

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA 2 of 2010

BEFORE

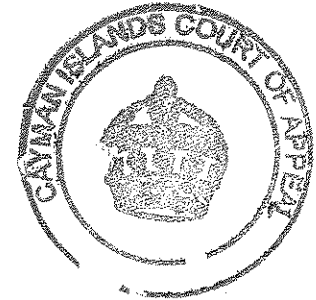
The Rt Hon Sir John Chadwick, President

The Hon Elliott Mottley, Justice of Appeal

The Hon Dr Abdulai Conteh, Justice of Appeal

ON APPEAL FROM THE GRAND COURT

(Cause No 845 of 1997)



BETWEEN

DELOITTE & TOUCHE, INC
(Trustee of the Estate of Bre-X Minerals Ltd, a Bankrupt)

Plaintiff

-and-

(1) JOHN B FELDERHOF
(2) INGRID FELDERHOF
(3) SPARTACUS CORP
and another

Defendants

Mr Alan Lenczner QC instructed by Mr David Dinner of Bodden & Bodden for the appellants, Ingrid Felderhof and Spartacus Corp.
Mr Mac Imrie and **Ms Jane Clarkson** of Maples and Calder for the respondent, Deloitte & Touche, Inc.

Hearing date: 11 August 2010
Judgment released 12th July 2011

JUDGMENT

Sir John Chadwick, President:

1. This is an appeal from an order made on 12 February 2010 by Justice Henderson in proceedings brought by Deloitte & Touche Inc., as trustee of the estate of Bre-X

Minerals Ltd, a Bankrupt, against John Felderhof, his former wife Ingrid Felderhof, Spartacus Corp, a company incorporated in the Cayman Islands, and Bank of Butterfield International (Cayman) Limited.

2. The proceedings were commenced as long ago as December 1997. On 18 December 1997, immediately before the issue the writ, the plaintiff obtained, without notice to the defendants, a worldwide freezing order restraining the first, second and third named defendants from disposing of, dealing with or diminishing the value of their assets up to the value of CDN\$3 billion. The defendants were given leave to apply to the court at any time to vary or discharge the order; but, subject to further order of the court, the order was to remain in force until after judgment in the action. On 2 May 2003 the action was stayed, by consent, pending the outcome of certain proceedings then before the Canadian courts.
3. By summons dated 30 June 2009 the second and third named defendants, Mrs Ingrid Felderhof and Spartacus Corp, sought orders setting aside the freezing order of 18 December 1997, discharging the stay imposed by the order of 2 May 2003 and striking out the action for want of prosecution and for the assessment of the damages for which the plaintiff was liable under the undertaking given when the freezing order was obtained. The summons sought, also, an order that a bond or other appropriate security be provided to support that undertaking. That summons came before Justice Henderson for hearing in December 2009.
4. By his order of 12 February 2010 Justice Henderson dismissed the summons dated 30 June 2009; but gave the applicants leave to apply, after a further year, for an order setting aside the freezing order of 18 December 1997 on the ground that the Plaintiff had failed to prosecute its case expeditiously. He directed the plaintiff to file a statement of claim. His reasons are set out in full judgment delivered on 10 February 2010.
5. The appeal is brought by Mrs Felderhof and (nominally, at least) by Spartacus Corp. We were told that that Spartacus Corp has ceased to exist. The fourth named

defendant, Bank of Butterfield International (Cayman) Limited took no part in the proceedings before Justice Henderson; and has taken no part in this appeal.

The underlying facts

6. The underlying facts are not, I think, in dispute. They are summarised by Justice Henderson at paragraphs 2 to 6 of his judgment:

“2. The Plaintiff (‘the Trustee’) is the Canadian trustee of the estate in bankruptcy of Bre-X Minerals Ltd. (‘Bre-X’), a company incorporated in Alberta, Canada whose shares were traded publicly on the Toronto, Alberta and Montreal stock exchanges and NASDAQ.

3. Bre-X was in the business of exploration and mining, particularly for gold. John Felderhof, the first defendant, is a geologist residing in the Cayman Islands. Until May, 1997 Mr Felderhof was the Vice Chairman and Senior Vice President of Bre-X, responsible for supervising, exploring and developing its mining claims in Indonesia. Bre-X had development rights in respect of properties located on the island of Kalimantan, Indonesia, in a remote area known as Busang.

4. On May 10th, 1993 the shares of Bre-X were trading at about 50 cents per share. On that date, a Bre-X press release announced to the world that it had acquired an 80% working interest in a gold project in Kalimantan. A steady stream of press releases throughout the period from May, 1993 to December, 1995 announced increasingly impressive drilling results and predictions based on them. By December 29th, 1995 Bre-X shares were trading at \$53 CAD per share. The trend continued in early 1996. As excitement among investors grew, Bre-X’s share price rose to \$286.50 CAD on May 22nd, 1996. On that date the shares split 10 for 1.

5. By October, 1996 concerns were being voiced publicly about the nature and extent of Bre-X’s entitlement to the mineral deposits in question. In March, 1997, a third party questioned the accuracy of Bre-X’s drilling results. Bre-X retained Graham Farquharson, President of Strathcona Mineral Services Limited, to perform a technical audit of Bre-X’s exploration work. On the same day (March 19th), Bre-X announced that Michael de Guzman, a geologist employed by Bre-X, had fallen from a helicopter to his death on his way to the Busang properties.

6. By March 26th, 1997 Mr Farquharson and Strathcona had formed the view that Bre-X’s drilling samples had been tampered with. The conclusion was that the samples had been ‘salted’ by the addition of gold particles obtained elsewhere. The bubble burst; the share price declined to virtually nothing. Bre-X eventually ceased trading and subsided into bankruptcy.”

The allegations against Mr Felderhof

7. As the judge explained, at paragraph 7 of his judgment, the Trustee alleges that Mr Felderhof, who (it is said) would have had intimate and early knowledge of the drilling results by virtue of his position in the company, traded Bre-X shares on a large scale. In particular, it is alleged that, while he was in possession of undisclosed material information affecting the value of the shares, Mr Felderhof sold Bre-X shares between December 1994 and September 1996 for a total sale price of some CDN \$71 million dollars. Many of those shares (it is said) had been acquired at relatively low prices per share.

The Canadian proceedings

8. The judge identified four sets of proceedings in the Canadian courts:
- (i) a class action in Ontario (the "Carom class action") against Bre-X, Mr Felderhof, other directors, officers and employees of Bre-X, and two brokerage houses;
 - (ii) a class action in Ontario against Mrs Felderhof and Spartacus Corp;
 - (iii) a derivative action in Ontario in the name of Bre-X brought by a group of investors against Mr Felderhof and other Bre-X officers and directors; and
 - (iv) criminal proceedings against Mr Felderhof under the Ontario Securities Act.

He noted, also, that a class action had been commenced in Texas, in the United States of America, against Mr Felderhof and other officers, directors and employees together with several brokerage and engineering firms. He observed, at paragraph 14 of his judgment, that the Ontario class action against Mrs Felderhof and Spartacus Corp had been stayed in 1998, pending determination of the claim against Mr Felderhof; but that that stay had been lifted. He explained, at paragraphs 14 and 16 of his judgment, that:

"14. . . . The class action and the derivative action initiated in Ontario have been the subject of case management and are to be heard together in the Commercial Division in Ontario."

"16. The Ontario actions have progressed slowly. Certification for the Texas class action has not been obtained, so that action is at an end. Mr Felderhof has been found not guilty of the charges under the Ontario Securities Act."

These proceedings

9. The writ in these proceedings was issued on 19 December 1997. It is endorsed with a claim for damages against Mr Felderhof for breach of his fiduciary duty and negligence in his capacity as a director, general manager and chief administrative officer of Bre-X. As the judge observed, at paragraph 9 of his judgment, the writ asserted no cause of action against Mrs Felderhof or Spartacus; But it was alleged (in the endorsement on the writ) (i) that Mrs Felderhof owned three pieces of real property and a boat as nominee or bare trustee for Mr Felderhof – in the alternative, that any beneficial interest she might have in those assets should be set aside because the assets were transferred to her with the intention of defeating the claims of the creditors of Mr Felderhof – and (ii) that assets in the name of Mrs Felderhof would be available to satisfy any judgment obtained by the plaintiff against Mr Felderhof. The fourth defendant, Bank of Butterfield International (Cayman) Limited had not, then, been joined as a party

10. A worldwide freezing order against Mr Felderhof, Mrs Felderhof and Spartacus Corp was granted by Justice Graham on 18 December 1997. Subsequently the order was varied to permit Mr and Mrs Felderhof to use funds for living expenses and legal costs. As the judge observed, at paragraph 10 of his judgment, “Thereafter, no real effort was made to advance the litigation in the Cayman Islands.”

11. At paragraphs 11 to 15 of his judgment the judge described the circumstances in which he had granted a stay of these proceedings in May 2003:
 - “11. In March, 1998 Mr Felderhof’s then attorney in Canada advised the Trustee that he preferred to meet the various claims in a single trial in one jurisdiction; he asked that the substantive claims be determined by a court in Ontario and acknowledged that if the Trustee obtained judgment then enforcement and tracing proceedings in the Cayman Islands would be required (first affidavit of Trent Morris, paragraph 6.5).

 12. Mr Joseph Groia, who was counsel to Mr Felderhof in February, 1999, wrote at that time to the Trustee’s counsel setting out his understanding of how this multiplicity of actions would be handled:

‘My understanding of the Trustee’s position had been that it intended to proceed with all of these allegations in Ontario, thereby creating a single omnibus action that we would defend in Ontario. As well, we had understood that the Cayman action would not be proceeded with except insofar as it might be necessary for enforcement or collection purposes should the Trustee be successful on its claim in Ontario.

If the intention is now to proceed on both fronts simultaneously, could you please advise me and we will take such remedies as may be open to us in order to bring about what we consider to be the only fair result for all concerned: a single law suit in Ontario to adjudicate on all of the various matters between your client and ours.’

13. The Trustee agreed that the Cayman action would not be proceeded with ‘except insofar as it might be necessary for enforcement or collection purposes.’ . . .

14. . . .

15. On May 2nd, 2003 I granted a consent order staying this proceeding ‘pending the outcome of either or both of the Ontario derivative action . . . and/or the Carom class action . . .’. My order of that date confirmed that the Mareva injunction would remain in force notwithstanding the stay. All parties were given liberty to apply to discharge or vary the injunction. When she consented to the stay of proceedings, Mrs Felderhof was aware of a commitment by the Trustee (given in an affidavit sworn December 20th, 2002) that it would move expeditiously to bring the Ontario derivative action on for trial. The Trustee has agreed that the stay of proceedings currently in effect may be lifted for the limited purpose of this review hearing.”

The judge’s reasons

12. The judge reminded himself, at paragraph 17 of his judgment, that no cause of action was asserted against Mrs Felderhof (or against Spartacus Corp) in these proceedings. He pointed out that the claim advanced against Mrs Felderhof was that she owned property which would be available to satisfy any judgment which the Trustee might obtain against Mr Felderhof. He referred to the “so-called *Chabra* jurisdiction” - that is to say, the jurisdiction to grant *Mareva* relief against defendants against whom no cause of action is pleaded – which has developed since the decision of Mr Justice Mummery, sitting in the High Court of England and Wales, in *TSB Private Bank International SA v Chabra and another* [1992] 1 WLR

231, [1992] 2 All ER 245. He set out the principles which, at paragraph 51 of his judgment in *Ahmad Hamad Algosaibi and Brothers Company v Saad Investments Company Limited and others* (unreported, Cause 359/09, 17 November 2009), he had derived from *Chabra* and the subsequent decisions.

13. The judge accepted that, notwithstanding (i) that some twelve years had elapsed since the grant of the freezing order in 1997 and (ii) that, by consenting to the stay imposed by his order of 2 May 2003, Mrs Felderhof might be said to have waived her right to assert that the freezing order should not have been made, he should entertain the application made by the summons that was before him. But, as he observed at paragraph 20 of his judgment, “the issues must now be approached in the light of the time which has passed and the agreement between the parties in 2003”.
14. At paragraph 23 of his judgment the judge referred to the submission, advanced on behalf of Mrs Felderhof, that the Grand Court had no power to grant a free standing *Mareva* injunction merely to assist a plaintiff in a foreign court who was not pursuing his claim in this jurisdiction. He rejected that submission for the reasons which he had set out at paragraphs 21 and 22. He relied, in particular, on the decision of this Court in *Telesystem International Wireless Inc and others v CDC/Opportunity Equity partners LP and others* [2002] CILR note 22. But he observed, first, that the claim advanced in the Cayman Islands (against the defendant in respect of whom a cause of action was asserted) must be one which was within the jurisdiction of the Grand Court; second, that the court must be satisfied that *Mareva* relief was needed to support the effective enforcement of a prospective foreign judgment “because the local defendant’s assets may become available to satisfy that judgment”; and, third, that the court should approach a request for such *Mareva* relief with “utmost caution” and accede to it only where the balance of advantage “plainly favours “ that course.
15. At paragraphs 24 to 26 of his judgment the judge addressed the submission that Mrs Felderhof had suffered prejudice by the delay since the grant of the freezing order.

He expressed the view that the Trustee's failure to serve a statement of claim was "somewhat troublesome". But he was satisfied that, in the events which had happened, the lack of a pleaded case had caused Mrs Felderhof no prejudice; observing that she had entered into the agreement leading to the 2003 consent order upon legal advice.

16. It was submitted on behalf of Mrs Felderhof that the plaintiff could have no good arguable case because the alleged negligence and breach of fiduciary duty by Mr Felderhof resulted in no loss or damage to Bre-X. In rejecting that submission, at paragraphs 27 and 28 of his judgment, the judge relied on observations made by Lord Hoffmann when delivering the opinion of the Privy Council in *Walsh and others v Deloitte & Touche Inc (Bahamas)* [2001] UKPC 58, at paragraph [13]. Put shortly, it was arguable that Mr Felderhof owed a fiduciary duty to Bre-X to refrain from using his insider knowledge to make a profit from dealing in its shares; and, further, arguable that the claimant, as trustee in the bankruptcy of Bre-X, could require Mr Felderhof to account for that profit.

17. The judge went on, at paragraphs 29 to 34 of his judgment, to address the submission that, in the circumstances that the evidence of Mr Farquharson (to whom he had made reference at paragraphs 5 and 6 of his judgment) had been rejected in the trial of Mr Felderhof on charges under the Ontario Securities Act, there was no longer a sufficient evidential basis to support the conclusion that there was a good arguable case against Mr Felderhof, either in the Ontario (civil) actions or in these proceedings.

18. In addressing that submission the judge accepted (at paragraph 32 of his judgment) that Mrs Felderhof was entitled to a fresh assessment of the question whether the Trustee's claim against Mr Felderhof was "strong enough to merit protection". He set out, at paragraph 33, a summary of the claims made against Mr Felderhof in the Ontario proceedings as described in the affidavit of Mr Clifford Lax QC, a senior litigation attorney in Toronto. He concluded, at paragraph 34:

“The several theories of liability described by Mr Lax depend very little, if at all upon the evidence of Mr Farquharson. In my view, the narrative of events surrounding the rise and fall of the Bre-X stock, the history of Mr Felderhof’s extensive trading in that stock, the contrast between what was said to the public about the Busang properties and what must have been known to Mr Felderhof, and the commercial viability of those properties as a source of gold, provide a more than ample demonstration of a good arguable case. With or without the evidence of Mr Farquharson, the Trustee has claims which are strong enough, whether they are proceeded with in Canada or in this country, to merit protection.”

19. At paragraphs 35 to 37 of his judgment, the judge addressed the submission that the delay in getting the claims against Mr Felderhof to trial was, of itself, a sufficient reason to discharge the injunction. He accepted, in principle, that in appropriate cases an interlocutory injunction can and should be discharged if a plaintiff failed to pursue its claim expeditiously; and that the delay of twelve years which had occurred in this case was “extraordinary”. Nevertheless, as he observed at paragraph 36, “much of this delay has been caused by the defendants themselves and cannot be attributed to the Trustee”. He set out, in that paragraph, some of the circumstances which led him to that view; and went on (at paragraph 37):

“As the examples above will demonstrate, the procedural history does not permit a conclusion that the delay, or any substantial part of it, can be attributed to fault or neglect on the part of the Trustee. There is not yet a justification for setting aside the Mareva injunction because of a failure by the Trustee to prosecute its case in a timely fashion.”

But, as I have said, he gave Mrs Felderhof leave to apply again after one year for an order setting aside the injunction on the ground of delay.

20. At paragraph 38 of his judgment the judge rejected Mrs Felderhof’s application for an order requiring the plaintiff to fortify its undertaking as to damages with security. He described that application as “a tactical manoeuvre coming, as it does, twelve years after the issuance of the injunction”. As he said, the question of fortification had not been raised before and there was no convincing explanation as to why it had become necessary.

The grounds of appeal

21. Mrs Felderhof and Spartacus Corp appeal from the order of 10 February 2010. The grounds of appeal, as they appear in the appellants' Memorandum dated 23 March 2010, may be summarised as follows:

- (1) The judge erred in principle in failing to set aside the injunction in circumstances where, in the period of twelve years which had elapsed since the injunction had been issued *ex parte*, no statement of claim had been issued in the proceedings.
- (2) The judge erred in law in thinking that the delay in the service of a statement of claim could be cured by requiring the plaintiff to serve a statement of claim within 28 days of the date of his order.
- (3) The judge erred in law in that, having accepted that the evidence of Mr Farquharson (on the basis of which the injunction had been granted in December 1997) had been discredited at Mr Felderhof's trial on charges under the Ontario Securities Act in 2007, he failed to discharge the injunction on the basis that there was no longer any evidential foundation to support the plaintiff's claim.
- (4) The judge erred in holding that the injunction, granted in December 1997, could be supported by the evidence given in the affidavit of Mr Lax QC, sworn in December 2009.
- (5) The judge erred in failing to appreciate that the plaintiff's claim in the Cayman Islands was ancillary to a statutory cause of action in Ontario which was not, itself, justiciable in this jurisdiction.
- (6) The judge erred in continuing *Mareva* relief under the *Chabra* jurisdiction in circumstances where no cause of action justiciable in this jurisdiction was pleaded.
- (7) The judge erred in continuing *Mareva* relief in support of the claims made in the Carom class action brought in Ontario.

22. These grounds of appeal were developed in the skeleton argument filed on behalf of Mrs Felderhof. In oral argument at the hearing of the appeal the appellants' submissions were advanced under four heads: (i) that, following the Securities Act

trial in Ontario, it could be seen that there was no good arguable case against Mr Felderhof; (ii) that there was no sufficient basis in the present case for the exercise of the so-called *Chabra* jurisdiction against non-cause-action defendants; (iii) that the plaintiff had forfeited any entitlement to *Mareva* relief by reason of its failure to pursue proceedings, in Ontario or in the Cayman Islands, with appropriate dispatch; and (iv) that the *Mareva* injunction should not have been continued in circumstances that the plaintiff's undertaking as to damages was not supported (or fortified) by security in the form of a bond. It is convenient to adopt the same approach in this judgment.

Whether, following the Securities Act trial, it can be seen that there is no good arguable case against Mr Felderhof?

23. It is not in dispute that the freezing order was granted by Justice Graham on 18 December 1997 on the basis of an affidavit sworn by Mr Ross Nelson on behalf of the plaintiff Trustee. In that affidavit Mr Nelson relied upon the report ("the Strathcona Report") which had been prepared by Mr Farquharson.

24. In his affidavit of 18 December 1997 Mr Nelson had deposed:

"5.2 On the basis of the information presently available, the Trustee puts Bre-X's case against Mr. Felderhof in two ways. First, the Plaintiff alleges that he and other directors caused Bre-X to misrepresent to the investing public the true nature of its interest in the Busang properties. Since the directors including Mr. Felderhof must have known the truth, I verily believe this constitutes breach of their fiduciary duty to the company. Second, the Plaintiff alleges that in his capacity as Bre-X's Sr. Vice President and General Manager resident in Indonesia, it was Mr. Felderhof's responsibility to ensure that the exploration work was carried out in accordance with recognized industry standards which are designed, *inter alia*, to ensure the integrity and reliability of assay results. The information available indicates Mr. Felderhof failed to do so for reasons which are set out in detail in the Strathcona Report. . . . If one gives him the benefit of the doubt (and the Trustee is not at present alleging fraud), and taking into account Mr. Felderhof's experience, it is difficult to escape the conclusion that he was grossly negligent to have made increasingly extravagant claims about the existence and extent of the extractable gold reserves in the Busang properties without bothering to take elementary steps

to secure the integrity of the core samples and check the accuracy of the assay results. . . .”.

It can be seen that the claims are put under two heads: (i) breach of fiduciary duty – in causing Bre-X “to misrepresent to the investing public the true nature of its interest in the Busang properties” – and (ii) negligence – in failing to ensure the integrity and reliability of assay results”.

25. The claim endorsed on the writ issued on the following day, 19 December 1997, reflected the basis upon which, as stated in Mr Nelson’s affidavit, the Trustee put its case against Mr Felderhof. It was a claim for “damages caused by the First Defendant’s breach of fiduciary duty and negligence in his capacity as director, general manager and chief administrative officer of Bre-X Minerals Ltd. during the period 1993 to 1997”.

26. In or about 1999 Mr Felderhof was charged by the Ontario Securities Commission with eight counts of violating the Ontario Securities Act, R.S.O. 1990 c.S.5. Counts 1 to 4 alleged insider trading, contrary to section 76(1) of that Act: counts 5 to 8 alleged the authorisation of misleading press releases, contrary to section 122(3). Mr Felderhof was tried on those eight counts before Justice Peter Hryn. Following a trial which extended over 160 days Mr Felderhof was acquitted on all counts. We have been taken to the very full judgment of Justice Hryn, released on 31 July 2007. His conclusions are summarised at pages 30 and 31 of the transcript of that judgment with which this Court has been provided

27. Mr Felderhof’s acquittal on counts 1 to 4 is, as it seems to me, of little or no relevance to the civil claims brought against him in the civil proceedings pending in the Canadian courts or in these proceedings. Section 76(1) of the Ontario Securities Act was in these terms:

“76(1) **Trading where undisclosed change.** – No person or company in a special relationship with a reporting issuer shall purchase or sell securities of the reporting issuer with the knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed.”

In that context “material fact”, means “. . . a fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of such securities”. There was no need, on a charge under section 76(1) of the Act, for the prosecution (the Ontario Securities Commission, or “OSC”) to allege or prove that the defendant had made any representation to the public.

28. Justice Hryn was not satisfied that the OSC had proved beyond a reasonable doubt that Mr Felderhof knew, at the times when he sold securities of Bre-X, of facts alleged to be material for the purposes of counts 1 to 4, - see, in particular, his analysis of the “material facts” alleged at pages 406 to 409 in the transcript which has been provided to this Court and his conclusions at pages 499, 516 and 554 – or that, in relation to the facts of which he did have knowledge (transcript pages 556 and 558) that, taken in isolation of the others, those facts were “material facts” (transcript pages 565, 573, 607 and 609). As Justice Hryn put it, in summary, at the conclusion of his judgment:

“Having found that the O.S.C has not proven Particular 1 and not proven Felderhof’s knowledge of Particular 2 and 3 beyond a reasonable doubt, Felderhof is found not guilty of Count 1 on that basis alone.

For the reasons given above the OSC has not proven beyond a reasonable doubt that Particulars 1 through 5 are material facts, an essential element of the actus reus of the offence, and on that basis Felderhof is found not guilty of Counts 1 to 4.”

There was no finding, in relation to counts 1 to 4, that Mr Felderhof had made (or caused Bre-X to make) any representation of material fact to the public. In so far as there were findings of knowledge (or lack of knowledge) of material facts, those findings were made on the basis of proof “beyond reasonable doubt” and not on the basis (applicable in civil proceedings) of proof “on the balance of probabilities”.

29. The position following Mr Felderhof’s acquittal on counts 5 to 8 is different. Section 122 of the Ontario Securities Act was in these terms, so far as material:

122(1) **Offences, general.** Every person or company that

(a) . . .

(b) makes a statement in any application, release, report, preliminary prospectus, prospectus, return, financial statement, information, circular, take-over bid circular, issuer bid circular or

other document required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact which is required to be stated or that is necessary to make the statement not misleading;

(c) . . .

is guilty of an offence . . .

(2) **Defence.** Without limiting the availability of other offences, no person or company is guilty of an offence under clause (1)(a) or (b) if the person or company did not know and in the exercise of reasonable diligence could not have known that the statement was misleading or untrue or that it omitted to state a fact that was required to be stated or that was necessary to make the statement not misleading in the light of the circumstances in which it was made.

(3) **Directors and officers.** Every director or officer of a company . . . who authorizes, permits or acquiesces in the commission of an offence under subsection (1) by the company . . . is guilty of an offence.”

In relation to counts 5 to 8 it was open to Mr Felderhof to seek to establish – and, if established, to rely upon – a defence of due diligence.

30. On counts 5 to 8 Justice Hryn found that the OSC had proved the *actus reus* of the offences beyond a reasonable doubt: that is to say, he found that Bre-X had issued the relevant press releases, that the press releases were required to be filed under Ontario Securities law, that the press releases contained statements announcing resource calculations which, at the time and in the circumstances under which they were made, were misleading or untrue, that Mr Felderhof was a director and officer of Bre-X and that Mr Felderhof did authorize, permit or acquiesce in the issuance of those press releases. But he held that Mr Felderhof was entitled to rely on the due diligence defence provided by section 122(2); which, as he had held, was available to a director or officer charged under section 122(3) of the Act.

31. Mr Farquharson had been called as a witness by the OSC for the purpose of proving the existence of what had been described in the Strathcona Report as “red flags”: that is to say, concerns or warning signs which they had identified in preparing their report. There were twenty items of concern: they were listed in a letter from Strathcona to Bre-X dated 20 October 1997 which Justice Hryn set out at pages 130

to 136. As Justice Hryn observed (at page 140 of the transcript of his judgment), “in the main the O.S.C. case [on due diligence] is based on the evidence of Graham Farquharson”. It is fair to say that Justice Hryn was critical of that evidence: see, in particular, the passages at pages 186/7, 226, 235, 307, 331, 359 and 369/70 of the transcript of his judgment; and, generally, the analysis of the evidence relating to the “red flag” issue at pages 395 to 406. In summarising his conclusion on counts 5 to 8 (at page 30 of his judgment) he said this:

“ . . . Where everyone else saw gold only Strathcona with hindsight saw red flags. I disagree with the O.S.C. and I find that I am satisfied on the balance of probabilities that Felderhof has proven that he took all reasonable care. In the circumstances of this case that means that I prefer the Defence evidence over the O.S.C. evidence with respect to the Red Flags alleged by the O.S.C.. Felderhof is found not guilty of counts 5 to 8.”

As Justice Henderson pointed out (at paragraph 29 of his judgment):

“Mrs. Felderhof says that, in light of this finding, the evidence of Mr. Farquharson must be regarded as unreliable.”

32. Nevertheless, Justice Henderson rejected the further submission that the criticism of Mr Farquharson’s evidence led to the conclusion that there was no longer a good arguable case against Mr. Felderhof and that the injunction should be discharged. As I have said, he took the view that “with or without the evidence of Mr Farquharson, the Trustee has claims which are strong enough, whether they are proceeded with in Canada or this country, to merit protection” (paragraph 34 of his judgment). He was satisfied that: “the narrative of events surrounding the rise and fall of the Bre-X stock, the history of Mr Felderhof’s extensive trading in that stock, the contrast between what was said to the public about the Busang properties and what must have been known to Mr Felderhof, and the commercial viability of those properties as a source of gold” provided a more than ample demonstration of good arguable case.

33. There is nothing in the judgment of Justice Hryn in the Ontario Securities Act proceedings which gives reason to think that the Trustee will face difficulty in establishing his case as to “the events surrounding the rise and fall of the Bre-X stock”; or “Mr Felderhof’s extensive trading in that stock”; or what was said to the

public about the Busang properties”; or “the commercial viability of those properties as a source of gold”. On the other hand, it must be recognised that Justice Hryn’s criticism – amounting to rejection – of Mr Farquharson’s evidence points to the conclusion that the Trustee will have substantial difficulty in pursuing a claim that Mr Felderhof was implicated in, or was negligent in failing to detect, the “salting” of the core samples.

34. In those circumstances, the critical question, as it seems to me, is whether – in the light of the findings in the judgment of Justice Hryn – Justice Henderson was entitled to reach the conclusion that there remained (at the least) a good arguable case against Mr Felderhof based on the history of his trading in Bre-X stock and “the contrast between what was said to the public about the Busang properties and *what must have been known to Mr Felderhof*” [emphasis added].

35. Justice Henderson reached the conclusion that he did after considering the affidavit of Mr Lax QC; passages from which he had set out at paragraph 33 of his judgment. Mr Lax had expressed the view, at paragraph 6.4 of his affidavit, that “the allegations pleaded in the Statement of Claim, if proven, would be sufficient to sustain causes of action under Ontario law for breaches of both Mr Felderhof’s fiduciary duty and his duty of care”. He had pointed out that, in Canada, the extent of a director’s duty to the company is “statutorily prescribed”: it is to require directors and officers “to act honestly and in good faith with a view to the best interests of the corporation”; and to “respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the objects of the corporation”. Duties in like terms would be recognised in this jurisdiction under the general law. Mr Lax had then gone on to say this (at paragraphs 6.6 to 6.8 of his affidavit):

“6.6 According to the Statement of Claim, Mr. Felderhof breached his fiduciary duty to Bre-X by, *inter alia*, representing to the investing public that the Indonesian properties at issue in this dispute (the ‘Busang Properties’) held large amounts of gold. Specifically, Mr. Felderhof confirmed gold resources of 71 million ounces, and stated that resources could top 200 million ounces based on his assessment of the drilling results to date. Mr. Felderhof also allegedly misrepresented

the extent of Bre-X's ownership in the Busang Properties. Mr. Felderhof is alleged to have either known that these statements were false or misleading or was reckless as to whether they were true. He is alleged to have made these misstatements in order to benefit from his subsequent sales of Bre-X shares.

6.7 The Trustee alleges that Mr Felderhof's breach of his fiduciary duty led Bre-X to expend more [than] \$110,000,000 of its capital in pursuing a mining venture that had no commercial value. The Trustee further claims that all profits made by Mr Felderhof as a result of his sale of the Bre-X shares should be deemed to be held by Mr Felderhof in constructive trust for the Trustee.

6.8 In my opinion, these allegations, if proven, would be sufficient grounds for a cause of action for breach of fiduciary duty against Mr Felderhof. If Mr Felderhof knowingly or recklessly made false statements [for] his own private gain, and these false statements caused damage to the company, then Mr Felderhof would have violated his duty to act honestly and in good faith with a view to the best interests of Bre-X ”

At paragraphs 6.15 and 6.16 of his affidavit Mr Lax addressed the cause of action in negligence. He said this:

“6.15 Like their fiduciary duty, the duty of care owed by directors and officers to the corporation is statutorily prescribed. A director or officer is required ‘to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

6.16 If the allegations in the Statement of Claim are correct, Mr Felderhof negligently performed his corporate duties in a number of respects. As examples, he misrepresented the amount the amount of gold in the Busang Properties, failed to follow the standard mining industry practice of having an independent expert test the Busang Properties, and failed in a number of respects to prevent the tests conducted on the Busang Properties from being fraudulently tampered with. This negligence led Bre-X to spend a great deal of capital pursuing the mining venture in the Busang Properties, which was in fact commercially worthless.”

36. There is obvious force in the submission, advanced on behalf of the appellants in their skeleton argument, that Mr Lax “does not purport to state any facts”; his opinion as to the existence of a cause of action in the Ontario proceedings is based on the stated assumption that the facts alleged in the statement of claim will be established. It is said that Justice Henderson erred in holding that the injunction, granted in December 1997, could be supported by the evidence given in the

affidavit of Mr Lax, sworn in December 2009. If the affidavit of Mr Lax had been the only material on which the judge relied to support his conclusion that, notwithstanding the findings of Justice Hryn, there remained a good arguable case against Mr Felderhof, I would have very considerable doubt whether that conclusion could stand. It was not enough for the judge to ask himself whether there was a cause of action on the pleaded case: it was necessary for him, also, to ask whether there was a good arguable case on the facts.

37. The affidavit of Mr Lax was not the only material before the judge. There was significant other evidence: identified at paragraph 41 of the written submissions which have been lodged on behalf of the Trustee on this appeal. The substance of that evidence is summarised at paragraph 42 of those submissions. In particular, it is pointed out by counsel for the Trustee (and not challenged on behalf of the appellants) that, in the summer of 1996 – at a time when the interests of Bre-X in the Busang properties were at risk of being lost - Mrs Felderhof sold “millions of dollars worth” of Bre-X shares which had been transferred to her by Mr Felderhof. Neither Mr Felderhof, nor Mrs Felderhof, filed insider trading reports in respect of those sales. The trustee invites the court to infer that the decision to sell those shares was driven by knowledge that the company’s public assertions that it was undisputed owner of the Busang properties were disingenuous.

38. In that context it is pertinent to have in mind observations made by the Privy Council in *Walsh and others v Deloitte & Touche Inc (Bahamas)* [2001] UKPC 58. The appellant was the widow and executrix of Mr David Walsh, the founder, chief executive and principal shareholder of Bre-X. Following the collapse of Bre-X, Mr and Mrs Walsh were (in common with Mr and Mrs Felderhof) defendants to proceedings in the Canadian courts. In 1996 Mr and Mrs Walsh had moved to the Bahamas. The Trustee commenced proceedings against them in that jurisdiction, the main purpose of which was (as Lord Hoffmann pointed out) “to obtain interlocutory relief in the form of a *Mareva* injunction restraining Mr and Mrs Walsh from dealing with their assets world-wide and an order for disclosure of the value, location and other particulars of such assets”. Orders to that effect were made by the

courts of the Bahamas in 1998. Following the death of her husband, Mrs Walsh sought to discharge those orders.

39. In the course of delivering the opinion of the Privy Council, Lord Hoffmann explained (at paragraphs 3 and 4 of his speech) that:

“Between October 1996 and March 1997 various rumours circulated to the effect that Bre-X's rights to exploitation of the Busang gold were being challenged in Indonesia, both by Indonesian parties involved in the joint ventures and by the Indonesian government. It was also rumoured that Mr Walsh and other insiders had sold substantial numbers of shares without revealing these difficulties to the market. Mr Walsh issued press releases saying that the challenges to Bre-X's title were without substance and that it was about to enter into a joint venture agreement with a large and reputable mining company for working the deposits and winning the gold.

In March 1997, however, the disputes about title were overtaken by an announcement that independent surveys on behalf of the prospective new mining partner had revealed that there was no gold at all. The drilling samples had been fraudulently salted. Mr Walsh commissioned an independent inquiry by a firm called Forensic Investigative Associates Inc ("FIA") into how the salting had occurred, who was responsible and who knew about it. The report found no evidence to implicate him.”

After addressing other submissions made on behalf of the appellant – including the submission that the alleged breach of fiduciary duty resulted in no loss or damage to the company (in the passage to which Justice Henderson referred in paragraph 27 of his judgment in the present case) – Lord Hoffmann turned (at paragraph 15) to the question whether the Trustee had made out a good arguable case on the facts. He said this:

“As for the facts, their Lordships do not think it desirable to say more than is absolutely necessary by way of agreement that a good arguable case has been shown. They will advert to only one of the matters relied upon. One of the apparent set-backs suffered by Bre-X in its relationship with the government of Indonesia was the cancellation on 15 August 1996 of the preliminary survey permit ("SIPP") which entitled the joint venture in respect of Busang II to set out the boundaries and confirm the content of exploration samples. No public announcement of this event was made in Canada to shareholders or the market. In a press statement issued on 26 February 1997, in response to rumours of insider dealing by

himself and other officers of the company, Mr Walsh said that the cancellation of the SIPP had not been a material event because the position of Bre-X was protected by mining authorisations which ‘supersede the legal status of the SIPPs’. That may or may not have been the case, but their Lordships think that a trial court may find it striking that in the week after cancellation, Mr and Mrs Walsh each sold about \$7m worth of shares. These and other facts are of course open to explanation but their Lordships think it impossible to say that the threshold requirement of a good arguable case was not satisfied.”

It is important to have in mind that, in the *Walsh* case, there was no evidence that Mr Walsh was implicated in the “salting” of the core samples.

40. In the present case, as it seems to me, Justice Henderson was entitled to take a similar view. Whether or not – in the light of the findings of Justice Hryn in the Ontario Securities Act - the Trustee has any real prospect of establishing that Mr Felderhof was negligent in failing to ensure that there were proper procedures to secure the integrity of core samples, it is impossible to say that - in so far as the allegation of breach of fiduciary duty is founded on the alleged misrepresentation as to the true nature of the interest of Bre-X in the Busang properties - the threshold requirement of a good arguable case is not satisfied.

Whether there was sufficient basis in the present case for the exercise of the so-called Chabra jurisdiction against non-cause-action defendants?

41. As I have said, the judge set out, at paragraph 17 of his judgment, the conclusions which he had derived from a review of the decisions following *TSB Private Bank International SA v Chabra and another* [1992] 1 WLR 231, [1992] 2 All ER 245. Those conclusions, first set out by the judge in his earlier judgment in *Ahmad Hamad Algozaibi and Brothers Company v Saad Investments Company* (unreported, cause 359/09, 17 November 2009), were considered by this Court on the appeal from that judgment (CICA 1 of 2010). For the purpose of the present appeal it is sufficient to note that this Court adopted, with approval, the proposition stated at sub-paragraph 51(iii) of Justice Henderson’s judgment in the *Algozaibi* case). In the words of this Court (at paragraph 22 of its judgment):

“ . . . there is jurisdiction to grant a *Mareva* injunction against an NCAD [a non-cause-of action defendant] in a case where such an injunction would be

ancillary and incidental to the effective enforcement of a prospective judgment against a defendant against whom there is a pleaded cause of action (a “cause-of-action defendant” or “CAD”) because the assets of the NCAD – that is to say, assets to which the NCAD is itself entitled beneficially (as well as assets in which the CAD has a beneficial interest) - may become available to satisfy a judgment against the cause-of-action defendant.”

42. It was submitted in the skeleton argument lodged on behalf of the appellants (at paragraph 34) that the so-called *Chabra* jurisdiction does not extend to permit a court in this jurisdiction to grant a freezing injunction “in aid of a proceeding in a foreign court” where (a) the cause of action pleaded in the foreign jurisdiction is not justiciable in this jurisdiction and (b) “the person whose assets are to be frozen is not a party defendant in the foreign jurisdiction”.

43. It was, I think, accepted that – without qualification – a submission that a court in the Cayman Islands has no power to grant *Mareva* relief against a person amenable to its jurisdiction in aid of proceedings pending in Ontario against that person could not be sustained. If authority be needed for the proposition that power to grant *Mareva* relief in such circumstances, it can be found in the observations of Lord Hoffmann in *Walsh* (*ibid*, at [21] and [22]):

“[21] Secondly, Lord Grabiner [counsel for Mrs Walsh as executrix of her husband’s estate] said that although the writ issued in The Bahamas made substantive claims, the Trustee had made it clear that after obtaining *Mareva* relief it intended to stay the action and proceed with the action in Ontario. There is no doubt that the court has jurisdiction to make an order in such circumstances: see *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334. But Lord Grabiner said that, as a matter of discretion, the Bahamian court should not have made a world-wide order solely in aid of proceedings in Canada.

[22] Their Lordships do not consider that any objection in principle can be made to the exercise of the jurisdiction in this way. It is commonplace that the most convenient forum may not be the place where it is desirable to obtain *Mareva* relief, either because the defendant resides there and is amenable to the enforcement jurisdiction of the local court, or because the assets are there and notice can be served upon persons (such as banks) who have them under control. As

long ago as 1983, in the early days of the English *Mareva* jurisdiction, Vinelott J. granted an order in aid of proceedings in Ireland: see *House of Spring Gardens Ltd v Waite* [1984] FSR 277 and more recently in *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 the Court of Appeal made a similar order in aid of proceedings in Switzerland. Their Lordships consider that such international judicial co-operation should be encouraged.”

44. The question whether the court in the Cayman Islands has power to grant *Mareva* relief against a person amenable to its jurisdiction in aid of proceedings pending in Ontario against that person in circumstances where the cause of action pleaded in the Ontario proceedings is not justiciable here – the question raised by qualification (a) - does not arise in the present case. Although the causes of action pleaded in the Ontario proceedings (in particular, in the derivative action) – include the statutory cause of action under the Ontario Securities Act – which would not be justiciable in the Cayman Islands – the allegations of breach of fiduciary duty and negligence are also relied upon in those proceedings. As Justice Henderson pointed out, it was held by the Privy Council in *Walsh* that it was arguable that a cause of action existed in equity against a person owing fiduciary duties to a company who had used inside information to profit from trading in the company’s shares. Further, as it seems to me, the real question is not whether the cause of action pleaded in the Ontario proceedings would be justiciable here: the real question is whether a judgment against Mr Felderhof in the Ontario proceedings could be enforced against him in the Cayman Islands. Given that proceedings have been commenced against him here, at a time when he was amenable to the jurisdiction of the courts of the Cayman Islands, which raise substantially the same issues as those raised in the Ontario proceedings, there is, at the least, a good arguable case that a judgment against Mr Felderhof in the Ontario proceedings would be enforceable here. That, of course, was the premise underlying the order made in 2003 for a stay of the proceedings in these courts.

45. The second qualification – that “(b) the person whose assets are to be frozen is not a party defendant in the foreign jurisdiction” - is based on the assumption that, following investigation, it will be established that the assets to be frozen are, indeed,

the assets of Mrs Felderhof and not assets which are held by her for the benefit of Mr Felderhof. In so far as the assets subject to the freezing injunction made against Mrs Felderhof are assets which she holds for the benefit of Mr Felderhof the question raised by the second qualification does not arise. But, as Justice Henderson had recognised in the *Algozaibi* case, the *Chabra* jurisdiction is not limited to assets which are held by the non-cause-of-action defendant for the benefit of the cause-of-action defendant: it extends to assets to which the non-cause-of action defendant is entitled beneficially which may (perhaps through some judicial process) become available to satisfy a judgment against the cause-of-action defendant. The relevant question, therefore, is whether in relation to assets in the latter category, the Caymanian courts have no power to grant *Mareva* relief against Mrs Felderhof because she is not a party to the proceedings pending against Mr Felderhof and others in Ontario.

46. In my view, the answer to that question is plainly “No”. The purpose of the *Chabra* jurisdiction is to ensure that enforcement of a future judgment of the court against a cause-of-action defendant is not frustrated by the dissipation of assets (in the hands of the non-cause-of-action defendant) which would or might otherwise be or become available to satisfy that judgment. The principle was explained by the High Court of Australia in *Cardile v Led Builders Pty Ltd* [1999] HCA 18; 198 CLR 380; 162 ALR 294; 73 ALJR 657 at paragraph 57:

“What then is the principle to guide the courts in determining whether to grant *Mareva* relief in a case such as the present where the activities of third parties are the object sought to be restrained? In our opinion such an order may, and we emphasise the word ‘may’, be appropriate, assuming the existence of other relevant criteria and discretionary factors, in circumstances in which:

- i. the third party holds, is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including ‘claims and expectancies’, of the judgment debtor or potential judgment debtor; or
- ii. some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute

to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor.”

There is nothing in that statement of principle to suggest that the question whether or not the third party is party to the substantive proceedings against the potential judgment debtor is of any relevance in relation to either the first or the second limb under which the jurisdiction may be exercised.

47. The remaining issues can be addressed more shortly.

Whether the plaintiff had forfeited any entitlement to Mareva relief by reason of its failure to pursue proceedings, in Ontario or in the Cayman Islands, with appropriate dispatch?

48. Justice Henderson accepted that, in appropriate cases, the failure of a plaintiff to pursue its claim with expedition can and should lead to the conclusion that a *Mareva* injunction should be discharged. He had in mind the observations of Lord Hoffmann in *Walsh*. Lord Hoffmann had drawn attention to the warning given by the judge (Justice Strachan) before whom the application to discharge was first made:

“It would plainly be wrong that a remedy, whose ultimate purpose is the avoidance of abuse and injustice, should itself become just that, and there is a real risk of that happening, if the action in Canada should not be, as I assume it will, expeditiously prosecuted.”

Lord Hoffmann had pointed out that, in giving that warning, Justice Strachan was echoing remarks made in the Court of Appeal of England and Wales in *Lloyds Bowmaker Ltd v Britannia Arrow Holdings Plc* [1988] 1 WLR 1337 – see *per* Lord Justice Glidewell at page 1347:

“ . . . a plaintiff who succeeds in obtaining a *Mareva* injunction is in my view under an obligation to press on with his action as rapidly as he can”

and *per* Lord Justice Dillon at page 1349-50:

“ . . . where a party has obtained a *Mareva* injunction, that party is bound to get on with the trial of the action – not rest content with the injunction.”

And he had gone on to say this:

“Their Lordships have no doubt that failure to progress the action, wherever it is taking place, is a ground upon which a court may discharge an injunction previously granted. For a discussion of the

considerations which may enter into the exercise of the discretion, see Mr Steven Gee QC's book *Mareva Injunctions and Anton Piller Relief* (4th edn 1988) at pp. 377-379.”

In those circumstances it cannot be said that Justice Henderson failed to appreciate that what he had described as an “extraordinary” delay of twelve years from the commencement of the Ontario proceedings was a factor to which he must give appropriate weight when deciding whether, in the exercise of his discretion, he should discharge the injunction granted in 1997.

49. At paragraph 36 of his judgment, Justice Henderson examined – in some detail – the circumstances in which the delay had occurred. As I have said, he held (at paragraph 37) that there was nothing in the procedural history to support or permit a conclusion that the delay, or any substantial part of it, could be attributed to fault or neglect on the part of the Trustee. There has been no real challenge to that conclusion: rather, it is said on behalf of the appellants that a delay of twelve years is, of itself, unacceptable and must lead to the discharge of the injunction.

50. On a true analysis, as it seems to me, the relevant delay is that between May 2003 (when the consent order was made) and June 2009 (when the appellants issued the summons to discharge which was before Justice Henderson): a period of some six years. The appellants had the opportunity in 2003 to complain of the lack of progress in the Ontario proceedings. But, with the benefit of legal advice, they agreed to a stay of the Cayman proceedings pending resolution of the dispute in Canada. As Justice Henderson pointed out at paragraph 15 of his judgment they did so on the basis that the Trustee had given an assurance (in an affidavit sworn on 20 December 2002) that it would move expeditiously to bring the Ontario proceedings on for trial. They did not seek to demonstrate, before Justice Henderson or in this Court, that the Trustee had not done what it could to give effect to that assurance. It is difficult to avoid the conclusion that the application made in June 2009 was driven more by the acquittal of Mr Felderhof on the criminal charges which had been brought against him than by a belief that the Trustee was dragging its feet in the civil proceedings.

51. Justice Henderson was plainly troubled by the lack of progress in the Ontario proceedings. If I may say so, he was right to think that a matter of concern. His response was to direct that Mrs Felderhof could apply, after a further year, for an order setting aside the injunction on the ground of delay. It is clear that he intended that, if there was a continuing lack of progress in the Ontario proceedings, the appellants should have the opportunity to bring the matter back to him for further consideration within a comparatively short time. In my view there are no grounds on which this Court, in the exercise of its appellate function, should pre-empt further consideration of the matter by the judge in accordance with the direction which he has given.

Whether the Mareva injunction should not have been continued in circumstances that the plaintiff's undertaking as to damages was not supported (or fortified) by security in the form of a bond?

52. Justice Henderson had found no merit in the submission that Mrs Felderhof was entitled to an order requiring the Trustee to fortify, or secure, its undertaking as to damages by posting security. His decision on that point was not challenged by the appellants in their Memorandum dated 23 March 2010; but the point was re-opened in the skeleton argument lodged on behalf of Mrs Felderhof and pursued, without objection by the Trustee, at the oral hearing of the appeal. It is said that, when he came to consider the question of security the judge overlooked the need to treat the grant of the injunction as a matter which was before him *de novo*; and so failed to give the request for security the consideration on proper principles which it required.

53. In my view this point is without substance. The judge was entitled to ask himself why, some twelve years after the injunction had been granted (without security being given), it was appropriate for Mrs Felderhof to seek security with “no convincing explanation presented now to explain why it has suddenly become necessary.” It is said, on this appeal, that “given the facts and circumstances of this case, fortification is patently justified”; and that “the amount of the fortification should be \$1 million, being an estimate of the costs of the trial of the action”. It is not clear whether that is intended to be an estimate of the Trustee’s costs of the

action (and, if so, on what basis) or the costs of Mrs Felderhof (and, if so, why she should incur costs of the action – as distinct from costs of resisting the freezing order). Nor is it clear why the costs of the action should be an appropriate measure of the damages which she will suffer if, following trial, it is held that the freezing order should not have been made. The judge was entitled to take the view that – given the terms of the freezing order itself - no case had been made to substantiate the claim that Mrs Felderhof had suffered (or would suffer) damages as a result of the order; and that the need for security to fortify the Trustee’s undertaking as to damages had not been made out.

Conclusion

54. I would dismiss this appeal.

Justice Mottley, Justice of Appeal

55. I agree

Justice Conteh, Justice of Appeal

56. I have read the draft judgment of Chadwick, P. and, for the detailed reasons he has given, I agree entirely with him that the appeal should be dismissed. I agree especially with his conclusion that the purpose of a *Mareva* freezing order and its extended *Chabra* jurisdiction is to ensure that the enforcement of a future judgment of a court against a cause-of-action defendant is not frustrated by the dissipation of assets (in the hands of a non-cause-of action defendant) which would or might otherwise be or become available to satisfy that judgment (paragraph 46 of his draft judgment).

57. I must, however, like Henderson, J. (whose refusal to discharge the injunction granted in 1997 is under appeal), express some unease about the length of time that has elapsed since the original order freezing the Appellant’s assets was obtained. However, as the President’s analysis of the relevant time span shows, at paragraph 50 of the draft judgment, only a period of six years is the material time (effectively

from May 2003, when the consent order agreeing to a stay was made, to June 2009, when the Appellant issued the summons to discharge the freezing order granted in December 1997).

58. Unarguably, whether twelve or six years, such a period of delay to bring an action to trial or conclusion after the grant of a *Mareva*, is an undoubted cause for concern. I however, agree with Chadwick P, that this court should not interfere by discharging the injunction on this appeal: Henderson J., properly, on the issue of delay, has directed that Mrs. Felderhof should have the opportunity to bring the matter back to him for further consideration. This court should therefore not preempt any further consideration of the issue by the judge below where the injunction was originally granted.

59. I would accordingly agree that the appeal should be dismissed.

Chadwick P

Mottley JA

Conteh JA

