[2013] JMCC Comm. 7

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMERCIAL DIVISION

CLAIM NO. 2013 CD00024

BETWEEN	**TRI-STAR ENGINEERING COMPANY LIMITED**	**CLAIMANT**
AND	**ALU-PLASTICS LIMITED**	**1ST DEFENDANT**
AND	**PAMELA JOSEPHS**	**2ND DEFENDANT**
AND	**JUDITH JOSEPHS**	**3RD DEFENDANT**

Mr. Jerome Spencer and Mr. Hadrian Christie instructed by Patterson Mair Hamilton, Attorneys-at-Law for the Claimant.

Mr. Maurice Manning, Ms. Grace Lindo, and Ms. Michelle Phillips, instructed by Nunes Scholefield De Leon & Co., Attorneys-at-Law for the Defendants.

IN CHAMBERS

HEARD: 21st and 25th March, 2nd, 12th, 6th and 24th April 2013.

CIVIL PRACTICE AND PROCEDURE-FREEZING ORDER- WHETHER DISCHARGE OF INJUNCTION ON GROUNDS OF NON-DISCLOSURE OR WHETHER INJUNCTION NOT TO BE CONTINUED UNTIL TRIAL- WHETHER GOOD ARGUABLE CASE OF BREACH OF TRUST OR BREACH OF CONTRACT-WHETHER CLAIMANT ENTITLED TO

PRODUCE WITHOUT PREJUDICE CORRESPONDENCE FROM DEFENDANT AT EX PARTE HEARING- WHETHER RISK OF DISSIPATION OF ASSETS- HARDSHIP TP DEFENDANT- WHETHER ORDER JUST AND CONVENIENT IN ALL THE CIRCUMSTANCES

Mangatal J:

[1] The Claimant Tri-Star Engineering Limited ("Tri-Star") is a company duly incorporated under the Companies Act of Jamaica, and is a civil engineering company specializing in building construction and project management.

[2] The 1st Defendant Alu-Plastics Limited ("Alu-Plastics") is a company duly incorporated under the Companies Act of Jamaica and its core business is described in its Articles of Incorporation dated March 23, 2007 as including the manufacture and distribution of windows, doors and other hardware items.

[3] In its Particulars of Claim, Tri-Star states that at all material times Alu-Plastics was controlled and operated by the 2nd Defendant Ms. Pamela Josephs and the 3rd Defendant Ms. Judith Josephs (collectively "the Josephs"), who were its only two directors. The Josephs are mother and daughter respectively. They were also the majority shareholders of Alu-Plastics.

[4] On the 1st of March 2013 I granted Tri-Star ex parte freezing orders against Alu-Plastics and the Josephs until the 7th March 2013. This order has been subsequently varied and extended up until the 24th April 2013. This is the inter partes hearing of the application by Tri-Star for these orders to be further extended until trial. On the 15th of March 2013 the Defendants filed an application which seeks, amongst other relief, to have the injunction first granted on the 1st March 2013 as extended and varied, discharged or allowed to lapse without further order. There were a number of Affidavits filed on both sides. It is with regard to these two applications that I now deliver my decisions.

[5] The Defendants have also filed an application to stay these proceedings pursuant to section 5 of the Arbitration Act pending the submission of the matters in dispute in this Suit to arbitration. However, I indicated to the parties that I will deliver my

ruling on that issue separately as there were aspects of that application that have not yet been completed. For completeness, I should also add what transpired on the morning of the 2nd of April 2013. On that date, these applications were already part-heard, with Mr. Spencer and Mr. Christie, the Attorneys appearing for Tri-Star having completed their submissions. Mr. Manning was well underway in his submissions on behalf of the Defendants, when Mr. Spencer indicated that that very morning an Affidavit, the 4th Affidavit of Mr. Derrick Clarke, a director and shareholder of Tri-Star, had been filed. Mr. Spencer stated that he was seeking leave to rely upon it. The application was strongly opposed by Mr. Manning. I refused this extremely late and unusual application on the basis that it would not be fair to the Defendants to allow the introduction of new evidence after the application hearings had already started, and which would necessitate re-opening of Tri-Star's case. Further, one of the matters which Mr. Spencer states that this Affidavit sought to address had to do with a claim for liquidated damages, and the Defendants having raised the issue of the lack of an Architect's Certificate being before the Court. In my judgment, this was not an issue which should have taken Tri-Star by surprise and it arises on the Claimant Tri-Star's own case. Most importantly, a freezing order is a draconian measure, which prevents the Defendants exercising certain rights and freedoms. In my view admitting this further evidence would inevitably result in delays, as in addition to involving Tri-Star essentially re-opening the case, I would have to allow the Defendants an opportunity to respond. This in my view would be unfair to the Defendants in all of the circumstances, having regard to the stage we had reached.

BACKGROUND

[6] On or about December 21, 2011, Tri-Star entered into a contract ("the Main Contract"), with ATL Automotive Limited ("the Employer") to construct an "Audi Showroom" and a "Volkswagen Showroom" at 1c Oxford Road, Kingston 5, ("the worksite").

[7] Tri-Star sub-contracted Alu-Plastics on or about March 20, 2012 to purchase and install curtain walls, aluminium windows and doors ("the material") for the Main

Contract. The terms of this agreement are contained in the duly signed Sub-Contract Agreement dated 20th March 2012.

THE CLAIM BY TRI-STAR

[8] Tri-Star pleads that the following were material conditions of the Sub-Contract:

a. Alu-Plastics should procure(purchase, fabricate, import and transport to the worksite) and install the material for the project; and
b. Tri-Star should provide Alu-Plastics with the funds required to procure the material.

Breach of Trust and Breach of Contract against Alu-Plastics

[9] Tri-Star states that on or around April 16, 2012, it paid over the mobilization sum of $20,217,252.50 to Alu-Plastics in the form of an advance. According to Tri-Star, it was expressly agreed that this mobilization payment would be applied for the exclusive purpose of procuring the material for the project. Once the material was obtained, Tri-Star would then be repaid by equal deductions from the sums approved for payment to Alu-Plastics under the Sub-Contract.

[10] Tri-Star avers that, in the circumstances, the sum of $20,217,252.50 advanced to Alu-Plastics was held on trust by Alu-Plastics. In breach of the agreement and the trust, Alu-Plastics failed to:

a. Purchase all of the required material from Guatamala –based supplier, Aluver Fenestracion Limited ("Aluver"). Alu-Plastics only paid Aluver the sum of $9,729,110.70 and withheld the balance of $10,488,141.80 without any legal justification;
b. Repay Tri-Star the sum of $10,488,141.80.

Tri-Star's averment continues that in the premises, the purpose for which the sum of $10,488,141.80 was loaned to Alu-Plastics failed and it was liable to repay that sum to Tri-Star.

[11] Between October 25 and November 30, 2012, Tri-Star claims that it completed the purchase of the material in order to complete the Main Contract by paying Aluver the US dollar equivalent of J$10,488,141.80.

[12] Tri-Star alleges that as a result of Alu-Plastic's breach of contract and breach of trust, it has suffered the loss of its $10,488,141.80.

Further Damages for Breach of Contract

[13] Tri-Star claims that under the Sub-Contract, Alu-Plastics is deemed to have knowledge of the terms of the Main Contract and agreed to :

a. proceed with the procurement and installation of the material with reasonable diligence;
b. carry out and complete the procurement and installation of the material in accordance with the Main Contract, which required the entire project to be completed by October 31, 2012, and
c. compensate Tri-Star for any loss it suffers as a result of its failure to carry out the works under the Sub-Contract.

[14] It is Tri-Star's complaint that, in breach of its agreement to exercise reasonable diligence, Alu-Plastics failed to submit its purchase order to the supplier in a timely manner, causing Aluver to delay the manufacturing of the material. It was argued that this ultimately caused the project to overrun the October 31, 2012 completion date.

[15] Tri-Star alleges that as a result of Alu-Plastics' breach of contract, Tri-Star incurred liability for liquidated damages at the rate of $87,000.00 per day from December 23 2012 and continuing. The liability for liquidated damages was an express term of the Main Contract which was known to Alu-Plastics and appended to the Sub-Contract.

THE ALLEGATION OF THE JOSEPHS' DISHONEST ASSISTANCE WITH ALU-PLASTICS' BREACH OF TRUST

[16] Tri-Star also alleges that the Josephs dishonestly assisted Alu-Plastics to breach the terms of the resulting trust and to withhold the trust money from Aluver and Tri-Star.

Against Alu-Plastics

[17] Tri-Star claims, amongst other matters, against Alu-Plastics:

a. The sum of $10,488,141.80 for breach of trust.
b. Alternatively, the sum of $10,488,141.80 for breach of contract.
c. The sum of $5,133,000.00 and continuing at the rate of $87,000.00 per day being further damages for breach of contract.
d. Interest at 1% above the average commercial banks' prime lending rate for such period as this Honourable Court deems fit.

Against the Josephs

[18] Tri-Star claims, amongst other matters, against the Josephs:

a. The sum of $10,488,141.80 for the dishonest assistance of Alu-Plastics' breach of trust.
b. Interest at 1% above the average commercial banks' prime lending rate for such period as this Honourable Court deems fit.

THE BASIS FOR THE GRANT OF A FREEZING ORDER

[19] In order to qualify for the grant of mareva relief the Claimant must show:

(a) A good arguable case;
(b) That there is a real risk of dissipation of the Defendants' assets or that those assets will be removed from the jurisdiction so that a judgment or award in favour of the Claimant may go unsatisfied.

See the well-known **Ninemia Maritime Corp.** case, reported at [1983] 1W.L.R. 340.

[20] For the relief to be granted it must be just and convenient for the Court to grant the relief –sub-section 49(h) of the Judicature Supreme Court Act. Thus, even where a Claimant shows a good arguable case and risk that without the injunction a judgment may go unsatisfied, the court has a discretion to exercise, as with any other equitable relief, having considered all of the circumstances of the case.

[21] I cannot let the opportunity pass to make an observation. Mareva injunction applications do sometimes, and have in our jurisdiction, as well as in others, had a tendency to become unwieldy, taking up a disproportionate amount of time and at great cost. The court has to look carefully at the circumstances and carry out the balancing act with as much economy and precision as it can. The court also has to be aware of, and attempt to guard against this tendency which occurs in some cases. At page 365 of the well-known work of Steven Gee, Q.C., **Commercial Injunctions**, 5 Edition, paragraph 12.051, and footnote 11 thereto, it is stated:

" 12.051

......

> **Concerns have been raised that some Mareva cases may get out of hand, with costs being incurred that are out of proportion to the end sought to be achieved and there being delay to the resolution of the merits of the case because of interlocutory applications ...** [11]
>
> **(**footnote 11**)- In the annual statement made by the judge in charge of the Commercial List on July 31, 1992, Evans J. referred to cases in which the "pursuit of assets acquires its own momentum and the Mareva tail begins to wag the dog, meaning the action itself ....The plaintiffs' need to obtain a judgment seems to be overlooked-perhaps deliberately....."**

[22] I am not for a moment saying that that is the situation in the instant case. I merely make the observation because I have had the same experience here in our courts and also because I think it is part of the balancing act that the court must perform. It is part of its managerial role to be carried out alongside the exercise of its discretion to see that the jurisdiction is guarded carefully, and only exercised in cases that truly justify the procedure.

THE CIRCUMSTANCES UNDER WHICH A COURT WILL DISCHARGE OR MODIFY A FREEZING ORDER

[23] A court may discharge or modify a freezing order where the Claimant failed to give full and frank disclosure of all material facts known to the Claimant or facts which he would have known if he had made proper enquiries. **Brink's-Mat v. Elcombe** [1988] 3 All E.R. 188, an oft-cited decision of the English Court of Appeal, cited by Counsel for both sides, provides useful guidance. See also the local decisions of **Half Moon Bay Ltd. v. Levy** JM 1997 SC 32, per Wolfe CJ, and **Jamculture Ltd. v. Black River Morass Development Co. Ltd.** (1989) 26 J.L.R. 244, and **Mossel (Jamaica) Ltd. v. Thrush** (2004) Claim No. HCV 2004 2087, per Sykes J.

[24] The head note in **Brink's Mat** states as follows:

> **"A person applying ex parte for a Mareva injunction is under a duty not only to make a full and fair disclosure of all material facts known to him but also to make proper inquiries for any relevant additional facts before making the application, since not only facts known to the applicant but also any additional facts which he would have known if he had made proper inquiries will determine whether there has been material non-disclosure. The extent of the inquiries which will be deemed to be proper will depend on all the circumstances of the case, including the nature of the applicant's case when making the application and the probable effect of the order on the defendant. Whether a 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 that fact to the issue to be decided by the judge on the application. The fact that the non-disclosure was innocent, in the sense that it was not known to the applicant or that its relevance was not perceived, is an important, but not decisive, consideration in deciding whether to order an immediate discharge. However, the court has a discretion, notwithstanding proof of material non-disclosure which justifies the**

immediate discharge of an ex parte order, to continue the order or to make a new one on terms."

[25] In the International Edition of the work **Commercial Litigation: Pre-Emptive Remedies**, 2005, cited by Mr. Manning on behalf of the Defendants, there is a paragraph A1-466, which has a sub-heading "Do not overload the court". I consider this passage most instructive. It is there stated:

> **"A1-466 Do not overload the court. There is a distinction between making full and frank disclosure and flooding the court with unnecessary documents. Thus, in *National Bank of Sharjah v. Dellbourg*** (The Times, December 24, 1993, C.A.) **, Lloyd L.J. said:**
>
> ***The material facts at the ex parte stage were those which were necessary to enable the judge to exercise his discretion properly and fairly between the parties, bearing in mind that he had not at that stage heard the defendants' side of the case, and bearing also in mind the hardship and inconvenience which a Mareva injunction caused.***
>
> ***But the place to disclose the facts, both favourable and adverse, was in the affidavit and not in the exhibits. No doubt it would usually be convenient to exhibit a few key documents where it was necessary to do so to explain the case.***
>
> ***But the recent tendency to overload the case at the ex parte stage and to burden the judge with masses of documents in case something was left out ought to be firmly resisted.***
>
> ***If the facts were not fairly stated in the affidavit it would not assist the plaintiff to be able to point to some exhibit from which the fact might be extracted.[Editor's emphasis.]"***

[26] In its grounds in support of the application, the Defendants stated that the Claimant failed to disclose material facts, not limited to the following:

i. That the Sub-Contract provides that disputes between Tri-Star and Alu-Plastics were to be submitted to arbitration.

ii. That Alu-Plastics is entitled to payments in respect of work performed under the Sub-Contract.

iii. That Alu-Plastics gave notice of its removal from premises at 284 Spanish Town Road and provided notice of its new address.

iv. Misrepresenting to this Honourable Court its ability to make contact with Alu-Plastics.

[27] In their written submissions, the Defendants have also added the following:

v. Tri-Star should have informed the court that although no further written correspondence was received by Tri-Star after January 21, 2013, the Defendants' Attorneys-at-Law were in telephone communication with the Claimant's Attorneys-at-Law in relation to this matter.

vi. No mention is made that Alu-Plastics would be entitled to compensation for its work under the contract in addition to damages. In the written submission it is stated "..This is not an insignificant omission. It is a fact that this was the 1st Defendant's contention, regardless of whether it was accepted or not. It was simply not enough to leave it to one of 200 pages of exhibits in a without prejudice letter. The Claimant's Attorneys are now painstakingly seeking to show that this Honourable Court was wrong to treat the letter as privileged. But regardless of whether it is or is not, the place to put the Defendants' contentions, are in the body of the affidavit. Full stop. This was not done and cannot be overlooked."

vii. "The Claimant is silent on whether the Architect had issued any certification that liquidated damages were due to the Employer (ATL) which is a prerequisite for any claim to liquidated damages. However, this Honourable Court was left with the impression that a

claim sounding in substantial damages had been made out against the Defendant(s)."

[28] In their submissions, the Defendants' Attorneys say that these were all matters that were material and within the knowledge of Tri-Star or could reasonably have been ascertained by it. They contend that by failing to provide this information to the Court Tri-Star has failed to give full and frank disclosure of all material facts and the injunction should therefore be discharged.

[29] The argument continues that in determining whether to discharge an injunction the court next goes on to consider whether or not the Claimant's fear that the assets will be dissipated or removed is justified. It is the Defendants' submission that no cogent, solid evidence was provided by Tri-Star of a risk of dissipation or removal of assets. Additionally, that the Claimant gave false and misleading information to the court regarding the Defendant's business operation and actions in relation to correspondence with the Claimant.

[30] The Defendants' Attorneys also rely upon a passage from the judgment of Kerr L.J. in the **Ninemia Corp.** case, at page 1426 D-E where it is stated:

> **" Further, it must always be remembered that if, or to the extent that, the grant of a Mareva injunction inflicts hardship on the defendants, their legitimate interests must prevail over those of the plaintiffs, who seek to obtain security for a claim which may appear to be well-founded but which still remains to be established at the trial."**

[31] Mr. Manning submits that the Affidavit of Pamela Josephs sworn on the 14th of March 2013 depones to the fact that the presence of the freezing injunction is very prejudicial to Alu-Plastics and hinders and slows down its efforts to do business.

[32] The Defendants submit that in the premises, it is clear that the Defendants are suffering hardship from the presence of the freezing injunction and that this is greater than any harm to the Claimant that would be caused by its discharge.

[33] The Defendants submit that this is not a proper case for the continuation of the freezing order "given the uncertainties of the Claimant's cause of action and the absence of any substantive facts to support any allegation of risk of dissipation or removal of assets. There is also the fact that the Claimant has not even apprised the court of the agreed term that disputes be referred to arbitration".

Application to Discharge an Injunction where it is granted for a limited time or extended

[34] In my view often times there is some amount of confusion as to the proper format of applications being made in opposition to the grant of mareva injunctions. When an injunction is granted for a limited time and then extended for a limited time and the matter is heard inter partes, an application to discharge the injunction is really not the appropriate application. The application is that of the Claimant to continue the injunction until trial and really involves a consideration of whether to continue or maintain the injunction already granted, rather than to discharge it. This is because it will have been granted only for a limited time. Part 17 of the Civil Procedure Rules, ("the CPR"), specifically Rule 17.4 (4) decrees that an application for an interim order, including a freezing order, made without notice to the Defendant, i.e. ex parte, cannot be granted for longer than 28 days (unless any of the Rules permits a longer period). However, prior to the CPR, when the Civil Procedure Code ("the CPC") was in effect, ex parte applications for mareva injunctions, (not yet re-named freezing orders), were normally considered ex parte and a mareva injunction granted until trial or further order of the court. Indeed, although a freezing order is such a draconian order, that way of proceeding had certain cost and time advantages to the parties concerned. It was only if a defendant wanted to set aside the order that the partes would have to assemble inter partes for usually a considerable time and at substantial expense. Our Rulemakers may want to consider re-drafting Rule 17.4 (4) to allow for/create an exception for freezing orders, allowing the judge a discretion to grant such orders ex parte until trial or further order if it seems just and convenient so to do instead of granting it for a maximum period of 28 days. It was under the CPC then quite appropriate for a

defendant to be applying to discharge the injunction because it would have been granted for a considerable time period that had not yet expired/lapsed. However, currently the order is made for a limited period of time ex parte, (as required under the CPR), and then it may be extended for further limited periods of time until the matter can be heard and determined inter partes. Then, (unless the application being made is for its discharge before the limited time has elapsed), the question really is one of whether to continue the injunction and not whether to discharge it.

[35] It seems to me that this is why Kerr L.J. in **Ninemia Corp.** made the distinction between the then prevailing practice in the English Commercial Court and the English Chancery Division. At page 1426 A-B Kerr L.J. stated:

> **" Whether the inter partes hearing takes the form of an application by the defendants to discharge the injunction, as is usual in the Commercial Court, or whether –as in the Chancery Division –the injunction is only granted for a limited time, and then there is an inter partes hearing as to whether or not it should be continued, the judge must consider the whole of the evidence as it then stands in deciding whether to maintain or continue, or to discharge or vary, the order previously made".**

[36] In other words, in the instant case I am really concerned with the question whether to continue the freezing order until trial and not so much whether to discharge it. The matters of non-disclosure are more relevant to the question whether I should continue the freezing order, and will contribute to my assessment of the conduct of Tri-Star when I decide how to exercise my discretion. In **Brink's Mat**, Gibson L.J. at page 193 quoted from **Lloyds Bowmaker Ltd. v. Brittania Arrow Holdings plc (Lavens, third party)** [1988] 3 All E.R. 178, where it was stated by Glidewell LJ at page 183:

> **" ...where the whole of the facts, including that of the original non-disclosure, are before it, [the court] may well grant such a second injunction if the original non-disclosure was innocent, and if an**

injunction could properly be granted even had the facts been disclosed."

<u>WHETHER NON-DISCLOSURE</u>

[37] I must say that this really is an example of an application where I felt somewhat bombarded by paper. At the time when I heard the ex parte application I was presented by the Attorneys for Tri-Star with a lever-arch bundle containing the First Affidavit of Derrick Clarke filed February 26 2013. This Affidavit was 15 pages in length and attached over 200 pages of exhibits. I was also given copies of a number of authorities to read, particularly to do with Trust issues.

[38] Whilst it is true that Counsel did advert to the clause of the Sub-Contract which deals with the Mobilisation Payment, and that clause is located on the same page as the Clause that deals with Arbitration, the arbitration clause did not come to my attention, whether on my own steam, or by Counsel referring to it. In fact, in keeping with the way this claim has been framed as against Alu-Plastics for breach of trust, and only alternatively for breach of contract, and as against the 2nd and 3rd Defendants for dishonestly assisting Alu-Plastics to commit a breach of trust, on the ex parte hearing it was the trust aspect of the claim, and not the contract aspect that was emphasized by Counsel. I think there is good reason why the learned authors of **Commercial Litigation: Pre-Emptive Remedies** speak about not overloading the court. I agree with Mr. Manning that the place for this point about the arbitration clause to have been made was in the Affidavit. Had it been in the Affidavit, I am fairly certain it would have weighed on my mind as a relevant consideration. It is true that mareva injunctions can be used to prevent dissipation of assets which would render an arbitration award, and not only a judgment in court proceedings unsatisfied. See for example, the **<u>Ninemia Corp.</u>** case where at first instance, reported at [1984] 1 All E.R. 398, at page 404e, Mustill J. stated " In conclusion, I should add that it is particularly important in the present instance that the court should not be drawn into a premature trial of the action, rather than a preliminary appraisal of the plaintiff's case, for the parties have contracted for a determination by arbitrators, not by the court, and nothing must be done to pre-empt the

decision of the agreed tribunal." However, the fact of the existence of an arbitration clause was plainly a point that ought to have been brought to my attention specifically in the Affidavit. Indeed, that point ought to have been accompanied with an explanation as to why the Claimant Tri-Star, the party who expressly agreed to go to arbitration in the Sub-Contract, should now be approaching the Court for resolution of its disputes with the other party to the Sub-Contract Alu-Plastics. Alternatively, the Affidavit could have gone on to spell out why the claim does not fall within the ambits of the arbitration clause or that could have been addressed in submissions.

[39] There is another point that relates to the fact that the facts should be fairly stated in the affidavit, not in the exhibits. This point has to do with the need to tell the Court what response if any the Defendants have made to Tri-Star's contentions. At the ex parte hearing, Counsel for Tri-Star referred me to a letter dated January 31 2013 which was written by Nunes Scholefield De Leon & Co., Attorneys-at-Law for the Defendants that was clearly marked "Without Prejudice". Counsel proceeded to hand me authorities and wished to make submissions as to why I should treat the letter as not really being without prejudice and have regard to its contents. Frankly, I think it is not an a priori right of a Claimant making an ex parte application to have the judge rule upon the issue of whether a letter written by the Attorneys for the Defendants is truly written without prejudice in the absence of the Defendants or their Counsel's input upon that issue. If ruled upon as not without prejudice in their absence and read by the judge, how could that possibly be fair to the Defendants? Is the Court expected to make a ruling on a point of law ex parte that the letter labelled "Without Prejudice" is not really without prejudice, and then when the matter becomes inter partes, be called upon to change his or her ruling if the Defendants now submit that the letter should have been treated as without prejudice? That cannot be fair without more. The right to claim that the document is privileged, and therefore that its disclosure cannot be compelled, is a right that resides in the Defendant. Indeed, in her Affidavit filed March 15 2013, Pamela Josephs states that at no time has she waived the privilege attached to the Without Prejudice letter written on behalf of the Defendants. Whether or not I could correctly rule that the document is not protected by privilege seems to me to be really besides the

point. Justice must not only be done, but it must also be seen to be done. As Omar Khayyam, the poet famously wrote "The Moving Finger writes, and having writ, moves on". The Court should not be exposed to the risk of having to try and call back, or reverse, its own ruling. One way of resolving such a problem may be, as discussed at a different stage of proceedings and in a slightly different way, in the case of **Linsen Int'l v. Humpuss Sea Transport** [2010] EWHC 303, a decision of the English Commercial Court, cited by and relied upon by Tri-Star's Attorneys, to have one judge deal with the ex parte application, and then have a different judge deal with the discharge application. At paragraph 55 Clarke J. in **Linsen** concluded, after weighing the many relevant considerations carefully, that "It is sufficient to say that some disclosure of without prejudice communication will be necessary if it is clear that without it the court may be misled." However, as stated by Clarke J. at paragraph 53, care must be taken in holding that a Claimant is entitled to disclose without prejudice material. The point is fairly novel, at least in our jurisdiction as far as I am aware, and no local decisions have been cited by Counsel on this point. Paragraphs [35]-[59] of the decision are well worth reading.

[40] At paragraphs [41], [52] and [53] Clarke J. makes points and references which are in my view particularly apposite to the instant case:

> **" [41] In *Pearson Education Ltd. v. Prentice Hall India Pte Ltd.* [2005] EWHC 636 (QB), [2006] FSR 8 Crane J held that the duty of full and frank disclosure might require a without prejudice document, or some indication of its existence, to be disclosed. On the facts he decided that the Claimant, when applying for permission to serve out, should have revealed the fact that a without prejudice letter had been received in order to avoid the implication in the evidence that there had been no response to the Claimant's formal letter of complaint. But he decided that the contents of the letter should not have been revealed because it was the Defendant's choice to make the letter without prejudice rather than open.**
>
> ....

[52] The basic rule must be the starting point for any consideration of what the court needs to be told. The rule is not without exception. The obligation of a party seeking *ex parte* relief to ensure that the court is not misled means that he cannot regard the basic rule as determinative on the question of disclosure......

[53] At the same time, as it seems to me, considerable care needs to be taken in holding that a Claimant is bound (and therefore, entitled) to disclose without prejudice material. A decision whether or not to disclose may well have to be taken within a short timescale. More importantly there is a real danger of Defendants being disadvantaged by the *ex parte* disclosure (which the Defendant is powerless to prevent) of such material by Claimants on the basis that they are only fulfilling a duty when the material consists of or amounts to admissions-the very risk that the first principle seeks to avoid. I cannot help thinking that, if disclosure of the content of the without prejudice meeting had been made in this case, the Judge would have wondered why the Owners felt able to do so, and the Defendants would, in time, have fiercely objected."

(Underlining emphasis mine).

[41] I agree with Mr. Manning that the responsibility of the Claimant Tri-Star is to set out the material facts as to the Defendants' contentions in the Affidavit. It was well known to Tri-Star what the Defendants' position was. In my view they could well have done so without having to rely only on the without prejudice letter particularly since, as discussed in the paragraph below, there were also discussions ensuing between the Attorneys-at-Law for the respective parties. In addition, there was correspondence from the Josephs themselves from which the gist of the fact that Alu-Plastics was making certain contentions could have been extracted and summarised in Mr. Clarke's Affidavit. This was not a case where without disclosure of the without prejudice communication the court would be misled.

[42] This leads me to another issue raised by the Defendants. At the ex parte hearing I indicated that other than the fact that the nature of the relief itself being sought, being a freezing order, and by nature being such that giving notice of the application may have jeopardized the very purpose of the application, I would not have wished to deal with this application ex parte. I expressly registered my discomfort because of the fact that these were Defendants whose Attorneys-at-Law had been in contact with the Claimant's Attorneys-at-Law by way of written correspondence not long before. Indeed, this was part of the reason that the freezing order was only granted for 7 days and the matter fixed for inter partes consideration on the 7th March 2013. In paragraph 9 of her Affidavit filed on the 15th March 2013, Ms. Grace Lindo, one of the Attorneys-at-Law having conduct of this matter on behalf of the Defendants, states that she did, on behalf of the Defendants after receiving the letter dated February 7, 2013, from Tri-Star's Attorneys-at-Law, enter into without prejudice negotiations via telephone. Against that backdrop I do think that Mr. Clarke should not at paragraph 26 of his Affidavit have stopped at saying that since the date when on February 7 2013 his Attorneys –at-Law responded to Nunes Scholefield's letter of January 31 2013 " … our Attorneys-at-Law have received no further written correspondence from the Defendants regarding this matter." I agree that Tri-Star should have in its Affidavit informed the Court that although no further written correspondence was received from the Defendants after January 31 2013, the Defendants' Attorneys-at-Law were in communication with the Claimant's Attorneys-at-Law. This is particularly so since elsewhere in the Affidavit of Mr. Clarke the Court was given the impression that Mr. Clarke did not know how to contact Alu-Plastics and that he was uncertain whether they were still operating.

[43] As to whether the original non-disclosure was innocent, there is no Affidavit evidence from Tri-Star on this point. I note that although Mr. Clarke's Third Affidavit responded to Pamela Joseph's 2nd Affidavit, which was filed on the 15th March 2013, which was the same day of filing of the Defendants' Notice of Application seeking to have the freezing order discharged on the grounds of non-disclosure, there was no attempt to address the issue of non-disclosure in the evidence.

[44] However, in this case, I do not see any evidence of conscious impropriety. Some omissions may simply have been as a result of an error of judgment. The matters upon which the non-disclosure has occurred do not necessarily go to the heart of the question whether Tri-Star has a tenable contractual claim and discharge or automatic lapse are not unarguably proportionate forms of punishment. As stated by Clarke J. at paragraph 61 in **Linsen**, "In any event I would not regard it as just or equitable, in this case, to refuse relief if on the totality of the material I am satisfied that the facts justify a freezing order."

[45] All told, I will have to put this conduct of Tri-Star and its non-disclosure of pertinent facts "in the melting pot" of considerations to be stirred before deciding how justly to exercise my discretion and in deciding whether the freezing order should be extended or continued until trial.

DOES TRI-STAR HAVE A GOOD ARGUABLE CASE AGAINST THE DEFENDANTS

[46] As Mr. Manning has submitted, it is not without significance that Tri-Star has in its claim against Alu-Plastics sought to rely upon there being a breach of trust, and only alternatively upon breach of contract. I think it is fairly obvious that the significance of the trust argument is that without it, the dispute as to breach of contract may fall squarely within the Arbitration clause of the Sub-Contract signed by Tri-Star and Aluver. Also, without the trust argument, Tri-Star cannot make out any claim against the 2nd and 3rd Defendants personally because its contract was with Alu-Plastics the company and not with the 2nd and 3rd Defendants in any other capacity but as agents for the disclosed principal Alu-Plastics. Without the trust argument there can be no claim against the 2nd and 3rd Defendants for "dishonest assistance of the 1st Defendant's breach of trust". I will therefore first consider whether Tri-Star has a good arguable case against Alu-Plastics for breach of trust. However, before doing so, I will just set out some of the clauses of the Sub-Contract that are relevant to the consideration of "good arguable case".

[47] Under the heading, “Completion and Default”, Clause 5 of the Sub-Contract provides, in part, as follows:

“5. **COMPLETION AND DEFAULT**

The Sub-Contractor shall carry out and complete the Sub-Contract Works in the period or periods stated herein together with any duly authorized extensions....”

[48] Under the heading “ Mobilisation Payment”, Clause 12 provides as follows:

“12. **MOBILIZATION PAYMENT**

The Mobilization Payment is an advance payment and shall be fifty percent (50%) of the Sub-Contract Sum. The Mobilization shall be repaid by way of equal deductions from payments to the Sub-Contractor.”

[49] Under the heading “ Disputes”, Clause 15 provides as follows:

“15. **DISPUTES**

(a) In the event of any dispute or disagreement between the parties touching or concerning this Agreement the same shall be referred to a single Arbitrator to be agreed upon by the parties.

(b) Whatever the Nationality, residence or domicile of the Contractor, Sub-Contractor or the Arbitrator, and wherever the Works, or any part thereof, are situated, the Law of Jamaica shall be the proper Law of this Agreement.”

Whether Breach of Trust by Alu-Plastics

[50] In order to make out this argument, the Claimant submits that the payment under the mobilization clause was not a payment as consideration, but was a loan through an advanced payment which should have been repaid to Tri-Star. It was submitted that this created a trust where Alu-Plastics was the trustee and Tri-Star the settler/beneficiary. According to the argument, the Mobilization payment was for the sole purpose of procuring materials. Reliance was placed upon the exceptional line of cases as embodied in **Barclay’s Bank Ltd. v. Quistclose Investments Ltd.** [1970] AC 567 and **Twinsectra Ltd. v. Yardley and others** [2002] UKHL 12. Reliance is also

placed upon the fact that Mr. Clarke wrote a letter dated 13th September 2012 in which there was reference to the fact that the Mobilization Payment was paid for the purpose of procuring materials for the project. However, it is clear that on a reading of the Sub-Contract and the Mobilization Payment Clause itself, there is nothing to indicate that the sum was to be used exclusively for the purpose of procuring materials. This is obvious to me, because unless there is magically, or otherwise, a proportionate 50:50 relationship between the cost of procuring materials and the value placed upon the rest of the Sub-Contract, then the fact that the figure quoted is described as an "advance payment" and amounts to 50 % of the contract price, clearly suggests it is not for the exclusive purpose of purchasing materials. Further, I agree with Mr. Manning that the fact that Mr. Clarke may have written what he did in his letter of September 13 2012 and that the Defendants did not deny that position at the time, does not mean that the Defendants were in any agreement with the fact that the sum was to be used exclusively for the purpose of procuring materials. The Defendants posit that the sum could also be used and was used for administrative expenses as well as for the purpose of procuring materials. If the Mobilization Payment was not exclusively for the purpose of procuring materials, then the bottom falls away from Tri-Star's trust argument. Since there can be no dishonest assistance to breach a trust unless there is first a trust in existence, that argument and claim against the Josephs would also disintegrate. Now on this inter partes hearing, now that I have had a chance to sift through all of the relevant material in detail and heard argument from both sides, it is clear to me that Tri-Star has not established a good arguable case based upon the Trust argument. That therefore leaves the alternative claim of breach of contract against Alu-Plastics.

BREACH OF CONTRACT CLAIM AGAINST ALU-PLASTICS

[51] Tri-Star has brought this claim for breach of contract in that it alleges that Alu-Plastics has failed to:

a. Act with reasonable diligence;

b. Procure the materials with reasonable diligence;
c. Install the materials with reasonable diligence and complete the Sub-Contract by the completion date;
d. Compensate Tri-Star for losses it suffered as a result of Alu-Plastics failure to carry out the works under the Sub-Contract;
e. Failed to repay Tri-Star the sum of $10,488,141.80.

Claim for Liquidated Damages

[52] Under the Main Contract, with a sub-heading " Damages for Non-Completion" , Clause 22 states:

> **" If the Contractor fails to complete the Works by the Date for Completion stated in the appendix to these Conditions or within an extended time fixed under clause 23 or clause 33(1)(c) of these Conditions and the Architect certifies in writing that in his opinion the same ought reasonably so to have been completed, then the Contractor shall pay or allow to the Employer a sum calculated at the rate stated in the said appendix as Liquidated and Ascertained Damages for the period during which the Works shall so remain or have remained incomplete and the Employer may deduct such sum from any monies due or to become due to the Contractor under this Contract."**

[53] I agree with Mr. Manning's submission that apart from Tri-Star's assertion that it is liable under the Main Contract for liquidated damages, there is no other evidence of this fact. Further, no Architect's Certificate has been produced by Tri-Star up to the hearing of this application, and I accept Counsel's submission that the Architect's Certificate does appear to be a prerequisite for liquidated damages to become payable under the Main Contract. In the work **Emden and Watson's Building Contracts and Practice** , 6th Edition, cited by Mr. Manning, the authors refer to a case **Dawnay v. Holloway Brothers Ltd.** (1930), Builder, 14th and 28th November, and state:

> **"... it has been held, and confirmed on appeal, that damages can only be recovered from a sub-contractor by a contractor provided that the latter has in fact been penalised by the employer."**

I should state that though I have not had an opportunity to refer to the case cited, the

proposition put forward seems a matter of good sense and logic to me.

[54] In addition, the liquidated damages claim is presented as a continuing claim. At paragraph 18 of Mr. Clarke's Third Affidavit filed March 19 2013, he does state that "installations were not completed until early February 2013". It would appear that not only could a claim for liquidated damages not likely succeed without an Architect's Certificate, but it is difficult to see how it could be sustained beyond the date of completion of the work to be performed.

[55] I am therefore of the view that, with regard to the claim for liquidated damages, Tri-Star does not have a good arguable case.

[56] I will now deal with other aspects of the claim for breach of contract. Tri-Star submitted that Alu-Plastics failed to submit its purchase order to the supplier Aluver in a timely manner, failed to pay all of the required payments to Aluver to enable the materials to be shipped in a timely manner. As a result, Alu-Plastics failed to install the aluminium windows, curtain walls and other items, by the October 31 2012 completion date.

[57] In their Affidavits in opposition to the freezing order application, the Josephs have stated that it was Tri-Star that was largely responsible for most of the delays under the Sub-Contract as drawings which were necessary in order for the Defendants to order the materials were not signed off on/finalized until as late as September 2012. Additionally, the Defendants contend that Tri-Star wrongfully and unlawfully interfered with the contractual relationship between Alu-Plastics and Aluver in or around September 2012. Further, that it subsequently wrongfully terminated the Sub-Contract between the parties. It was further asserted by the Defendants that pursuant to the

payment arrangements it had with Aluver it was up to date with payments. However, as a result of Tri-Star's wrongful interference with the contractual arrangements, Aluver took a position that it had not taken with Alu-Plastics at any time prior to September 2012, and set out a payment schedule. Further, that ATL, the Employer, extended the time for performance to December 22, 2012, and that based upon its observations, Alu-Plastics say that the installation under the Sub-Contract was completed by November 30 2012.

[58] In their written submissions on behalf of Tri-Star, Counsel respond to Alu-Plastics assertion that Tri-Star caused most of the delay, by (at paragraph 30), calling Alu-Plastics assertion a bald one, and they summarize that this assertion fails to displace the inference that Tri-Star has a good arguable case for the following reasons:

a. Alu-Plastics failed to pay over the mobilization money as required;
b. It failed to employ reasonable skill, care and diligence in its work and as such the shop-drawings were delayed between May and July 2012;
c. Tri-Star's delay of a week was minor;
d. Despite the shop drawings being approved in July, Alu-Plastics failed to pay down on the Audi showroom materials until September 21st and that no good explanation has been forthcoming for this;
e. When the materials were ready to be shipped, Alu-Plastics ignored Aluver's email and then failed to address the issue of the outstanding amounts due to Aluver; and
f. Most importantly, up to the termination of the contract on November 6th 2012, the completion date for the contract had passed and not one piece of material was even in Jamaica.

[59] In response to Alu-Plastics' point about Aluver's insistence on a payment schedule, it is Tri-Star's position that(see paragraph 29 of the submissions), regardless of the payment schedule, the mobilization payment should have been paid to Aluver to meet that schedule. Further, if, as Alu-Plastics alleges, there was any unilateral variation of their agreement with Aluver, Alu-Plastics should take that up with Tri-Star.

[60] In the **Ninemia Corp.** case at first instance, reported at [1984] 1 All E.R. 398, at page 605, Mustill J. described a good arguable case as "one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success".

[61] In my judgment, based upon the facts and circumstances of this case, Tri-Star has made out a good arguable case against Alu-Plastics for breach of contract. As to whether such disputes would in fact be covered by the Arbitration Clause agreed to by the parties is quite another matter and will be dealt with in the Defendants' other application seeking a stay of the proceedings.

RISK OF DISSIPATION OF ASSETS

[62] In the **Ninemia Corp** case, Mustill J. stated, at page 406:

> **"It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. It may consist of direct evidence that the defendant had previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is(where it is incorporated, what are its corporate structure and assets, and so on), so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there."**

[63] I have already indicated that the Claimant has not made out a good arguable case for breach of trust by Alu-Plastics. Indeed they have not made out a good arguable case for the existence of a trust. They therefore have also not made out a

claim for dishonest assistance against the Josephs personally. Thus, the only entity or person in respect of whom I am obliged to consider the risk of dissipation of assets is Alu-Plastics. I have also indicated that Tri-Star have not made out a good arguable case for liquidated damages. Therefore, the claim for breach of contract is concerned mainly with the sum of $10,488,141.80, which is claimed by Tri-Star against Alu-Plastics for breach of contract at paragraph 19.1. b. of the Particulars of Claim, claimed in the alternative to the claim for breach of trust.

[64] In the written submissions filed on behalf of Tri-Star, at paragraphs 49 and 50, it is submitted, and I accept, that Tri-Star need not prove any "nefarious intent". The submission continues, that, however, if there is any dishonest intent, that would favour the extension of the freezing order until trial.

[65] It was submitted that here there are allegations of dishonesty against Alu-Plastics and therefore "the question whether the evidence shows that [Tri-Star] has 'a good arguable case' .....overlaps the separate question whether the evidence also shows the "real risk" of assets ceasing to be available to meet a judgment if the plaintiff succeeds. "-reference was made by Counsel to the case of **<u>Mayor and Burgesses of the London Borough of Lambeth v. Clarke and others</u>** Court of Appeal (Civil Division) Transcript No. 1563 of 1993 (22 December 1993).

[66] Tri-Star submitted that there is solid evidence of a risk of dissipation of assets "considering the dishonest and shifty manner in which the Defendants handled this contract, and how they have handled contracts in the past: the VistaPrint and UWI Housing Projects." Tri-Star also contends that this risk was heightened when one considers the actions of the Josephs after they breached the contract. It was argued that :

a. They resurrected Global Windows and changed office without notifying Tri-Star, with whom it had a contractual dispute;
b. They changed Alu-Plastics' numbers (which were for-at least a brief time-out of service); and

c. Based on the evidence before this court, Global Windows and Doors is in the process of taking over business from Alu-Plastics-this in circumstances where Alu-Plastics' bank accounts are empty and all its assets are either liquid or easy to transfer.

[67] Counsel for Tri-Star also proposed that the Court considers what Steven Gee Q.C. calls "the checklist" in the 5th Edition of his work "**Commercial Injunctions**". The list, in its simplest form (as extracted from the case of **Shepherd Construction Ltd. v. Berners (BVI) Ltd.** [2010] EWHC 763), is this :

a. The nature of the assets and the ease with which they can be dissipated;
b. The nature and financial standing of the defendant's business ;
c. The length of time the defendant has been in business;
d. Any expressed or implied statement of intent made by the defendant in respect of dissipating assets;
e. Whether the substantive claim relates to dishonesty; and
f. Previous court orders.

[68] It was further submitted that the Defendants fall afoul of each of these considerations in some way, which are summarised at paragraph 60 of the written submissions as follows:

"....

a. The Josephs have demonstrated a clear lack of propriety-they have been dishonest with Tri-Star and all concerned in relation to the Sub-Contract;

b. The Defendants have used the mobilisation payments for some purpose other than the Sub-Contract;

c. The Josephs are in the process of transferring business from Alu-Plastics to Global Windows and Doors;

d. **The nature of the Defendants' assets and financial position is such that there is a risk that assets can and will be dissipated or shifted around if necessary; and**
e. **The Defendants operate their business in such a way that the assets of Alu-Plastics are already being dissipated on the Josephs' personal living expenses.**

[69] The 1st Affidavit of Mr. Clarke in addition to making the comment that Tri-Star's Attorneys received no further correspondence from the Defendants' Attorneys-at-Law's letter of January 31 2013, went on to say that Alu-Plastics began operating at a different location and that its phone numbers were out of service. Additionally, Tri-Star referred to the fact that based upon Alu-Plastics filings at the Registrar of Companies, its indebtedness was $27,000,000.00 as at April 11, 2012. Tri-Star also advert to the fact that the Josephs incorporated a new business, Glasstech Jamaica Limited whose core business is the manufacture of UVPC and aluminium windows and doors and which subsequently changed its name to Global Windows and Doors Limited. Tri-Star relies upon a conversation which Mr. Clarke testifies that he has been advised that one of his lawyers had with an employee of Alu-Plastics as to the relationship between Alu-Plastics and Global Windows and Doors.

[70] As stated in the **Ninemia** , at this interlocutory stage the Court now has to look at the evidence as a whole. I will first deal with the submission that Alu-Plastics has been dishonest with Tri-Star in the manner in which it has managed the Sub-Contract, and further, Tri-Star alleges that Alu-Plastics has used the mobilisation payment for some purpose other than the Sub-Contract. It has been Alu-Plastics contention that the mobilization payment was not for the sole purpose of procuring materials. The submission is that the payment was a payment as a deposit on goods, supplies and materials and was to cover preliminaries and administrative expenses and any costs associated with commencing the Sub-Contract. That being the position taken by Alu-Plastics, it is being denied that Tri-Star are due to be repaid the sum of $10,488,141.80. Alu-Plastics also states that it is entitled to bring a claim for damages and a claim for

compensation for work performed under the Sub-Contract. At paragraph 54 of her Affidavit filed on March 15 2013, Pamela Josephs states as follows:

> *54. Neither the First Defendant nor I have taken or contemplated taking any steps to move money or assets out of the reach. I am informed by the Third Defendant that she has not done any such thing either. The first Defendant has a genuine dispute with the Claimant and I verily believe the Claimant is using this order to cripple the First Defendant and force a result from us.*

[71] It seems to me that in the circumstances, the position taken by Alu-Plastics cannot be used to demonstrate dishonesty or a real risk that it will dissipate its assets and leave any judgment that Tri-Star may obtain unsatisfied. If Alu-Plastics genuinely maintains that it has not acted in breach of the Sub-Contract, and that it was Alu-Plastics that has wrongfully terminated the Sub-Contract, then I do not see why its refusal to pay over the sum of $10,488,141.80 would signify that if they are held liable there is a real risk that its assets will have been dissipated. In the **Ninemia** case, Mustill J. disposed of a different, but in some ways analogous point, at page 409 h-j:

> **"So one must start with the evidence for the buyers..... Furthermore, the sellers have refused to give an indemnity in respect of further leakages. ...It amounts to a complaint that the sellers have failed to admit liability in advance, in respect of defects not yet known to exist. I see no reason why they should do any such thing, or why their refusal to do so should justify the inference that if they are held liable they will no longer be in funds to pay."**

[72] The Defendants do not dispute their indebtedness, as set out in their filings at the Companies Registry, nor the fact that the Josephs have incorporated a new business. However, the company Glasstech was incorporated in September 2011, which was some time before the Sub-Contract was entered into. Alu-Plastics was incorporated from 2007. Pamela Josephs has indicated that she has been active in the local window and door manufacturing and distribution industry since 1975. I agree with Mr. Manning's submission that there is no solid evidence to suggest that the Defendants

"resurrected" the company Glasstech as alleged by Tri-Star. The Josephs have stated that the reasons for incorporation were to have a company with a separate business model and to avoid potential conflicts of interest with two of Alu-Plastics directors, who are also directors of Sunlight Windows and Doors.

[73] As regards the reference to the fact that Alu-Plastic does have considerable indebtedness, I agree with the statement of my brother Sykes J. (Ag.) (as he then was in **Shoucair v. Tucker- Brown** (2004) HCV 01032/2004, delivered May 4, 2004, in respect of the facts in this case that :

> **"The defendants' indebtedness while a factor that cannot be ignored does not with the other points made by the Claimant, establish that there is a real risk of dissipation.... A claimant's suspicion is not enough.**

[74] At page 355 of the 5th Edition of Gee's Work, **Commercial Injunctions**, the authors make the point that indebtedness, especially recent default in paying debts, may not signify more than that a defendant is going through a rough financial period. See paragraphs 50, 51 and 53 of the Affidavit of Pamela Josephs. This also relates to the issue of hardship and whether in all of the circumstances it is just and convenient to grant a freezing order. Paragraph 12.039(iii) (6) at page 355 states:

> **"(6) The defendant's past or existing credit record. A history of default in honouring other debts may be a powerful factor in the claimant's favour-on the other hand, persistent default in honouring debts, if it occurs in a period shortly before the claimant commences his action, may signify nothing more than the fact that the defendant has fallen upon hard times and has cash-flow difficulties, or is about to become insolvent. The possibility of insolvency does not justify mareva relief. As a factor it may weight against it, on the grounds that an injunction would be oppressive because it might deprive the defendant of a last opportunity to put his business affairs in good order again. The fact that a Mareva injunction has been granted over**

> **the Defendant's assets may well discourage a bank or other company from lending him money or otherwise coming to his aid."**

[75] In **<u>Linsen</u>** Clarke J. made some interesting observations, based upon arguments raised by Counsel, about the possible relationship in certain cases between the strength of defences available to a defendant and the risk of dissipation of assets. At paragraph 71 he stated:

> **"[71] Although the existence of any defence and the risk of dissipation are two separate subjects, I accept that the former may have some bearing on the court's approach to the latter. A court may, depending on the circumstances, be disposed to regard a Defendant with no defence at all as more likely to dispose of assets in order to defeat the claim than one who has a perfectly respectable defence. The former type of Defendant will, ex hypothesi, have no valid reason for not paying and his refusal to do so may prompt the inference that he will do what he can to avoid having to do so more readily than is the case with someone who has some reason for not paying. Whether or not there is a real risk of dissipation is, however, likely to turn on matters other than the Defendants' putative defences."**

In the instant case, it cannot be said that Alu-Plastics has no defence at all and thus there would be no basis on that ground to find any greater risk of dissipation of assets.

[76] One of the circumstances which I think was the strongest in Tri-Star's favour was the fact that the Josephs do seem to intermingle Alu-Plastics funds with their own personal funds. For example, Pamela Josephs, in her Affdavit filed March 15 2013 stated the First Global Bank Account Number 990751030337 as being an asset belonging to Alu-Plastics. It was from this account that Alu-Plastics sought and obtained permission to vary the original freezing order to draw sums for ordinary business expenses. The Josephs sought and obtained permission to draw funds in respect of ordinary living expenses from the same account as well. However, on balance, it seems

to me that this is but one of the factors to be taken into account along with others in considering how to resolve this application justly.

<u>Hardship to Defendant-and Justice and Convenience</u>

[77] In her Affidavit evidence Pamela Josephs has stated that the presence of the freezing order has been prejudicial to Alu-Plastics' fortunes as it is hampering its efforts to do business, and has slowed down its ability to service its debts. She states that the construction industry is small and the presence of the order and the fetter on withdrawing funds has slowed down, if not stifled the business of Alu-Plastics.

[78] At paragraph 12.050 of the Gee, the learned author summarizes principles to be gleaned from the decided cases. It is there stated, under the heading (7) **Justice and Convenience**:

> **".... In the context of mareva relief, the court has to bear in mind that there is a discretion to be exercised in all the circumstances of the case.**
>
> **Those circumstances may themselves make it inappropriate to grant Mareva relief even though the claimant shows a good arguable case and a risk that, without the injunction, judgment may go unsatisfied. An example is where, if an injunction were granted, it would interfere in an unacceptable way with third parties....Another is where an injunction might destroy the defendant's business....The same is true of other businesses** (other than, for example, banks) **liable to be destroyed if confidence is undermined or credit is withdrawn. Similarly, if on the facts, Mareva relief is likely to result in denying the defendant the possibility of finding employment, or prevent him from continuing his business or trade, or starting afresh, this is an important factor to be taken into account in deciding whether to grant the relief.**
>
> **The court should be satisfied before granting the relief that the likely effect of the injunction will be to promote the doing of justice overall, and not to work unfairly or oppressively. This means taking into**

account the interests of both parties and the likely effects of an injunction on the defendant.”

DISPOSITION

[79] On balance, Tri-Star has a good arguable case in contract against Alu-Plastics, and there may be some risk of dissipation of assets, based upon the manner in which the Josephs operate the business of Alu-Plastics and the intermingling of company and personal funds. However, I have had regard to the totality of the material, evidence and circumstances before me, including the non-disclosure and manner in which Tri-Star’s case has been pitched. Those factors, along with the clear hardship that is being experienced by Alu-Plastics as a result of the Order, lead me to the view that the more just course, and the course likely to cause the least injustice, is to refuse an extension or continuation of the freezing order until trial.

[80] I therefore make the following orders:

1. Paragraph 2 of the Notice of Application for Court Orders filed on March 15, 2013 on behalf of the Defendants is refused.
2. The Application seeking extension until trial of the Freezing Order first granted ex parte on March 1 2013 (as varied and extended), on the Claimant’s Notice of Application filed February 26, 2013 is refused.
3. Costs of the Application to the Defendant to be taxed, if not agreed. Special Costs Certificate granted for two (2) Attorneys-at-Law.
4. Defendants’ Attorneys-at-Law to prepare, file and serve the Formal Order.