IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 172 OF 2016 (IMJ)

BETWEEN

MERIDIAN TRUST COMPANY LIMITED
AMERICAN ASSOCIATED GROUP LTD

Applicants

AND

(1) EIKE FUHRKEN BATISTA
(2) 63X INVESTMENTS LTD
(3) 63X FUND
(4) 63X MASTER FUND
(5) MAPLES CORPORATE SERVICE
(6) BANCO BTG PACTUAL S.A.

Respondents

IN CHAMBERS

Appearances: Mr. Halkerston of Counsel instructed by Ms. L Hatfield and Mr. J McGee of Solomon Harris
Mr. J Golaszewski and Ms. A Dixon of Carey Olsen on behalf of the 1st to 4th Respondents.
Ms. J Colegate of Ogier on behalf of the 6th Respondent

Before: **The Hon. Justice Ingrid Mangatal**

Heard: **24 January 2017**

Draft Reasons for Ruling Circulated: **15 February 2017**

Reasons for Ruling delivered: **16 February 2017**

HEADNOTE

Civil practice and Procedure - Freezing Orders - Variation of Orders – Application for stay of Disclosure Order or Extension of Time for Complying.

REASONS FOR RULING

1. On the 24 January 2017 I had before me for consideration, an application by the Applicants Meridian Trust Company Limited and American Associated Group Limited ("together **"The Applicants"**) for the Worldwide Freezing Order which I granted on 28 October 2016, as varied upon a number of occasions, to be continued against the 1^{st} – 4^{th} Respondents until the granting of any final judgment in Florida proceedings, or in such other terms as may be just and convenient. This application is by way of summons dated 16 January 2017.

2. The written reasons for my Ruling on 28 October 2016 were delivered on 11 November 2016 in a written unreported judgment. The Freezing Order was granted pursuant to section 11A of the ***Grand Court Law (2015 Revision)*** in respect of proceedings then intended to be brought against 1^{st} – 4^{th} Respondents and others, in Florida. The evidence is that the Florida proceedings ("the **Florida Complaint**") have since been filed on 12 January 2017.

3. Also before me for consideration was an application by the First Respondent Eike Furken Batista Da Silva (aka Eike Fuhrken Batista) **("Mr. Batista").** The summons dated 19 January 2017, in which the relief set out in paragraph 4 below was sought, specifically states that the application is being made without submission to the jurisdiction of the Courts of the Cayman Islands, and that all Mr. Batista's rights to challenge jurisdiction, service and orders made in these proceedings and generally are being fully reserved.

4. The summons sought the following:

> *"1. An order that time for compliance by the First Respondent with paragraphs 5-7 and 10-12 of the worldwide freezing order of Mangatal J dated 28 October 2016 as amended ("**the WFO**") shall be extended until the later of:*
>
> *(a) 7 days after the determination of applications to be brought as soon as reasonably practicable by the First respondent to challenge orders made against him ex parte in these proceedings; or*
>
> *(b) Until 4pm on 14 February 2017.*
>
> *Or further order of the Court in the meantime.*
>
> *2. The said orders be subject to such exceptions and provisos as the Court shall consider appropriate.*
>
> *3. Such further or other directions as the Court sees fit.*
>
> *4.* [Mr. Batista] *be granted liberty to apply."*

5. On 24 January 2017, I made an order, which in essence, amounts to a further variation of the WFO as follows:

> *"UPON the Applicants' Summons dated 16 January 2017 and the 1st Respondent's Summons dated 19 January 2017 coming on for hearing.*
>
> *AND UPON reading the Applicants' Skeleton Argument, the 1st to 4th Respondents' Skeleton Argument, the Sixth Affidavit of Richard Trainer, the Seventh Affidavit of Richard Trainer and the First Affidavit of Ashleigh Dixon.*

AND UPON the Applicants' undertaking to swear and file an affidavit exhibiting documents placed before the Court not already contained in affidavits.

AND UPON hearing Counsel for the Applicants.

AND UPON hearing Counsel for the 1st to 4th and the 6th Respondent.

IT IS HEREBY ORDERED THAT:-

1. *The 1st respondent's summons is dismissed.*
2. *A further Return Date be listed on 23 February 2017 at 9: 30 a.m. with a time estimate of one day (the Second Return Date).*
3. *The First Respondent do comply with the disclosure obligations contained in paragraphs 5,6,7,10,11,12 of the worldwide freezing order dated 28 October 2016 as varied (the WFO) by the following deadlines:*
    - *3.1. The First Respondent comply with paragraphs 11 and 12 of the WFO by 5pm on 26 January 2017;*
    - *3.2. The first Respondent comply with paragraphs 5 and 6 of the WFO by 5:00 p.m. on 27 January 2017; and*
    - *3.3. The First Respondent comply with paragraphs 7 and 10 of the WFO by 5 p.m. on 31 January 2017.*
4. *If and to the extent that the First Respondent considers in the course of complying with the disclosure of assets referred to in paragraph 3.2 above, that his disclosure of assets may be incomplete or inaccurate, he shall identify, in the affidavit to be served pursuant to paragraph 3.3. above, in what respect the asset disclosure provided may be incomplete or inaccurate.*

5. *If the Respondent identifies that his affidavit may be incomplete and inaccurate in accordance with paragraph 4 above, the First Respondent shall by 5pm on 3 February 2017 file and serve a supplemental or corrected affidavit addressing any omissions or areas of information which were incomplete or inaccurate in the asset disclosure already provided.*

6. *The WFO will continue in force up to and including the Second Return Date.*

7. *Paragraphs 14 and 22 of the WFO, as varied, be further varied so as to read as follows:*

"14. This Order does not prohibit each Respondent from dealing with or disposing of any of their assets in the ordinary and proper course of business, provided that the Respondents

(a) ~~shall~~ notify the Applicant's attorneys 5 business days in advance of any such dealing or disposal worth more than USD$10,000 so as to afford the Applicants a reasonable opportunity to apply for further relief from this Court; <u>and</u>

<u>(b) notify the Applicants' attorneys at the same time of the name of the bank, entity or person from which such funds will be transferred. Upon receiving such a notification the Applicants shall provide confirmation to the identified bank, entity or person that such notification has been given."</u>

"22. Withdrawals by the Respondents – No bank need enquire as to the application or proposed application of any money withdrawn by the Respondents if the withdrawal appears to be permitted by this Order. <u>For the avoidance of doubt, a bank in receipt of an instruction from any Respondent to apply or withdraw sums of money pursuant to paragraph 14 above may</u>

<u>only comply with that instruction if the bank has received confirmation from the Applicants' attorneys that notification has been given in accordance with paragraph 14."</u>

8. *Without prejudice to his right to make further applications in these proceedings, by 4 pm on 15 February 2017, the First Respondent shall, if advised, file and serve Summonses together with evidence in support of those Summonses:*

   8.1. To set aside the Order of Mangatal J dated 16 January 2017 (by which the Court granted permission to serve the WFO on the First Respondent by way of substituted service); and/or

   8.2. To set aside the WFO on the grounds stated in paragraph 17 of the First Affidavit of Ashleigh Dixon.

9. *Costs reserved to the Second Return Date."*

6. These are my reasons for making that Ruling. The Order at paragraph 7 which was sought by the Applicants was not opposed, so these Reasons do not address those paragraphs.

7. For ease of reference and understanding of the Order made at paragraph 3 of the 24 January 2017 Order, I have set out paragraphs 5-7, and 10-12 inclusive of the WFO as follows:-

*"2. **DISCLOSURE OF INFORMATION***

5. *Each Respondent must inform the Applicants' attorneys in writing within 72 hours of service of this order and to the best of their ability of all assets (save for domestic chattels worth less than USD$10,000.) whether inside or outside the Cayman Islands and whether in his or its own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.*

6. *Each Respondent must within 72 hours of service of this order and to the best of their ability inform the Applicants' attorneys in writing of:*

   (a) *all their liabilities (including debts) above the value of USD10,000;*

   (b) *any claims of which they have been notified above the value of USD500,000; and*

   (c) *details of any pending legal proceedings or legal actions against them or legal proceedings which have been threatened against them in the previous 2 years but not yet served upon them.*

7. *The information in paragraph 5 and 6 must be confirmed by the First Respondent and, in the case of each corporate Respondent, a director of each corporate Respondent in his capacity as a director of a corporate Respondent, in an affidavit which must be served on the Applicants' attorneys no later than 4.30 pm on the fifth clear business day after service of this Order."*

"10 Save insofar as the Respondents have already delivered up documents pursuant to any other orders made in these proceedings, the Respondents must within 4 business days of service of this Order deliver up to the Applicants' attorneys all documents ("the Asset Documents") which they have in their possession, power or control and which evidence:

(a) the existence, location or value or details of any of their assets worth more than USD10,000; and

(b) all bank statements in relation to all bank accounts in which the Respondents have (or had) any interest (direct or indirect, legal or beneficial, sole or joint) from 1 January 2010 onwards or copies of those documents. In the case of bank accounts, these documents must include bank statements showing the state of the account at the date of this order.

4. DELIVERY UP OF ASSET DOCUMENTS HELD BY THIRD PARTY

11. Where any Asset Documents are in the custody of third parties (including but not limited to banks, safety deposit holders, accountants, legal advisors, financial advisors, investment managers or advisors, trustees and nominees (including, for the avoidance of doubt, Maples Corporate Services Limited) and whether inside or outside the Cayman Islands) who hold such documents (including but not limited to bank statements) to the order of the Respondents or hold such documents on the

Respondents' behalf or who are obliged to deliver the originals or copies to the Respondents on payment of a fee, the Respondents shall as soon as possible and in any event within one business day of service of this Order give written and (where possible) oral orders or instructions to such third parties immediately to deliver up all such documents or copies thereof to the Applicants' attorneys or to make available to the Applicants' attorneys all such documents for inspection and copying.

12. The Respondents shall within 2 business days of service of this Order sign and deliver up to the Applicants' attorneys letters addressed to such third parties in the forms set out in Annex A hereto (Part 1 in respect of banks and Part 2 in respect of others) including but not limited to all the banks (and/or any other deposit holding entities) with whom the Respondents hold bank accounts."

8. At paragraphs 26-31 of Trainer 6, Mr. Trainer, a solicitor of the Senior Courts of England and Wales, and one of the advisors to the Applicants, set out allegations that Mr. Batista and the 2nd – 4th Respondents ("**the 63X Companies**") are in breach of the WFO as follows:

"Batista and the 63X Companies are in breach of the Cayman Mareva

26. The 63X Companies were served on 9 January 2017.

27. Mr. Batista was served on 16 January 2017. As outlined above at paragraph 7, it is understood that he has been on notice of the

Cayman Mareva since 6 January 2017. There is no indication in the Batista letter to the contrary.

28. *No response had been received by any of the Respondents as at close of business on 19 January 2017 and so each of the Respondents was in breach of the Cayman Mareva until that point in time.*

29. *In addition to its prohibition on asset disposal, the Cayman Mareva also required the Respondents to take the following mandatory steps within the timeframes specified:*

…….. [See paragraph 7 above]

30. *Batista has provided no evidence as to why he should not comply with his disclosure obligations and why he cannot comply with his disclosure obligations.*

31. *With respect to the affidavit of Ashleigh Dixon, in particular paragraphs 13, 15 and 16, this is hearsay. Given the length of time that Batista has been on notice of the Cayman Mareva, it is reasonable to have expected Batista to have given evidence in these respects in the circumstances."*

9. At paragraphs 32-41 (inclusive), Mr. Trainer discussed correspondence with BTG and alleged evidence of dissipation. At paragraphs 42-50 (inclusive) he described allegedly suspicious transfers of funds by 63X Master Fund during January 2017.

10. At paragraph 51 Mr. Trainer highlighted the Applicants' concerns regarding evidence of large transactions leaving Mr. Batista's accounts. He stated that the Applicants need the disclosure from Mr. Batista in order to police the WFO because the evidence is, he alleges, that so far millions of dollars were transferred, during 2013 and subsequently, from accounts belonging to the 63X Companies from BTG alone. Further, that there is no indication of where those funds are presently located. BTG's production revealed, Mr. Trainer continues, that included in these transfers is a sum of US $30 million to a lawyer in Florida.

11. At paragraph 52 of Trainer 6, the Applicants set out the relief sought, and at paragraphs 53-54 (and also paragraph 55), refer to the Florida proceedings as follows:

*"**Relief sought***

52. By reason of the same, the Applicants seek at the Return Date the following relief:

52.1. The Cayman Mareva be granted on an inter partes basis until further order (with the Applicants having liberty to apply for matters necessary for the ongoing policing and enforcement of the Cayman Mareva, and with minor amendments with respect to notification requirements on banks with notice of the Cayman Mareva);

52.2 The Respondents should be given a short period to comply with their disclosure obligations. It is submitted that:

52.2.1. Asset documents letters can be delivered by Mr. Batista by close of business on the date of this hearing.

52.2.2. Statements of assets can be given within 24 hours of this hearing.

52.2.3. Affidavits verifying those statements can be given 48 hours thereafter.

52.2.4. Asset Documents can be produced at the same time as verifying affidavits.

52.3. The Cayman Mareva be varied to provide for the ongoing non-compliance by the Respondents.

52.4. The Applicants' costs of and occasioned by the Return Date be the Applicants' costs in Case Number 2017-001040-CA-01 in the Court of the State of Florida against each Respondent.

52.5. The costs of the ex parte injunction and ancillary orders be the Applicants' costs in Case Number 2017-001040-CA-01 in the Court of the State of Florida against each Respondent.

Florida proceedings

53. As set out in my fifth affidavit, the Florida Complaint (the **Complaint***) was filed on 12 January 2017.*

54. The Applicants are aware of their obligation pursuant to their undertaking in Schedule 1 (4)(b) of the Cayman Mareva to take steps to serve the Florida proceedings as soon as practicable at [sic] *the service of the Cayman Mareva.*

……."

12. In Trainer 7, Mr. Trainer updated the Court on a number of items of correspondence flowing between Solomon Harris, the Attorneys-at-Law for the Applicants, and Carey Olsen, the Attorneys-at-Law, for Mr. Batista and the 63X Companies, further disclosure from the 63X Companies, further correspondence with BTG and additional alleged

evidence of dissipation. However, of particular note was the reference to an article published by the O Globo Press Outlet in Brazil, on 22 January 2017, which was exhibited to Trainer 7. Paragraphs 8, and 19-22 of Trainer 7 state as follows:

> "8. *I also update the Court with the fact that the effect of the Cayman Mareva has been reported in the Brazilian press. In particular, the following article was published by the O Globo press outlet in Brazil (See RWT/7), the translation of which I am told by Mr. de Araujo is as follows:-*
>
> *"Cayman Authorities Freeze $7 million from Eike Batista*
>
> *BY LAURO JARDIM, 1/22/2017 6.056 PM*
>
> *Two international investors obtained a global order freezing Eike Batista's financial assets from the Cayman Justice system.*
>
> *According to expert lawyers, it is not a simple thing to block additional assets in Brazil and other jurisdictions where Eike could have saved the millions left over from his billions on the basis of the Cayman decision.*
>
> *But at least in the Cayman Islands, the sentence is valid. There, he had about $7 million. These, Eike can no longer move.""*
>
> *"19 On 23 January 2017, having not received a substantive response to their letter of 20 January 2016, Solomon Harris wrote to Carey Olsen (RWT7/). The letter stated:*
>
> *19.1 That Mr. Batista was in deliberate and continuing breach of the Cayman Mareva which could be inferred*

as part of a deliberate attempt to frustrate the effectiveness of the Cayman Mareva.

19.2 *It was unacceptable that the Applicants, having secured a worldwide asset freezing order before the Grand Court served on Batista over a week ago, are not yet aware of the extent to which Mr. Batista's assets have been frozen in order to police that injunction.*

19.3 *That a response was required, together with Mr. Batista's basic asset disclosure, by 5 pm on 23 January 2017, and in any event before the return date hearing.*

20. *The letter also referred to the O Globo press article outlined above and went on to state:*

20.1 *That it was apparent that this particular press outlet in Brazil had received information that USD 7 million of Mr. Batista's assets are located within the jurisdiction of the Grand Court and were frozen by the Order.*

20.2 *That this demonstrated the prejudice being suffered by the Applicants where Mr. Batista's asset information, and the effect of the Cayman Mareva, are being reported in the local press, in circumstances where Mr. Batista still refuses to comply with the disclosure requirements.*

20.3 *The information which Mr. Batista is obliged to provide was needed urgently to ensure effectiveness of the order is not frustrated.*

20.4 *The Applicants requested urgent confirmation on 23 January 2017 as to whether the press report above was correct or not. If it was correct, confirmation of the* *nature, location and precise amounts of assets which are located within the islands.*

21. *In the absence of any disclosure to date, the Applicants' knowledge of Mr. Batista's assets is limited* to [sic] *the information which has been disclosed by third parties, such as BTG. On 4 January 2017, BTG disclosed cash balances in accounts to approximately USD 1.27 million: see paragraph 14(c) of my third Affidavit.*

22. *The Applicants are unaware of the location of assets belonging to Batista of "$7 million", yet the media has picked up on the quantum of assets allegedly frozen in Cayman belonging to Mr. Batista. This state of affairs exemplifies the prejudice being suffered by the Applicants due to the continued breach of the Cayman Mareva by Mr. Batista. The Applicants require Mr. Batista's basic asset disclosure urgently in order to properly police compliance with the Cayman Mareva's prohibition on asset disposition."*

13. During the lunch interval on 24 January 2017, with the hearing set to commence in the afternoon, Carey Olsen wrote to Solomon Harris. This letter was produced in Court, and was subsequently, at the Court's request, exhibited to the eighth affidavit of Mr. Trainer, Trainer 8. The letter stated, amongst other matters, the following:

"…..

Disclosure

As you are aware, our client has made an application dated 19 January 2017 in relation to the disclosure obligations under the Freezing Order. This is a further matter to be addressed at today's hearing. Your assertion that he is in deliberate breach of the Freezing Order is therefore incorrect.

However, without prejudice to our client's position that he is not submitting to the jurisdiction of the Courts of the Cayman Islands, and without prejudice to his right to challenge the jurisdiction of the Courts of the Cayman Islands and to make applications to stay or discharge the disclosure obligations under the Freezing Order, we are instructed to confirm that there is US$7,166,901.53 of Mr. Batista's assets (as defined in the Freezing Order) in the BTG Cayman Islands bank accounts..."

14. The only affidavit filed in support of the application by Mr. Batista is the affidavit of Ashleigh Dixon. Miss Dixon is an attorney-at-law of Carey Olsen, Attorneys for Mr. Batista.

15. Further to what Mr. Trainer had to say in his affidavit regarding Ms. Dixon's affidavit, Mr. Halkerston in the Applicants' skeleton arguments and in oral submissions, submitted that the assertions in paragraphs 13, 15 and 16 are inadmissible pursuant to GCR Order 41, Rule 5(1). Reference was also made to the decision of Smellie CJ in ***A v B*** [2010(1) CILR 553], at paragraph 116.

16. Whilst I think this is a borderline case on admissibility, I am of the view that the contents of Ms. Dixon's affidavit, including those paragraphs are admissible. This is because some of the matters which she addresses are matters that she, as one of the attorneys-at-law acting for Mr. Batista can speak to. In any event, I am prepared in the circumstances to err on the side of admitting the evidence rather than excluding it. Paragraph 16 includes allegations about not being served with certain documents in relation to the ex parte application for the WFO which Solomon Harris have addressed in correspondence as well as in paragraph 18 of Trainer 7. I do not intend to go into those matters as I do not consider it necessary to do so in order to deal with the instant applications.

17. At paragraphs 12-15, Ms. Dixon states as follows:

> ***"Application for an extension of time***
>
> *12. The WFO and supporting materials comprise a vast quantity of documentation which has clearly taken a considerable time for the Applicants to prepare. The principal skeleton argument lodged on behalf of the Applicants itself runs to 129 pages; there are 9 affidavits in support which run to over 4,300 pages and include detailed evidence of two foreign laws as well as evidence from a forensic accounting investigator and other factual evidence; and the total application bundle exceeds 5,000 pages.*
>
> *13. In the circumstances, it is unsurprising that, in the limited time since 16 January (just over two days), Mr. Batista and his legal*

team have had insufficient time even to read the application materials properly, let alone to assimilate the large amount of material purportedly served, give it proper consideration, take proper instructions and prepare an appropriate response. The material includes very serious allegations against Mr. Batista and he should have a proper opportunity to scrutinize those. At the same time Mr. Batista is subject to orders that he make onerous disclosure of assets and documents under an aggressive and unrealistically short timeframe.

14. *By the WFO, Mr. Batista is required to give full disclosure of all of his assets and liabilities within a short period of time (i.e. by 7: 23 p.m. Cayman Islands time on 19 January 2017). Further, Mr. Batista is required, shortly thereafter (i.e.by 4pm. On 24 January 2017), to deliver up copies of* ***all*** *documents which evidence the existence, location or value of assets exceeding US$10,000, and all bank statements for accounts in which he is interested dating back to 1 January 2010.*

15. *As a practical matter, Mr. Batista is unable to comply with these provisions of the WFO in the limited time allowed by that order. It is no secret that Mr. Batista has held a wide range of business interests, and it was the Applicants' case at the ex parte hearing that he was once a very wealthy individual. Seeking full and proper instructions in relation to his assets and liabilities, and locating*

and collating documentary evidence (including bank statements) as to his assets is likely to take a considerable period of time. The suggestion that he would be able to provide the information and documentation required within the tight timeframe prescribed by the WFO is simply unrealistic."

18. Mr. Golaszewski, in making submissions on behalf of Mr. Batista, submitted that the Court should grant the stay sought at paragraph 1 (a) or alternatively the application to extend time sought at paragraph 1 (b) of the summons. He argued that in this particular case, it is common ground that the Court has granted a worldwide freezing order against a non-resident, Mr. Batista, in a previously unprecedented use of the section 11A Grand Court Law jurisdiction. Further, that in so far as the WFO includes provision in the sum frozen for "treble damages" under Florida RICO legislation, this is also an unprecedented use of the Grand Court Law jurisdiction.

19. Counsel also indicated that up to the time of the hearing, it was Mr. Batista's intention to apply to set aside the order for substituted service, and to set aside the WFO. It is Mr. Batista's case that he has strong grounds for making these applications and that this is a relevant consideration, in deciding whether to grant a stay or extension of time.

20. I accepted the submissions of Counsel for the Applicants that the authorities demonstrate that the fact that a respondent intends to challenge a freezing order does not absolve that person from complying with disclosure obligations. I also accepted that, although Mr. Batista was seeking an extension of time until either 7 days after the date when his

applications are determined, or 14 February 2017, whichever is later, in reality, as Counsel for the Applicants points out, any application to challenge a Mareva can delay disclosure for a long period of time.

21. In my judgment, quotations from two of the authorities cited by the Applicants will suffice.

22. In ***Motorola Credit Corp v Uzan*** [2002] EWCA Civ 989, at paragraphs [2],[3] and [28]-[30], Lord Waller, who along with Lord Woolf CJ constituted the majority, discussed the issues this way:

> "*[2] The point which arises on this appeal is not unimportant in the context of freezing orders (Mareva injunctions as they used to be called). A worldwide freezing order has been made against the first and fourth defendants by Moore Bick J in the Commercial Court in aid of proceedings which had been taken against the defendants in the United States of America. As part of the order made the defendants were ordered to provide information, confirmed at a later date by sworn affidavits, of all their assets worldwide, to the solicitors for the claimants.*
>
> *[3] The defendants are, however, making an application in the Commercial Court to have the worldwide order set aside. They say that they have a strong case for setting aside the orders. The question is whether (although they do not seek a suspension of the*

freezing order itself in the meanwhile) there should be a suspension or stay of the requirement to provide information and to provide the sworn affidavits to the solicitors for the claimants. David Steel J refused the first defendant a stay on the grounds that, prima facie, or in principle, disclosure orders were part and parcel of the freezing order jurisdiction and on the basis that the circumstances relied on by the first defendant did not take the case out of the norm.

....

[28] *Steyn LJ also recognized that undoubtedly there would be prejudice to the Sheik in that case if he was forced to disclose his assets and ultimately managed to set aside the proceedings for want of jurisdiction, <u>but Steyn LJ emphasized that that was not anywhere near as much prejudice as would be suffered if the claimant was unable to police the Mareva injunction for some time</u>. The emphasis in that case, as has been the emphasis in this case by Mr. Cran, is that whereas at first sight it looks as though the court in dealing with suspending the supply of this information for only a short period of time, that is until the hearing of the summons to set aside the freezing order on 17 July, the reality is that that decision is likely to be appealed to the Court of Appeal, and indeed it may well go to the House of Lords. The reality is that*

if it were suspended now, it would be suspended for a very great period of time.

[29] *In my view, in the light of the above citation from Steyn LJ the attack that David Steel misdirected himself is unfounded. Furthermore, I do not think that this is a case in which we should interfere with the exercise of the discretion. The factors that weigh with me are these. First, although it is an invasion of privacy to force any party to disclose assets, a freezing order in normal circumstances simply cannot be effective without that disclosure. Once one has the situation which did exist in this case, which was that on 13 June it was accepted that the freezing order should continue, then prima facie David Steel J is right in saying that a disclosure provision would be the normal provision so that that freezing order can be properly policed and be effective.*

[30] *The second factor that weighs with me is that it may be that the defendants have an arguable case for setting aside the worldwide order, but Motorola clearly have a strong case that a fraud has been committed-a strong case that dissipation is a serious risk. Furthermore, the defendants have done nothing to comply with the United States order to replace the shares or their value. I for my part am quite unimpressed by the reasons for not replacing the shares. Furthermore, if the defendant wished to be free from this injunction he could have arranged for security to be given, but he*

has offered none. That security of course would be released if the injunction were set aside, but that simply has not happened."

(My emphasis)

23. On a similar theme is the decision in ***Malofeev v VTB Capital plc*** [2011] EWCA 1252, where the English Court of Appeal, at paragraphs [40] - [42], having referred to a number of decisions, including ***Motorola***, stated(per Jackson LJ):

"[40] Where I part company from Mr. Foxton is in relation to the distinction which he draws between the jurisdictional challenge on the one hand and the discharge application on the other hand.It is no doubt perfectly reasonable for Mr. Foxton to characterize the jurisdictional challenge as a root-and-branch challenge. I agree that the discharge application is put on more disarming grounds, namely that undertakings are being offered which should suffice. Nevertheless, both are applications to discharge the worldwide freezing order. One application is made on the basis that the original order should never have been made; the other application is put on the basis that the worldwide freezing order, even if properly made initially, is no longer necessary.

[41] In my view, that distinction is not relevant for the purposes of the present appeal. The simple fact is that unless and until one or other of those two applications succeeds, there is a worldwide freezing order in place. In order to be effective the worldwide

freezing order, certainly in the context of this litigation, should be accompanied by an order for disclosure of assets.

[42] *Mr. Foxton submits that it will not be long before the discharge application is resolved, therefore no harm would be done by extending the disclosure obligation until the outcome is known in relation to discharge. I am not persuaded by this argument. I accept that there is a hearing date for the discharge application in the relatively near future. However, judgment may be reserved following that discharge application. Appeals may follow. Nothing in the history of this litigation inspires confidence that any party will readily accept an adverse decision or that there will be early and final resolution of the discharge application."*

(My emphasis)

24. At the ex parte stage, I formed the view that the Applicants have a good arguable case regarding a fraud perpetrated on them by Mr. Batista and a strong case that dissipation is a serious risk. The evidence filed on behalf of Mr. Batista does not attempt to address when exactly Mr. Batista became aware of the WFO and nor indeed is there any denial of the allegations of fraud, and other matters asserted by the Applicants. In my judgment, in the case before me also, like ***Motorola*** and ***Malofeev***, there is a worldwide freezing order in place, and there is on the evidence before the Court, plainly a need for disclosure to accompany that order for it to be properly policed and be effective. There is no evidence before the Court from Mr. Batista himself, and such evidence as there is in the form of

the affidavit of Ms. Dixon, is not such as to take this case outside of the norm, though I appreciate that there is no inflexible rule.

25. In my judgment, undoubtedly there may be prejudice to Mr. Batista if he was forced to disclose his assets and ultimately managed to set aside the proceedings for want of jurisdiction, or to set aside the WFO on any of the other grounds, or to set aside the order for substituted service. However, there would not seem to be anywhere near as much prejudice as would be suffered if the Applicants were unable to police the Mareva injunction for some time.

26. Whilst Mr. Batista may have an arguable case for setting aside the order for substituted service or the WFO, I would have to say that at this stage, the scales tip in the direction of the Applicants. The Applicants have a good arguable case regarding fraud and a strong case regarding the risk of dissipation. I have also taken into account, in a preliminary way, my present state of knowledge of the law regarding orders for substituted service. In my judgment, there was a greater risk of injustice, prejudice and irreparable harm if I were to stay the disclosure order, or grant the substantial extension of time sought, than if I were to refuse the relief sought on behalf of Mr. Batista and grant only a short additional period for compliance.

27. By way of example in relation to the importance of disclosure for the purposes of policing the WFO, it is in particular of some concern to this Court, that whereas BTG in its information and disclosure provided to the Applicants, has spoken to Mr. Batista

having funds/cash balances in the sum of approximately USD 1.27 million, Mr. Batista's Counsel has now indicated that Mr. Batista has assets significantly more than that, over six million dollars more. It would seem that it is as a result of the exhibiting of the O Globo Article in Trainer 7 that Mr. Batista has disclosed that he has assets of US$7,166,901.53 in BTG bank accounts. It was plain to me that the Applicants require Mr. Batista's basic asset disclosure urgently in order to police compliance with the WFO prohibition on asset dispositions.

28. In my judgment, the WFO did have some tight timeframes for performance and the obligations imposed upon Mr. Batista are heavy and wide-ranging. However, it was not particularly helpful that the evidence filed on behalf of Mr. Batista does not reveal when exactly he first became aware of the WFO. It is not in dispute that the 63X Companies were deemed served with the WFO on 9 January 2017. The evidence filed on behalf of the Applicants is that the WFO and the Originating Summons were delivered to the registered address of the 63X Companies, and to Mr. Bermudes, Mr. Batista's Brazilian lawyer, on 6 January 2017. That is a considerable time ago.

29. In any event, it was in those circumstances, that I felt that the balance would be struck by granting the variations giving a short additional period, though not as short a period or formulation as suggested by the Applicants' Counsel, for Mr. Batista to comply with his disclosure obligations, in the manner outlined in paragraph 5 above. I have also found useful, and adopted, an additional order made by Norris J in the ***Malofeev*** decision,

which is referred to at paragraphs 29-30 of that decision. Similar orders are reflected at paragraphs 4 and 5 of the Order that I made on 24 January 2017.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT