COVID-19 when emergency orders were in place; when The Bahamas and indeed the world were in absolute mayhem and almost everything was at a standstill. The pandemic is still real and, as we move forward, the Court must be cognizance of this realism. Therefore, I cannot hold the Applicant culpable for the apparent delay in actively investigating this matter. That said, I will encourage the Applicant to give this matter the gravity it deserves.

[90] Additionally, FC Capital submits that the reference to the US executive orders and sanctions does not assist the Applicant since it does not relate to any of the Respondents and it is a matter of record that no sanctions currently exist against the First and/or Second Respondents. Accordingly, the Applicant has failed to show any connection with the Respondents and any other entity or person which would support an arguable case of criminal or terrorist activity.

[91] On this point, I pause to reflect a bit on POCA. It is not a penal statute. It does not possess the commonly known aspects of a criminal legislation in that no offence is created. No one is charged with an offence nor is anyone tried for an offence. The Respondents or the Interested Party are not on trial. However, what it does is to enable the Court to grant orders, such as property freezing orders, where there is a reasonable ground for believing that the property is derived from the proceeds of criminal conduct. Its thrust is to deprive ownership, possession and control of those properties from those who hold them at the time of initiating proceedings under POCA. The proceedings are *in rem* and even hearsay evidence may be admissible.

[92] Now, although the burden of proof rests with the enforcement authority, it appears to me that under POCA, if you cannot prove that the origins of the property were gainfully obtained, you may lose it. These new powers give the enforcement authority the ability to freeze bank accounts and apply for forfeiture orders.

[93] The threshold is low: reasonable belief. The Applicant, in my view, has met the threshold requirement. Although very persuasive in his submissions, I am unable to agree with Mr. Moree that the Applicant has failed to show any connection with the Respondents and any other entity or person which would support an arguable case of criminal or terrorist activity. In my judgment, Mr. Littrell's letter demonstrates a connection between the Respondents and PDVSA.

Free-standing injunction

[94] The Court invited the parties to make submissions on whether or not a free-standing injunction can be obtained under POCA. This is because the Court is all too familiar that a free-standing injunction is unknown to the laws of The Bahamas unless there is a substantive claim. The Court in **Dramiston Ltd. and others v. Financial Intelligence Unit** [2018] 1 BHS J. No. 147 stated at paragraph 3 of that Judgment (unreported):

> **"3. Since there is no substantive cause of action, the Court cannot grant a free-standing injunction which is unknown to the laws of The**

Bahamas: Meespierson (Bahamas) Ltd v Grupo Torras S.A. (No. 41 of 1998) and Bimini Blue Coalition Limited v Rt. Hon. Perry Christie Prime Minister et al (SCCivApp Side No. 35 of 2014) applied."

[95] Mr. Moree submits that, as can be seen in the case of **Director of the Assets Recovery Agency v Kean** [2007] EWHC 112, the discretion of the Court under POCA in relation to Property Freezing Orders '*is to be exercised on familiar grounds applicable to interlocutory injunctions'*. Mr. Moree further submits that without the legislation expressly providing that the position is different with respect to a property freezing order, he sees no reason to infer that the established law should be altered to accommodate a property freezing order. According to him, the fact that POCA allows the granting of the property freezing order, does not obviate the need for an applicant to establish a cause of action or claim. In **Volpi v. Delanson Services Limited and another** [2019] 1 BHS J. No. 54, the applicant sought a Mareva injunction in support of arbitral proceedings outside the jurisdiction. Under the Arbitration Act S.55, the parties could apply to the courts of the seat for injunctive relief in support of the proceedings outside the jurisdiction. However, the Bahamian Supreme Court refused to grant such relief on the basis that there is no law in The Bahamas which supports a free-standing injunction. Winder J applied **Meespierson** as well stating that:

> **"19 The defendants' argue, and I agree, that this court is not empowered to grant free standing interim injunctive relief in support of legal proceedings taking place outside of The Bahamas. In Meespierson (Bahamas) Limited and others v Grupo Torras SA and another - 2 ITELR 29 the Court of Appeal held that there was no jurisdiction in the Supreme Court under the Supreme Court Act to grant a free standing Mareva injunction in aid of English proceedings. According to Gonsalves-Sabola P., page 34:**
>
> > **Certainly s 25 of the English 1982 Act made a significant inroad in the The Siskina principle by allowing a free-standing Mareva in aid of foreign (Contracting State) proceedings brought or to be brought. Nowhere in Bahamian statute law is there a comparable enactment to s 25 of the English 1982 Act and therefore the conclusion seems irresistible that the Bahamian Parliament has not yet considered that public policy calls for law reform in the shape of the English legislation. The following question arises: could it be**

> **said that where the Bahamian Parliament, unlike its English counterpart, has omitted to reform the law by thus widening the power of the courts to grant Mareva relief, the courts may themselves, as a matter of inherent jurisdiction, effect the desired reform? To pose the question is to answer it. As a matter of first principles, a court may not arrogate to itself legislative functions. For this court to apply a rule of law that is inconsistent with The Siskina without the authority of legislation to that end, simply because it is considered desirable to achieve the result produced by s 25 of the English 1982 Act, is an impermissible aberration from the judicial function."**

[96] Mr. Moree argues that in light of the forgoing, there is no basis in Bahamian law for a free-standing injunction and this Court should not permit the same with respect to a property freezing order.

[97] On the other hand, Ms. Kelly reminds the Court that the regime under POCA is simply different from Mareva freezing orders. According to her, POCA specifically makes provisions for the enforcement authority to obtain property freezing orders as a means to preserve certain property where the requirements for making such an application are met. There is no requirement in the Act that the application for a freezing order must be precipitated by any application. The purpose of POCA is to consolidate and strengthen measures to recover the proceeds and instrumentalities of crime and to combat identified risks. Section 51 of the Act allows for property to be frozen where there are reasonable grounds for believing that the subject property is proceeds of crime, or instrumentalities, or terrorist property. In these circumstances, the Applicant made an application to preserve the subject property for the purposes of an investigation to be launched into its derivation and legitimacy. If the funds were in fact found to be the proceeds of crime, or instrumentalities, or terrorist property, then the Applicant intended to make an application for a civil forfeiture order.

[98] Ms. Kelly submits that POCA makes provision for the Court to grant free-standing freezing orders. She also submits that the majority of the cases relied on by the FC Capital in their response were decided before the enactment of POCA and all

of them applied to Mareva Injunctions, which are quite different from the Property Freezing Orders under POCA regime and should not be confused. Consequently, they do not apply to these proceedings and the statute is clear as to the authority to grant a free-standing property freezing order.

[99] As I see it, the provisions under POCA represent a departure from the typical Mareva-type freezing orders. I therefore agree with Ms. Kelly that when considering whether or not to grant a property freezing order pursuant to POCA, one cannot strictly apply the Mareva principles as POCA is a peculiar piece of legislation which uniquely provides for the process of obtaining a PFO in the particular circumstances expressed therein.

Certificate of urgency

[100] The requirements for applying for a PFO are laid out in section 51 of POCA and it appears that nowhere in that section is there a requirement for a certificate of urgency.

[101] As Ms. Kelly properly submits, it has long been established that an act of parliament will overrule the common law if there is a common law principle and an act which conflict relative to the same area of law. Statutes are enacted by Parliament, which is the supreme lawgiver, and judges must follow statutes. The supremacy of parliament is one of the basic tenets of Bahamian law, together with the separation of powers which defines a clear distinction between the legislative power of the Members of Parliament who are elected by the citizens, and the judicial power of the judges, who are unelected. Therefore, parliament can override the decisions made at common law by enacting legislation to cover an area of law previously covered by common law. It is only when a statutory provision mirrors the common law, that the common law provision can be applied in those circumstances. POCA provides for applications relative to property freezing orders and lays out the procedure in which such applications must be made. In the circumstances, once the requirements of the Act have been met, the application is properly made and there is no need to resort to common law principles. Therefore,

there is no requirement to obtain a certificate of urgency in relation to this application. I agree.

Conclusion

[102] For all of the reasons given above, I will dismiss the Summons filed on 6 July 2020 by FC Capital to revoke the *Ex parte* Order made by Bethell J. In reviewing the Order, this Court has the power to either discharge, issue a new order or amend the existing order. I will make some minor amendments to the *Ex Parte* Order which will now read as follows:

> **"AND UPON BEING SATISIFED that the five (5) share certificates #001, #002, #003, #004 & #005 (Fund License Number: 10-P-206; ISIN: BSP879061062) valued at €1,342,228,700.00 held by the 5th Respondent and the Promissory Note valued at USD $33,296,552.69 held by the 4th Respondent in Account #13640666.1008 at Private Investment Bank Limited ("the 5th Respondent") situated at New Providence, Bahamas are the 1st Respondent's or another's proceeds derived from crime or was intended to be used in criminal conduct and needs to be frozen while an intelligence led investigation continues:**
>
> **IN EXERCISE of the powers conferred on me by Section 51(1) & (2) of the Proceeds of Crime Act, 2018;**
>
> **AND THE APPLICANT undertakes to abide by any order as to damages caused to the Interested Party by the granting or extension of this Order**
>
> **IT IS ORDERED: Henrique Jose Rodriguez Guillen, Suelopetrol Energy Fund Limited, Suelopetrol Exploracion y Produccion, S.L. and Ruve Beratung & Treuhand AG or any other person is prohibited from dealing with the Share Certificates, Promissory Note and monies held inn any accounts in Private Investment Bank Limited, situated at New Providence, The Bahamas (hereinafter "the Bank") in the name of Henrique Jose Rodriquez Guillen; Suelopetrol Energy Fund Limited, Suelopetrol Exploracion y Produccion, S.L. and Ruve Beratung & Treuhand AG;**
>
> **AND IT IS FURTHER ORDERED that:**
>
> 1. **The name of the 2nd Respondent is amended from "Suelopetrol Energy Funds Limited" to "Suelopetrol**

Energy Fund Ltd."

2. **The parties are to appear before the Court on the 24th day of September, A.D., 2020 at 3:30 p.m. for the Applicant to report on the progress of the investigation thus far.**

3. **Costs are reserved.**

4. **The parties shall have liberty to apply.**

[103] Last but not least, I am immeasurably grateful to both Counsel for their industry and helpful submissions in this developing area of law.

Dated this 30th day of July, A.D. 2020

Indra H. Charles
Justice