ND COURT OF THE CAYMAN ISLANDS

SERVICES DIVISION

CAUSE FSD NO: 360 of 2024(NSJ)

IN THE MATTER OF THE GRAND COURT ACT (2015 REVISION)

BETWEEN:

PRODUCTIVITY MEDIA INC.

(*A corporation incorporated under the laws of Ontario, Canada)*

(In its capacity as the General Partner of Productivity Media Income Fund I LP) (Acting by its receiver and manager, KSV Restructuring Inc., appointed by the 19 November 2024 Order of the Ontario Superior Court of Justice)

Applicant

-and-

(1) WILLIAM GREGORY SANTOR

(2) SONJA SANTOR (aka SONJA NISTELBERGER)

(3) PRODUCTIVITY MEDIA PRODUCTIONS (CAYMAN) LTD

(4) ERBSCHAFT CAPITAL CORP

(5) STREAM.TV (CAYMAN) LTD

(6) STARK INDUSTRIES LIMITED

Respondents

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Introduction

1. Last Friday (6 December) I heard an *ex parte* application made by a summons (the ***Summons***) issued on 5 December 2024 seeking urgent relief pursuant to section 11A of the Grand Court Act (2015 Revision) (***Section 11A***). The are six respondents to the Summons (each respondent is referred to as R1, R2 etc). R1 (Mr Santor) and R2 (Mrs Santor) are individuals said to be resident in the Cayman Islands. R3-R6 are Cayman incorporated companies. The relief sought is a freezing injunction relating to R's assets in the Cayman Islands in connection with proceedings brought by the Applicant in Ontario, Canada.

2. The Summons is supported by the First Affidavit of Mr Robert Kofman (***Kofman 1***). Mr Kofman is President of KSV Restructuring Inc.. On 19 November 2024 KSV was appointed by the Ontario Superior Court of Justice (Commercial List) (the ***Ontario Court***) as receiver and manager over the property and assets of the Applicant (the ***Receiver***). The Applicant makes the application acting by the Receiver. Exhibited to Kofman 1 was a short report (the ***Report***) for this Court prepared by the Receiver together with a very large number of documents (nearly 4000 pages) which included affidavits filed in the Ontario Court in support of an application made by the Applicant for a worldwide freezing order, which order was made on 2 December 2024 (the ***Ontario WWFO***). The documents exhibited to Kofman 1 include an endorsement (a short judgment) by Justice W.D. Black of the Ontario Court briefly explaining his reasons for granting the Ontario WWFO (the ***Justice Black Judgment***).

3. The Applicant filed a draft order (the ***Applicant's Draft Order***) and helpfully provided a version of the order which shows the changes made to the standard form of injunction set out in GCR Form 64.

4. The Applicant seeks a freezing injunction in this jurisdiction prohibiting R1 and R3-R6 from removing from the Cayman Islands or in any way disposing of or dealing with or diminishing the value of any of their assets up the value of CAN$44,448,871 or

US$31,599,689 (whichever is higher) including various listed assets. The order against R2 is more limited. It prohibits her from disposing of or dealing with or diminishing the value of a Cayman Islands property at Vista Del Mar (or any interest she has in it or proceeds in respect of it). The Applicant's Draft Order seeks an order that pursuant to section 124 of the Registered Land Act (2018 Revision) an inhibition be registered on the register of title for that property. In addition, the Applicant's Draft Order seeks disclosure orders in respect of each of the R's assets in the Cayman Islands. The Applicant's Draft Order also includes various undertakings to be given by the Applicant.

5. Mr Fox of Mourant Ozannes (Cayman) LLP (***Mourant***) appeared on behalf of the Applicant. Mourant filed a helpful Applicant's Note on *Ex Parte* Application (the ***Applicant's Note***) setting out the Applicant's submissions. Mourant also lodged a Suggested Pre-Reading note (although I did not see this before the hearing) which identified various parts of the documents (and evidence) on which the Applicant relied.

6. Mr Fox, fairly in my view, emphasised that because this application had to be made in a huge hurry his written submissions were not as fully developed and as clearly set out as he would have liked. For this reason, during his oral submissions Mr Fox slowly and carefully took me through the voluminous and in some respects complex documents exhibited to Kofman 1, reviewed the applicable authorities and where appropriate drew to my attention various matters and issues that he considered to be relevant to the Applicant's duty of full and frank disclosure. He submitted that the Applicant had adduced sufficient evidence to show and had otherwise demonstrated that it was entitled to the relief sought in the Applicant's Draft Order.

7. At the end of the hearing I indicated that I was prepared to grant the relief sought by the Applicant subject to various amendments being made to the Applicant's Draft Order which I identified, and which were then immediately after the hearing recorded in an amended form of draft order (the ***Amended Order***) which I approved.

8. The hearing was recorded, and Mourant have agreed to arrange for a transcript to be prepared as soon as possible and to serve a copy on the Rs when the Amended Order is served (as well as to file a copy with the Court). This will provide the Rs with a full record of the submissions made during the hearing and the basis on which I made my decision to grant the Amended Order.

9. To provide further assistance to the parties I have prepared this short judgment setting out my main reasons. But I have not sought to set out and review all the evidence and documents to which I was referred and all the submissions made, or points raised. I focus here only on the key points that I consider helpful to record in writing at this stage.

10. In view of the fact that there are further hearings scheduled to take place in Toronto shortly which may be relevant to the Summons and the terms on which relief is to be granted in this jurisdiction and because of the onerous terms of the Amended Order and the need to provide the Rs with an early opportunity to make representations to the Court if they wish, I agreed at the end of the hearing to listing of an early return date of Thursday 19 December at 10am (the hearing to be conducted remotely).

The background

11. The Applicant is the general partner of Productivity Media Income Fund I LP (the ***Fund***).

12. The freezing injunction was sought in support of proceedings brought in the Ontario Court. The Applicant acting by the Receiver has issued proceedings, which are set out in a statement of claim dated 22 November 2024 (the ***Statement of Claim***). Each of the Rs is a defendant but not all the defendants are respondents to the Summons. The Applicant seeks relief arising out of an alleged fraud conducted by R1 and others and involving alleged misrepresentations to and the misappropriation of substantial funds from the Applicant. The relief sought is set out at [1]-[4] and [32] – [52] of the Statement of Claim.

13. The claims and relief can be summarised as follows. The Applicant claims against R1 damages and/or restitution for fraud, fraudulent misrepresentation, misappropriation and conversion, unjust enrichment, breach of fiduciary duties, breach of trust, breach of contract, breach of duty of good faith and conspiracy in the sum of CAN$44,448,871 (or such further sums as may be proved at trial) together with aggravated, exemplary and punitive damages in the amount of CAN$5 million. The Applicant also claims against R3, R4, R5 and R6 damages and/or restitution for fraud, fraudulent misrepresentation, misappropriation and conversion, fraudulent conveyance, knowing assistance, knowing receipt, unjust enrichment, breach of trust and conspiracy in the same amount together once again with aggravated, exemplary and punitive damages in the amount of CAN$5 million. The Applicant claims against R2 damages and/or restitution for knowing receipt and unjust enrichment in the same amount (but no claim is made for aggravated, exemplary and punitive damages).

14. The Applicant also claims in the alternative against all Rs disgorgement (the ***Disgorgement Claim***) of any and all proceeds and profits earned from the alleged fraudulent scheme, special damages, an accounting of all funds, assets and property of any kind had and received, a declaration (the ***Declaration***) that the Applicant possesses an equitable interest in the assets, property (real and personal) and interests of the Rs on the basis of a constructive, resulting, implied and/or express trust, an equitable tracing (the ***Tracing Claim***) of the proceeds misappropriated by the Rs from the Applicant into the assets, property and interests of the Rs and an interim, interlocutory and permanent injunction restraining the Rs the sale or disposition of the Rs assets.

15. R1, R3, R4, R5 and R6 are defined in the Statement of Claim as the Fraudulent Defendants because they are alleged to have been parties to and the claims against them are based on their participation in the alleged fraudulent scheme. R2 is defined as an Enriched Defendant because the claims against her are not based on her participation in the alleged fraud but rather on knowing receipt and unjust enrichment in respect of the proceedings of the fraud.

16. As I have already noted, on 2 December 2024 the Applicant obtained the Ontario WWFO. Exhibited to Kofman 1 was the evidence filed in support of the application for the Ontario WWFO. This included an affidavit (sworn in November 2024) of Mr Chang-Sang (***Chang-Sang 1***) and an affidavit of Ms Krista Mooney (***Mooney 1***). Mr Chang-Sang was (but I believe is no longer) the President and chief financial officer of the Applicant and Ms Mooney is a partner with PricewaterhouseCoopers LLP (**PwC**) who has led the PwC team conducting an investigation into the alleged fraud (the alleged fraudulent conduct is helpfully summarised at [36]-[53] of Mooney 1).

17. The Ontario WWFO was served on 3 December 2024 on the Cayman bank (CIBC Caribbean) with whom R1 and R3-R6 appear to have accounts covered by the Ontario WWFO. The Applicant was originally told by CIBC Caribbean that it intended to freeze these accounts in accordance with and in response to the Ontario WWFO and in light of this the Applicant, while planning to apply in this jurisdiction for similar relief next week, did not consider that such an application was immediately required. Following service of the Ontario WWFO on CIBC Caribbean, that order was personally served on all the Rs save for R2 on 4 December. However, on 5 December CIBC Caribbean wrote to Mourant and said that "*in order to respond to the requests [made to them to comply with the Ontario WWFO] they will require an order from [this Court]*". In these circumstances, since the Rs had already been made aware of the action taken by the Applicant and the Ontario WWFO and since the accounts with CIBC Caribbean were now not frozen, the Applicant considered that it an application for a freezing order to this Court be made and heard as a matter of urgency. Mourant yesterday evening requested that the Court list a hearing as soon as possible and I agreed to deal with this and list the hearing today at 11am. I was satisfied that there was a proper basis for making and hearing the Summons on an *ex parte* basis.

The Applicant's submissions

18. As regards the applicable law, the Applicant relied on the judgment of Chief Justice Smellie in *Classroom Investments Incorporated v China Hospitals Incorporated and China*

Healthcare Incorporated 2015 (1) CILR 451 (***Classroom***) (and the authorities cited therein).

19. In brief, the Applicant submitted that:

(a). there was jurisdiction to grant the relief by reason of Section 11A.

(b). the Applicant's claims as set out in the Statement of Claim were (a) for damages and (b) proprietary relief.

(c). in both cases the Statement of Claim and the Ontario proceedings were (to use the language of Section 11A) capable of giving rise to a judgment which may be enforced in this jurisdiction. The claims for damages could result in a money judgment enforceable at common law. The claim for proprietary relief (including the Disgorgement Claim, the Declaration and the Tracing Claim, were also capable of being enforced in this jurisdiction).

(d). as regards the damages claims, the Applicant had a good arguable case (under and as a matter of Ontario law, being the law governing the relevant causes of action). Furthermore, this Court would grant interim relief if the substantive proceedings were being conducted here. In addition, the evidence showed that there was a real risk that a future judgment would not be satisfied because of an unjustified dissipation of assets by the Rs, having regard in particular to the allegations and evidence regarding the allegedly fraudulent conduct of the Fraudulent Defendants or in the case of R2 her involvement with and obtaining of benefits from that conduct. The assets covered by the Amended Order were all within the jurisdiction and it was clear that it would be just and convenient in all the circumstances to grant the freezing injunction. The injunctive relief against R2 was suitably limited to the property in which she appeared to have an interest and which the evidence indicated had probably been purchased with the proceeds of the alleged fraud.

(e). as regards the proprietary claims, in addition to the claim for a freezing order, since the Applicant clearly had an arguable claim to proprietary relief and was likely to succeed at trial, damages would not be an adequate remedy, any loss suffered by or caused to the Rs would be compensable in damages and the balance of convenience favoured the grant of an interim proprietary injunction in respect of the assets in this jurisdiction.

(f). the interim relief being sought here was consistent with and supported the interim relief granted by the Ontario Court.

(g). the Court should dispense with the need for a cross-undertaking in damages from the Applicant since it was acting by the Receiver, an officeholder appointed by the Ontario Court who had no personal interest in the Ontario Proceedings and who, as the Report explained, was unable to give an unlimited cross-undertaking as to damages. The Receiver had confirmed in the Report that it would comply with any orders made by this Court. The Receiver had confirmed that it believed that the Fund had material assets (even if not immediately realisable) with a value of approximately US$8.5 million so that there was every reason to believe that the Receiver would, and would be able, to meet any order for damages. The Applicant recognised that dispensing entirely with a cross-undertaking would be an unusual step but said that the clear evidence of fraud justified this (in reliance on *US Securities & Exchange Commission v Manterfield* [2010] 1 WLR 172. However, if the Court was not prepared to dispense with the need for a cross-undertaking the Applicant was prepared to provide one limited in amount to the Fund's assets available after the payment of secured creditors and the expenses of the receivership (Mr Fox pointed out that the Receiver has the benefit of a charge over the Applicant's and the Fund's assets to secure their liability in respect of its fees). The Applicant submitted that this approach was broadly consistent with that suggested by Form 64 which referred to the undertaking being "*limited to the property and assets in the beneficial ownership of the Plaintiff in the hands of the liquidator*."

Discussion and summary of reasons for decision

Decision

20. I accept that the Court should grant the freezing injunction sought by the Applicant essentially for the reasons set out in its submissions.

The applicable law

21. It seems to me that even though the law governing the availability and granting of freezing injunctions in support of foreign proceedings has moved on since the former Chief Justice's judgment in *Classroom* as a result of the Privy Council's judgment in *Broad Idea International Ltd v Convoy Collateral Ltd* [2023] AC 389 (***Broad Idea***) (on an appeal from the BVI, which although not binding on me has strong persuasive weight), the law relating to Section 11A and the approach to be followed by the Court in this jurisdiction on applications made under Section 11A remain as set out in *Classroom*.

22. Mr Fox did not raise the question of the possible impact of *Broad Idea* on *Classroom* and therefore there has been no debate on whether *Broad Idea* has affected the availability of relief under Section 11A. I therefore do not propose to deal with the point further save to note that:

(a). the basis on which the Court will grant a freezing injunction was set out by Lord Leggatt at [101] of his judgment's (reflecting the enforcement principle):

> *"a court with equitable and/or statutory jurisdiction to grant injunctions where it is just and convenient to do so has power—and it accords with principle and good practice—to grant a freezing injunction against a party (the respondent) over whom the court has personal jurisdiction provided that:*

> *i) the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;*
>
> *ii) the respondent holds assets (or, as discussed below, is liable to take steps other than in the ordinary course of business which will reduce the value of assets) against which such a judgment could be enforced; and*
>
> *iii) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied."*

(b). it is arguable that the approach adopted by the Privy Council (either confirming or restating the true principle at common law) means that a party seeking a freezing injunction in support of foreign proceedings and a prospective foreign judgment does not need to rely on Section 11A. The enforcement principle applies equally to a judgment or award of a foreign court capable of being enforced as if it were a judgment of the domestic court. As Chief Justice Smellie noted (see footnote 4 on page 460) in *Classroom* section 25 of the Civil Jurisdiction and Judgments Act 1982 (***CJJA***) (and therefore Section 11A) had been passed to overcome the difficulties caused by the decision in *The Siskina* whose reasoning has now been departed from in *Broad Idea*. It remains to be seen, as this is an issue for argument on another occasion, whether the judgment in *Broad Idea* has any effect on the basis on which relief may be claimed under Section 11A.

23. Chief Justice Smellie relied on and followed the approach set out in a number of English cases in particular in the English Court of Appeal's decisions in *Credit Suisse Fides Trust S.A. v Cuoghi* [1998] QB 818 and *Refco Inc. v Eastern Trading Co* [1999] 1 Lloyd's Rep 159. 159 (*Refco*). He noted (at [18] and [19]) that while there were differences in the wording of Section 11A and section 25(2) of the CJJA notwithstanding the differences in wording "*the approach to the question of whether or not interim relief will be granted will, in substance, be the same*."

24. Under the approach set out in *Refco* the Court first considers whether the facts would warrant the relief sought if the substantive proceedings were brought in England. Lord Justice Morritt said this in *Refco* (at page 170-171):

> *"For present purposes it is sufficient to point out that it was implicit in all the judgments that the approach of the Court in this country to an application for interim relief under s. 25 is to consider first if the facts would warrant the relief sought if the substantive proceedings were brought in England. If the answer to that question is in the affirmative then the second question arises, whether, in the terms of s. 25(2), the fact that the Court has no jurisdiction apart from the second makes it inexpedient to grant the interim relief sought.*
>
> *Accordingly, the first issue is whether if the substantive proceedings were pending in this Court the conditions for the grant of the Mareva relief sought have been satisfied."*

25. I take this requirement to arise because the applicant must first show that the relief sought is the type of relief that can and would be granted by the Court. Section 11A does not permit the Court to make orders outside the scope of its normal jurisdiction or powers (see section 11A (7)). This means that an applicant for relief under Section 11A will first have to address the requirements for a freezing injunction in this jurisdiction. The applicant will need to overcome the test which requires him to show that it is sufficiently likely (that he has a good arguable case) that, in the foreign substantive proceedings, he will recover damages (or some other pecuniary relief) for a certain or approximate sum and that there are reasons to believe that the respondent has assets to meet such a judgment, in whole or in part, but that steps may be taken in relation to them which mean that they may no longer be available when judgment is given. Consistent with proceeding at this first stage as if the Court was itself the primary court seised of the substantive proceedings, I am required to conduct a separate exercise of judgment on these evidential matters rather than simply accept any decision or indication upon them by the foreign court.

26. Where the relevant foreign proceedings are based on causes of action governed by foreign law it will usually be necessary for the applicant to adduce evidence of foreign law in support of its claim to have a good arguable case on the merits.

27. If the court concludes that interim relief would be appropriate if the substantive claim were a domestic one, the Court then considers (applying the test in section 11A(6)) whether, having regard to the matters set out in that subsection including the purpose of the statutory power and all the relevant circumstances, it would be just or convenient to grant the freezing injunction. I would note that it has been said that the Court's ancillary jurisdiction must be exercised with caution in particular so as to ensure that this Court does not tread on the toes of the foreign court.

28. As I noted at the hearing, the merits test for freezing injunctions has recently been reviewed and restated by the Court of Appeal in England in *De Santos v Unitel SA* [2024] EWCA Civ 1109 (***De Santos***). At [96] Lord Justice Flaux said this:

> *"In my judgment, the correct test as to what constitutes a good arguable case for the purposes of the merits threshold for the grant of a freezing injunction is that formulated by Mustill J in The Niedersachsen , applied by first instance judges many times over the last forty years and endorsed by at least three more recent decisions of this Court. A "good arguable case" in the freezing injunction context is not to be assessed by reference to the three-limb test derived from Brownlie to determine whether a claim falls within one or more of the jurisdictional gateways for the purposes of permission to serve out of the jurisdiction and the recent decisions in Harrington and Chowgule which adopt that test were wrong to do so."*

29. The test in *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH* (the *Niedersachsen*) [1983] 2 Lloyd's 600 requires a claim to be "*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*."

30. Lord Justice Popplewell in *De Santos* said that the good arguable case test in the context of freezing injunctions should be regarded as the same as the "serious issue to be tried" test in the context of other interlocutory injunctions. He noted that it would be preferable to use the terminology "serious issue to be tried" in the context of freezing orders and to restrict the use of the expression "good arguable case" to the context of jurisdictional gateways.

31. It seems to me to be right, for the purposes of this application, to follow the approach adopted in *De Santos*.

32. When assessing whether there is a real risk that a future judgment will not be satisfied because of an unjustified dissipation of assets the Court must decide whether the evidence objectively demonstrates a risk of unjustified dissipation that is sufficient in all the circumstances to make it just and convenient to grant a freezing injunction: *Les Ambassadeurs Club Ltd v Songbo Yu* [2021] EWCA Civ 1310 [36]-[37].

33. Where there is a good arguable case that the defendant has been engaged in wrongdoing against the applicant, which is relevant to the issue of dissipation, it may not be necessary in such circumstances to adduce additional evidence of a risk of dissipation: *Lakatamia Shipping v Morimoto* [2020] All ER (Comm) 359 at [51].

The evidence and application of the law to this case

34. At the outset of the hearing I explained to Mr Fox that it seemed to me that this Court needed to be able to rely on evidence filed and adduced by the Applicant in this Court and not just on evidence and documents filed in the Ontario Court. Mr Fox said that he was able to undertake that the Applicant would as soon as practicable file an affidavit sworn by Ms Mooney verifying Mooney 1. However, because Mr Chang-Sang was no longer employed by the Applicant he was unable to give an unqualified undertaking in relation to him but could and would give a best endeavours undertaking. I said that this was acceptable and undertakings in these terms are included in the Amended Order.

35. Also, at the hearing I said to Mr Fox that I assumed that the causes of action set out in the Statement of Claim were all said to be governed by Ontario law and I raised with him the absence of any expert evidence on Ontario law having been adduced by the Applicant. Mr Fox said that the Applicant accepted for the purpose of the Summons that the causes of action relied on in the Statement of Claim are governed by the law of Ontario but he submitted that even though expert evidence of Ontario law has not yet been adduced the

Court can rely on or at least take comfort from the decision of the Ontario Court on the application for the Ontario WWFO (in so far as the Ontario Court had to be satisfied as to the merits of the Applicant's claims to a similar standard before making that order).

36. I am prepared to accept for the purpose of this hearing that I can rely on the Justice Black Judgment as evidence that as a matter of the applicable Ontario law, the Applicant has a good arguable case for being granted a judgment in the Ontario Proceedings. Justice Black has concluded and found as much in the Justice Black Judgment. He says at [30] that the facts presented to him provided "*the basis for a strong prima facie case of civil fraud, and fraudulent misrepresentation [and that it also appeared] that Mr Santor breached his fiduciary duties to [the Applicant] and the Fund thereby enriching himself and the other [Rs]*." It appears (both from the Justice Black Judgment and the Applicant's written submissions) that the strong prima facie case standard applied under Ontario law and by Justice Black is broadly similar to and at least as demanding as the good arguable case applicable in this jurisdiction.

37. However, it is worth adding a word of caution. It could be said that even though the Ontario Court has itself applied and made its own assessment of the merits of the Applicant's claims by reference to applicable Ontario law for the purpose of deciding whether to make the Ontario WWFO, since the Justice Black Judgment does not set out in detail what the applicable Ontario law is and this Court does not have the benefit of expert evidence as to applicable Ontario law, this Court is not in a position to form its own view as to what Ontario law says on relevant matters and therefore cannot be satisfied that the good arguable case test has been satisfied. I am not currently persuaded that this is an objection of substance. I can certainly take it and properly assume that whatever applicable Ontario law says on the issues that arise on the Applicant's claims, Justice Black considers that the Applicant has a strong prima facie case. Nor do I consider it likely that this Court would ever come to a different view from the Ontario Court as to whether the Applicant had a good arguable case as far as the requirements of Ontario law are concerned. But I do just wish to put down a marker on the point so that the Applicant can give further consideration

to whether it wishes to file expert evidence before this Court, particularly if there is a challenge to the order made on the *ex parte* Summons.

38. Accordingly, I accept that Justice Black's Judgment can be relied on for the purpose of establishing a preliminary view *as a matter of Ontario law* as to the merits of the claims set out in the Statement of Claim. However, as I have already noted, I am required to review the evidence and form my own view as to whether (in this case applying the applicable law of Ontario to the extent I can) the Applicant has established on the evidence that it has a good arguable case that it will obtain a money judgment in at least the sum claimed against the Rs on the assumption that the claims made in the Statement of Claim were being brought here. I have carefully reviewed the Statement of Claim, and the evidence set out and referred to in, in particular, Mooney 1 (but also taking into account the evidence set out in Chang-Sang 1) and the submissions made by the Applicant in the Applicant's Note. I have noted the caveats raised by Mr Fox, in particular as to the limitations on the Applicant's evidence at this stage arising from the fact that PwC's investigations remain at a relatively early stage and are incomplete and on the need to rely on inference for the purpose of the fraud allegations against R2 and R3-R6, and the limited information available regarding the source of payment for the purchase of the Vista Del Mar property (I note the points raised by the Applicant at [33] of the Applicant's Note). I have concluded that the evidence relied on and to be adduced is sufficient to justify the conclusion that the Applicant has a good arguable case on the merits that it will succeed in obtaining an award of damages and monetary relief in at least the sum claimed so as to justify a freezing injunction. As Chief Justice Smellie found in *Classroom* on the facts of that case, the evidence adduced in this case also shows a very disturbing state of affairs indicative of a carefully constructed fraudulent scheme orchestrated by R1 to which R3-R6 were parties and from which they and R2 benefitted to misappropriate assets of the Applicant.

39. It is necessary to show that the judgment of the Ontario Court will be enforceable here. One issue that arises, which I raised with Mr Fox at the hearing, is the basis for the Ontario Court's assertion of jurisdiction over the R's. R1 and R2 are individuals who appear neither to be present or resident in Canada (as regards the applicable law on the enforcement of

foreign judgments in these circumstances, see Dicey, Morris and Collins, *The Conflict of Laws*, 16th ed., Rule 47). Mr Fox submitted that the relevant test for the purpose of deciding whether to grant an interlocutory freezing injunction was (and had to be in order to permit such relief to be granted) whether the judgment sought in the foreign proceedings could when granted be enforced here. Whether enforcement would be permissible would in a case such as the present case depend on future developments during the course of the Ontario proceedings (for example whether Mr Santor and Mrs Santor chose to submit or participate in those proceedings). Mr Fox also pointed out that some of the claims were based on or arose out of or in connection with an employment agreement which included a submission to the jurisdiction of the Ontario court so that it was at least arguable that Mr Santor had submitted to the jurisdiction. I am prepared to accept Mr Fox's submission at this stage on this point. I note that section 11A(1)(b) states as one of the jurisdictional preconditions for relief that the foreign proceedings "*are capable of giving rise to a judgment which may be enforced in*" this jurisdiction.

40. I explained to Mr Fox at the hearing that it seemed to me that while it was likely that the Applicant could also (as was done in *Classroom*) establish a sufficiently arguable case to support its proprietary claims and an entitlement to a proprietary injunction on *American Cyanamid* grounds it seemed to me that since the application had been generally based on freezing injunction grounds (and the Applicant's case that it had a good arguable case that it would obtain a money judgment enforceable here and a real risk of dissipation) and there was nothing before the Court as to the law governing the proprietary claims or as to Ontario law (if it was the law governing some of these claims) applicable to the claims (for example, were the claims based on constructive trust relying on a remedial or institutional constructive trust), it was preferable at this stage not to consider granting such a proprietary injunction.

41. Having carefully reviewed the evidence and the Applicant's submissions (in particular the submissions set out at [16]-[17] of the Applicant's Note, I am satisfied that the Applicant has established a real risk that unless the injunction sought is granted, the Rs will deal with their assets (or take steps which make them less valuable) other than in the ordinary course

of business with the result that the availability or value of the assets will be impaired and a judgment obtained by the Applicant from the Ontario Court will be left unsatisfied. I accept that the Applicant has made out a good arguable case that the Rs have been engaged in wrongdoing relevant to the risk of further unjustified and improper dealings with the assets (with R1 as the person behind and implementing the allegedly fraudulent scheme to misappropriate assets from the Applicant, R3-R6 as being controlled by him and having been involved in the fraud and R2 as having acted as a knowing recipient of the benefits of the fraud) such that it is unnecessary for the Applicant to adduce additional evidence of a risk of dissipation (see the reference to *Lakatamia Shipping* I have set out above). I also accept that the Applicant has adduced some additional evidence of some weight demonstrating that R1 intends to engage in further dealings with the assets.

42. It seems to me that had the Ontario Proceedings been commenced in this jurisdiction, it would have been just and convenient to grant a freezing injunction sought by the Applicant. Having so concluded, I then need to consider (applying the test in section 11A (6)) whether, having regard to the matters set out in that subsection including the purpose of the statutory power and all the relevant circumstances, it would be just or convenient to grant the freezing injunction. It seems to me that it would be. The Rs are all resident or incorporated in this jurisdiction. They are all cause of action defendants in the Ontario Proceedings. The assets subject to the Amended Order are all located in this jurisdiction. The relief sought is clearly consistent with and in support of the orders made by the Ontario Court as the primary court.

43. I also consider that it is appropriate and permissible to grant the Applicant's application for an order that an inhibition (pursuant to section 124 of the Registered Land Act (2018 Revision)) be entered in the register of title relating to the Vista Del Mar Property. During the hearing Mr Fox handed up a copy of an extract from Professor Cooper's *Real Estate Law and Practice in the Cayman Islands* which (at [1.4.4]) states that "*The Inhibition may be used, for example, to give effect to a Mareva injunction freezing a defendant's land assets*." Mr Fox also drew my attention to the wording in the standard form of freezing injunction dealing with inhibitions.

44. As regards the cross-undertaking in damages, I would note that as the English Court of Appeal observed in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2016] 1 WLR 160 (***Pugachev***) the acceptance of a more limited cross-undertaking forms part of the judge's discretion to grant relief and there are certain categories of case where the Court may either not require the applicant to provide any cross-undertaking at all or at least not require an unlimited one. A limited undertaking will have a cap on the potential liability of the applicant under it in the event that it is ordered that it be enforced.

45. As Lewison LJ summarised the position in *Pugachev* (at [68]-[69]) the default position is that an applicant for an interim injunction is required to give an unlimited cross-undertaking in damages. But the question of the extent of the cross-undertaking is a matter of discretion for the Court. The mere fact that litigation is being conducted by a liquidator (or other officeholder) of an insolvent company does not compel the conclusion that the cross-undertaking must be capped (see *Abbey Forwarding Ltd (In Liquidation) v HM Revenue & Customs* [2015] EWHC 225 (Ch)). The fact that a liquidator (or officeholder) is the claimant (or is bringing the claim by way of the applicant) is relevant because he/she is not bringing the claim for his/her own benefit. But he/she will be seeking to recover assets for the benefit of other creditors, and they may be prepared or be required to provide backing for the cross-undertaking. In *Wood v Baker* [2015] EWHC 2536 (Ch) at the without notice stage, HH Judge Hodge QC accepted a cross-undertaking in damages by a trustee in bankruptcy which was limited to the value of the unpledged assets in the bankrupt's estate (though he was not prepared to exclude the costs, expenses and disbursements of the bankruptcy pending the return date).

46. In the present case, I have noted what the Receiver has said in the Report. As currently advised, I do not consider that in the circumstances it would be appropriate to require the Receiver to incur personal liability under the cross-undertaking above the assets available to reimburse him out of the Applicant's estate. I note that there is no evidence before the Court as to who the main creditors of the Applicant are and who will be the main beneficiaries of recoveries made in the Ontario proceedings. It may be that such evidence

will be needed together with evidence as to whether they have been approached to provide backing for the cross-undertaking and what position they have taken in order to justify the continuation of the Amended Order at and after the return date. However, the limited cross-undertaking which the Applicant/Receiver proposed in the alternative seems to me to be acceptable and to represent the fair balance to be adopted for the time being.

47. I am also satisfied that in the circumstances of this case the disclosure orders set out in the Amended Order are necessary, justified and proportionate.

48. Finally, I also consider that the financial limits for living and legal expenses included in the Amended Order are justified, fair and proportionate. I did require the amounts to be increased from the sums included in the Applicant's Draft Order to avoid the order being oppressive and unduly restrictive and I accept that, of course, the Rs may wish to show why these sums are too low and in fact remain oppressive. This will be a matter for them to address at the return date or in a subsequent hearing.

Final note

49.

I should add one further point for the record. Some months ago, I had been asked, and had agreed, to participate in a World Bank conference in Nassau as part of a panel of speakers discussing how to design insolvency legislation to meet the needs of the host jurisdiction. Mr. Fox was to chair the panel. I joined two brief Zoom calls to prepare for the panel discussion and Mr. Fox was on at least one of the calls. However, Mr. Fox had to withdraw from the panel because of work commitments. When the Summons was assigned to me, I did not know that Mr. Fox was involved in these proceedings or that he would be appearing on behalf of the Applicant. When I found this out shortly before the hearing,

I considered whether my earlier participation in the calls preparing for the World Bank panel might be seen as raising concerns (in particular as to apparent bias) but I concluded that it did not. There would be no reasonable basis for such concerns. My contacts with Mr.

Fox were brief and public and only involved the normal limited interactions among speakers (including lawyers from other firms and jurisdictions) preparing for a major international conference to be attended by a wide range of professionals, regulators, institutions and governments. However, it did seem to me that I should set this out for the record and benefit of the Rs.

The Hon Justice Segal
Judge of the Grand Court, Cayman Islands
18 December 2024