COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2018/CLE/gen/177

BETWEEN

ESSEX GLOBAL CAPITAL, LLC

Plaintiff

AND

PURCHASING SOLUTIONS INTERNATIONAL, INC

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Ferron Bethell with him Mrs. Viola Major of Harry B. Sands, Lobosky & Company for the Plaintiff
Mr. Stephen Turnquest with him Ms. Syneisha Bootle of Callenders & Co. for the Defendant

Hearing Date: 15 January 2019

Practice - Service of court process outside of the jurisdiction – Action in respect of breach of contract within the jurisdiction – Leave to serve out of jurisdiction – Test for grant of leave – Whether Plaintiff have to show good arguable case that court has jurisdiction — Good and arguable case – Serious issue to be tried – Whether case a proper one for the jurisdiction - Full and fair disclosure – Material non-disclosure

Evidence – Defendant challenges Hanna 2nd affidavit – Whether affidavit contains hearsay and inadmissible evidence – Interlocutory or final application

On 19 February 2018, on an ex parte Summons, the Plaintiff sought leave to serve Notice of the Writ of Summons upon the Defendant outside of the jurisdiction. The application was supported by an affidavit of Lakeisha Hanna sworn to on 19 February 2018. On 26 March 2018, the Court granted leave to the Plaintiff. On 26 April 2018, the Defendant filed a Conditional Appearance. On 10 May 2018, the Defendant applied to have the Order granting leave to serve out of the jurisdiction discharged. The Defendant alleged that (i) the Plaintiff has failed to make full and frank

disclosure to the Court; (ii) the Court did not have before it all the admissible material relevant to the case and (iii) having regards to all the circumstances of the case, it is not a proper case for service out of the jurisdiction within Ord. 11 r. 4 and the Court in its discretion, should have refused to grant leave for such service.

The Plaintiff asserted that it has satisfied the threshold test for leave to serve out of the jurisdiction and that the Defendant's application to discharge ought to be dismissed with costs.

HELD: Dismissing the application to discharge the ex parte Order for service out of the jurisdiction with costs and finding that the Plaintiff, having disclosed all relevant materials for its claim, the matters complained of by the Defendant raise a serious issue to be tried.

(1) In order to enable the Court to decide an application under RSC, Ord 11, r 1 (f) (iii), it was necessary for the party making the application to supply all the material facts within his knowledge. The Court would then, without trying to determine the merits of the action, consider all the relevant documents, even though that might involve some investigation, and make an order accordingly. In the present action, the Court finds that the Plaintiff has done so.

(2) When considering an application for leave to allow service of proceedings out of the jurisdiction under Ord 11, r.1(1) the court, before exercising its discretion to grant leave, had to consider (i) whether there was a good arguable case that the court had jurisdiction under one of the paragraphs of r.1(1), and (ii) whether there was a serious issue to be tried so as to enable exercise of the discretion to grant leave under r 4(2). In particular, the test of the strength of the case on the merits which a plaintiff had to establish for the grant of leave to serve proceedings out of the jurisdiction was merely whether the evidence disclosed that there was a serious issue to be tried, not whether he had a good arguable case: **Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran** [1993] 4 All E.R. 456 at page 457.

(3) The Court has a discretion to discharge an ex parte order granted at a hearing for failure on the part of the applicant/plaintiff to give full and frank disclosure but this is not the inevitable consequence of every non-disclosure. The Court will have regard to all the circumstances of the case and will assess the gravity of the alleged breach, the degree and extent of culpability with regard to the non-disclosure, the importance and significance of the facts not disclosed to the outcome of the application, any excuse or explanation offered, the severity and duration of any prejudice caused to the respondent/defendant and whether the non-disclosure can be and, if so, has been, remedied. In my opinion, the Plaintiff has sufficiently disclose all relevant material to the Court and it is now time for the Defendant to file and serve his Defence.

(4) The Court declined to make an order to set aside service under Ord. 12 r.7. The facts pleaded at paragraphs 5-22 of the Statement of Claim are sufficient, if proved, to establish a cause of action. These paragraphs of the Statement of Claim were reiterated in the Hanna 1st affidavit seeking an order for service out of the jurisdiction. On the evidence before the Court, there is clearly a serious issue to be tried: Seaconsar Far East Ltd at page 457 relied upon.

RULING

CHARLES J:

Introduction

[1] This is an application by the Defendant ("Purchasing Solutions") seeking to discharge the ex parte Order which I made on 26 March 2018 granting leave to the Plaintiff ("Essex") to serve Notice of the Writ out of the jurisdiction and set aside all subsequent steps and proceedings taken by Essex. The application is made pursuant to Order 12 Rule 7 of the Rules of the Supreme Court ("RSC Ord. 12 r. 7") and is supported by two affidavits of J. Mike Williams ("Mr. Williams") filed on 23 May 2018 and 11 January 2019 respectively. Mr. Williams' 2nd affidavit is filed without prejudice with the intention of objecting to the affidavit of Lakeisha Hanna ("Hanna 2nd affidavit") filed on 4 January 2019.

Challenge to the admissibility of Hanna 2nd affidavit filed on 4 January 2019

[2] Before the application to discharge even got off the ground, Purchasing Solutions launched an attack on the Hanna 2nd affidavit. I shall firstly address this challenge.

[3] Learned Counsel Mr. Turnquest appearing for Purchasing Solutions submitted that the Hanna 2nd affidavit filed on 4 January 2019 is inadmissible in this proceeding because it is in substance one sworn on information and belief. He reasoned that while the ultimate issue is whether leave to serve outside the jurisdiction was properly granted, the underlying issue is one which goes to the heart of the dispute between the parties namely, whether the claim is well-founded on its merits. According to him, Ord. 41 r. 5 (1) states as follows:

> **"Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit *may* contain only such facts as the deponent is able of his own knowledge to prove."**[Emphasis added]

[4] And subsection (2) states:

> **"An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information and belief with the sources and grounds thereof."**[Emphasis added]

[5] Learned Counsel Mr. Turnquest submitted that the present application to discharge the ex parte order is not an interlocutory proceeding and therefore, to the extent that Essex wishes to adduce evidence, it was obliged to act in accordance with Ord. 51 r. 5(1). In other words, the effect of this provision is that, Mrs. Hanna can only swear to facts within her own knowledge. An exception is made for interlocutory applications.

[6] The question then is whether the present application to discharge is interlocutory or not?

[7] Case law provides a helpful aid. Learned Counsel Mr. Turnquest relied on the cases of **Rossage v Rossage and Others** [1960] 1 All .R. 600; **Re J (an infant)** [1960] 1 All E.R. 603 and **Gilbert v. Endean** (1878) 9 Ch. D. 259 to demonstrate that the present application is final and not interlocutory, therefore the Hanna 2nd affidavit is inadmissible. In **Rossage**, a father applied in divorce proceedings for a suspension of the mother's right of access to the child of the marriage. The application was supported by affidavits consisting largely of scandalous allegations against the mother based on hearsay. It was common ground that rules of court required affidavits to contain only matters of which the deponent had first-hand knowledge, unless the affidavit was intended for use in an interlocutory proceeding. The hearsay material contained in the affidavits sought to rely upon was ruled to be irrelevant and inadmissible. It was held that though interlocutory in form, the application to suspend a mother's right of access to her child was determinative of the rights of the parties and hence not an interlocutory proceeding.

[8] Then, in **Re J (an infant)**, a mother's application for leave to remove a ward of court from the jurisdiction, was supported by an affidavit sworn on information and belief. Notwithstanding (as the court noted) that directions in infancy cases are never final and that the application might well be interlocutory for appeal purposes, the affidavit evidence was inadmissible because the application was not being made to preserve the status quo for the purpose of obtaining directions as to

procedure and was therefore not interlocutory for the purpose of evidence admissibility.

[9] In **Gilbert v. Endean**, the plaintiff had obtained an order against a defendant for the defendant to give a bond for payment of money to the plaintiff and to deposit some shares as security for compliance. Subsequently, the plaintiff entered into a compromise with the defendant by which the plaintiff agreed to accept payment of a smaller sum. The plaintiff later sought to proceed under the initial order on the basis that the compromise was reached because the defendant had concealed a material fact, that is, the defendant's father had died during the negotiations for the compromise whereas the plaintiff had been led to believe that the father was alive and would not help the defendant. In other words, the defendant was not in the penniless state that he had led the plaintiff to believe. The court at first instance allowed the plaintiff to enforce the initial order. Cotton LJ said that: "those applications only are considered interlocutory which do not decide the rights of the parties, but are made for the purpose of keeping things in status quo till the rights can be decided, or for the purpose of obtaining some direction of the Court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the Court ultimately to decide upon the rights of the parties."

[10] On the other hand, learned Counsel Mr. Bethell relied on the case of **J.T.R. Associates Limited v United Enterprises Group Limited** No. 591 of 1998 (Supreme Court of The Bahamas). Dunkley J (ag), in dealing with the admissibility of an affidavit stated:

> "***Rossage*** **concerned an application by a father to suspend the access of the mother to a child of the family. The court in that case was required to determine a substantive right of one of the parties. Similarly, in** ***Re J (an Infant)*****, the English Court had before it an application for leave to take the ward of the court out of the jurisdiction. Again the court was concerned with the determination of a substantive right.**
>
> **In the instant case, the only right that I am being asked to determine on this application is the right of Shandong to intervene in this action. The determination of this right is not, in my view, the determination of a**

substantive right between the parties necessitating the strict requirement of proof by direct evidence. Rather it is the determination of a procedural right between the parties.

I cannot agree that this application should not be treated as an interlocutory one for the purposes of determining the quality of the evidence required to be adduced by the parties. Hearsay evidence is, in my view, admissible on this application."

[11] Learned Counsel Mr. Bethell submitted that, in the present application, the Court is not called upon to determine any substantive right of any party because if the Court were to exercise its discretion to rule against Essex, Essex could still re-apply for leave to serve under the jurisdiction.

[12] I agree with the submissions advanced by Mr. Bethell. In this regard, I refer to the case of **Marty Steinberg, Receiver (in his capacity as Receiver of Lancer Offshore, Inc. and The Omnifund, Limited appointed by the United States District Court for the Southern District of Florida et al v Swisstor & Co et al** HCVAP 2011/102 –Territory of the Virgin Islands [unreported]. In that case, one of the issues before the Court of Appeal concerned permission to serve out of the jurisdiction. At paragraph 45 et seq, the Court dealt with the service out of the jurisdiction point. Mitchell J.A. [ag] at paragraph 1 said:

"This is what used to be called a procedural appeal under the Civil Procedure Rules 2000 ("CPR") prior to their amendment on 1st October 2011. It is now an interlocutory appeal against an order of the High Court setting aside permission to serve the proceedings on the two respondents out of the jurisdiction…"

[13] The above case, notwithstanding that it was brought under the new rules, substantiates Mr. Bethell's submissions that issues of service out of the jurisdiction and setting aside in the Supreme Court as well as the Court of Appeal are labelled "interlocutory" as they are not determinative of the substantive rights between the parties. Therefore the hearsay evidence contained in the Hanna 2nd affidavit is admissible in the present application.

[14] Consequently, I agree with learned Counsel Mr. Bethell that the arguments advanced on behalf of Purchasing Solutions challenging Hanna 2nd affidavit are misconceived and must fail.

[15] Now to the present application. However, before I do so, it is helpful if I set out the history and Essex' allegations.

Procedural history and allegations

[16] On 29 March 2018, Essex, a Florida limited liability company, filed a Writ of Summons and Notice of Writ of Summons against Purchasing Solutions, a Texan corporation with its principal place of business in Fort Worth, Texas, USA, alleging breach of contract, breach of fiduciary duty and conversion. It seeks, among other things, damages and an accounting of (i) all items ordered for the residential condominium units; (ii) the vendors from whom such items were ordered; (iii) the payment status of items ordered including evidence of any deposits and/or payments made; (iv) the production status of items ordered; (v) the physical location of items ordered and (vi) all amounts paid to Purchasing Solutions in connection with its services under the Purchasing Agent Agreement ("the Agreement').

[17] Essex alleges that on or about 23 January 2014, Purchasing Solutions, entered into the Agreement. Under the terms of the Agreement, Baha Mar Ltd ("Baha Mar", a project development company and eventual assignor to Essex) was the owner/principal and Purchasing Solutions was the Purchasing Agent.

[18] The Agreement contained a forum selection clause which states that disputes will be resolved by a court of competent jurisdiction in the Commonwealth of The Bahamas. Pursuant to the Agreement, Purchasing Solutions was to procure certain goods for the Baha Mar project in The Bahamas. Purchasing Solutions agreed to both procure the specified goods and also arrange for their shipment to The Bahamas. Under the Agreement, Purchasing Solutions was to be paid an agreed sum in exchange for its procurement and shipment of the goods.

[19] Further and pursuant to the Agreement, Purchasing Solutions was required to maintain accounts and records of all transactions on behalf of Baha Mar. Purchasing Solutions was further required to grant Baha Mar and its accountants access to audit and copy the accounts and records related to such transactions (Article 4.1 of the Agreement).

[20] Pursuant to Article 10.6.1 of the Agreement, Baha Mar exercised its right to assign the Agreement and did in fact assign same to Essex through an Assignment dated 20 April 2015. The Assignment also conveyed to Essex all right, title and interest to the goods procured under the Agreement.

[21] On or about 20 April 2015, Baha Mar provided Purchasing Solutions notice of its assignment of the Agreement which Purchasing Solutions acknowledged. On or about 8 September 2014, Purchasing Solutions entered into a Master Services Agreement with Suddath Global Logistics, LLC ("Suddath"), a Florida limited liability company.

[22] Pursuant to the Master Services Agreement, Suddath provided warehousing and shipping services for the goods that Purchasing Solutions purchased.

[23] On information and belief, Purchasing Solutions directed that the goods be shipped from the vendors to Suddath warehouses in Florida.

[24] In or about March 2016, Essex learnt for the first time that a portion of the goods were being stored in the Suddath facilities and that Suddath was asserting a lien over the goods for unpaid storage fees incurred by Purchasing Solutions. Around the same time, Essex began to receive complaints from vendors from whom Purchasing Solutions had ordered and failed to pay for the goods. The vendors were looking to Essex for payment before they would release the goods to Essex or to the Baha Mar project.

[25] On or about 6 May 2016, Suddath provided a Final Notice of Sale to Purchasing Solutions and Essex in which it advised that it (Suddath) would be executing upon

its lien on the goods unless warehousing and late fees were paid by a specified date. Purchasing Solutions did not satisfy the lien.

[26] On or about 23 December 2016, Suddath advised Essex that, due to the failure of Purchasing Solutions to satisfy the lien, Suddath had transferred all of the goods to another party ("a third party") acting on its behalf to satisfy the lien for warehousing and late fees.

[27] By correspondence dated 11 May 2016 and 27 May 2016 respectively, Essex, through its Counsel, requested an accounting pursuant to Article 4 of the Agreement. Purchasing Solutions has failed and/or refused to do so.

[28] As a result, Essex instituted these proceedings in the Bahamas seeking unspecified damages; an accounting under six heads of enquiry and costs.

[29] On 19 February 2018, on an ex parte Summons, Essex sought leave to serve Notice of the Writ of Summons upon Purchasing Solutions outside of the jurisdiction. The application was supported by the affidavit of Lakeisha Hanna filed on 19 February 2018 ("Hanna 1st affidavit") which sets out Essex's claim against Purchasing Solutions as set out in paragraphs 16 to 28 of this Ruling [supra].

[30] On 26 March 2018, I granted leave to issue a Specially Indorsed Writ of Summons against, and, to serve notice thereof on, Purchasing Solutions out of the jurisdiction.

[31] On 26 April 2018, Purchasing Solutions filed, without leave, a Memorandum of Conditional Appearance in order to prevent judgment going by default.

[32] On 10 May 2018, Purchasing Solutions took out a Summons praying that the Order granting Essex leave to issue and serve notice of the writ be discharged. This is the application that the Court is concerned with.

[33] On 22 May 2018, Essex issued a Summons seeking to have the Conditional Appearance struck out and/or the appearance ordered to stand as unconditional, the same having been entered without prior leave of the Court.

[34] On 23 May 2018, the affidavit of Mr. Williams was filed in support of Purchasing Solutions' application and on 30 August, the exhibits to Mr. Williams' affidavit (which by oversight not been annexed to the Williams affidavit) were filed into Court.

[35] On 12 October 2018, Purchasing Solutions, without prejudice to its position that the same was unnecessary, took out a Summons praying for leave to file a Conditional Appearance and in conjunction therewith, for an Order that the Conditional Appearance filed on 26 April 2018 do stand as conditional.

[36] On 22 October 2018, leave was granted to Purchasing Solutions to enter a Conditional Appearance. The Court ruled that the Conditional Appearance filed on 26 April 2018 stands as conditional with costs to Essex to be taxed if not agreed.

[37] On 4 January 2019, an affidavit of Lakeisha Hanna ("Hanna 2nd Affidavit") in response to Purchasing Solutions' application to discharge the Order granted on 26 March 2018 was filed.

[38] On 11 January 2019, the Second Affidavit of Mr. Williams was filed. In a nutshell, it seeks to object to the admissibility of the Hanna 2nd affidavit.

The issues arising

[39] Purchasing Solutions sought to discharge the ex parte Order made on 26 March 2018. The grounds of the application are three-fold in nature namely:

(i) The Court did not have before it all the admissible material relevant to the case;

(ii) Essex failed to make full and frank disclosure to the Court and;

(iii) Having regards to all the circumstances of the case it is not a proper case for service out of the jurisdiction within RSC Ord. 11 r. 4 and the Court in its discretion should have refused to grant leave for such service.

[40] Purchasing Solutions' application to discharge was supported by two affidavits of Mr. Williams filed on 23 May 2018 and 11 January 2019 and submissions.

The law

[41] Permission to serve out of the jurisdiction is governed by RSC Ord. 11. Ord. 11(1)(1) (f)(iii) provides as follows:

> **"Subject to rule 3 and provided that the writ does not contain any such claim as is mentioned in Order 67, rule 2(1),service of a writ, or notice of a writ, out of the jurisdiction is permissible with the leave of the Court in the following cases, that is to say –**
>
> **(f) if the action begun by the writ is brought against a defendant to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which**
>
> **(i) was made within the jurisdiction; or**
>
> **(ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction; or**
>
> **(iii) is by its terms, or by implication, governed by Bahamian law."**

[42] Ord. 11 r. 4 (1) provides that an application for the grant of leave under rule 1 or 2 must be supported by an affidavit stating the grounds on which the application is made and that, in the deponent's belief, the plaintiff has a good cause of action.

[43] Ord. 11 (4) (2) provides that "No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction."

[44] Permission is always required for service of a Notice of a Writ out of the jurisdiction. The claim must satisfy the criteria set out in the rules. There is no general discretion reposed in the Court to grant permission outside those grounds. In addition, a party

does not have an absolute right to permission. The Court is always master of its own procedure.

[45] Ord. 32 r.6 states "The Court may set aside an order made *ex parte*." In **Becker v Noel and another (Practice Note)** [1971] 2 All ER 1248, Lord Denning MR said:

> **"I am quite clear that not only may the court set aside an order made ex parte, but where leave is given ex parte it is always within the inherent jurisdiction of the court to revoke that leave if it feels that it gave its original leave under a misapprehension on new matters being drawn to its attention."**[Emphasis added]

[46] The jurisdiction to subject a foreigner to the jurisdiction of the court has been described as extraordinary and should only be exercised with great care. In **The Hagen** [1908] P 189 at page 201, per Farwell L.J. noted that:

> **"[I]f on the construction of any of the sub-heads … there was any doubt, it ought to be resolved in favour of the foreigner; and … in as much as the application is made *ex parte*, full and fair disclosure is necessary, as in all *ex parte* applications, and a failure to make such full and fair disclosure would justify the court in discharging the order, even although the party might afterwards be in a position to make another application."**

[47] Any applicant to the Court for ex parte relief must act in the utmost good faith and disclose to the Court all matters which are material to be taken into account by the Court in deciding whether or not to grant relief ex parte and if so, on what terms.

[48] The duty to make full and fair disclosure has been comprehensively set out in the submissions of learned Counsel Mr. Turnquest. For present purposes, I gratefully adopt it.

[49] In **Bloomfield v Serenyi** [1945] 2 All ER 646, the plaintiff issued a writ against a defendant who was then within the jurisdiction. The plaintiff subsequently applied for leave to join as second defendants, the firm of which the defendant was managing director, and for an Order for service out of the jurisdiction. In support of the application, an affidavit was sworn by a clerk of the plaintiff's solicitor averring that the first defendant and the proposed defendants were joint contractors with

the plaintiff and that the plaintiff's claims were based on that proposition. Although the affidavit was the only document before the court, leave was given for notice of the writ to be served on the foreign firm as being a necessary or proper party to the action. The second defendants applied to set aside the order for service out of the jurisdiction. The judge, on considering all the relevant documents before him, found that the facts disclosed no joint contract between the plaintiff and the 2 defendants, and that there had not been full disclosure to the court of all the facts within the plaintiff's/applicant's knowledge. Judgment was therefore given for the defendants. The decision was affirmed on appeal. Scott, L. J. said, at page 648:

> **"… I feel bound to say that the plaintiff's solicitors' clerk in the original affidavit upon which leave was asked did not put before the court anything like full disclosure. I cannot help thinking that the deponent must have been erroneously instructed, perhaps quite innocently, by the plaintiff as to what the position was. But I want to say definitely that it is the duty of a solicitor, asked to obtain leave under R. S. C., O.11, to examine with care the material put before him for the purpose of so acting and to make sure that he does know the real case that his client has before he makes, or allows a clerk to make, an affidavit upon which the court must necessarily rely. The solicitor should remember also that he is an officer of the court".**

[50] In **Taylor v Sherman** [1993] BHS J. No. 59, Sawyer J. (as she then was), in discharging an injunction which had been obtained *ex parte*, said at para. 17:

> **"In Brinks MAT Ltd. v. Elcombe and Others [1988] 3 All E.R. 188 (another case of a Mareva injunction). Gibson, L.J. (with whom Balcombe and Slade L.JJ., agreed) set out the following as some matters to be considered by a court to which application is made to discharge an injunction granted <u>ex parte</u>:-**
>
> > **In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following: (i) The duty of the applicant is to make a full and fair disclosure of all the material facts. See R. v. Kensington Income Tax Comrs, ex p. Princess Edmond de Polignac [1917] 1 KB 486 at 514 per Scrutton LJ. (ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see the Kensington Income Tax Comrs case [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR, citing Dalglish v. Jarvie (1850) 2 Mac G 231 at 238, 42 ER 89 at 92, and Thermax Ltd. v. Schott**

Industrial Glass Ltd. (1981] FSR 289 at 295 per Browne-Wilkinson J. (iii)The applicant must make proper inquiries before making the application: see Bank Mellat v. Nikpour [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant see, for example, the examination by Scott J of the possible effect of an Anton Pillar order in Columbia Picture Industries Inc. v Robinson [1986] 3 All E.R. 338 [1987] Ch 38, and (c) the degree of legitimate urgency and the time available for the making of inquiries: see Bank Bellat v. Nikpour [1985] FSR 87 at 92-93 per Slade LJ. (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains… an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty…": see Bank Mellat v. Nikpour (at 91) per Donaldson LJ, citing Warrington LJ in the Kensington Income Tax Comrs case. (vi)Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the nondisclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': see Bank Mellat v. Nikpour [1985] FSR 87 to 90 per Lord Denning MR. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:

> **…when the whole of the facts, including that of the original nondisclosure, are before it, [the court] may well grant such a second injunction if the original nondisclosure was innocent and if an injunction could properly be granted even had the fact been disclosed."**

[51] Although **Taylor** concerned an injunction, the principles regarding material non-disclosure remain the same on any *ex parte* application.

[52] In **III Dune Capital Partners 7 Inc. v Bay Spring International Ltd and others** [2017] 1 BHS J. No. 99, Winder J., directed that the Order of Ferguson-Pratt, J

(ag) granting leave to issue the concurrent writ of summons against the Applicants be set aside; one of the reasons being that the Plaintiff failed to be full and frank at the hearing of the *ex parte* application. Winder J stated at para. 16:

> **"I am satisfied that there was material non-disclosure in respect of both the commonality of directors as well as existence of a related action pending in Hong Kong. Those are facts which ought to have been brought to the attention of the court on the hearing of the ex parte application."**

[53] It is well-established that an applicant seeking an *ex parte* order must disclose not only material facts known to the applicant but also any additional facts which he would have known if he had made such inquiries. That duty extends to any possible defence(s) of the defendant on an ex parte application.

Discussion: Issues 1 and 2

[54] Issues 1 and 2 could be subsumed together. Purchasing Solutions alleged that (1) the Court did not have before it all the admissible material relevant to the case and (2) Essex failed to make full and frank disclosure to the Court.

[55] Learned Counsel Mr. Turnquest correctly submitted that since the application to serve out was heard ex parte, Essex was obliged to disclose all material matters which would extend even to possible defences. He submitted that Essex failed to disclose that:

1. Baha Mar had an agreement with another purchasing agent in respect of the Baha Mar Development.

2. Purchasing Solutions has never received funds from Essex.

3. All invoices were billed to Baha Mar and even invoices billed to Purchasing Solutions for shipping costs of goods to Suddath's warehouse were still for the account of Baha Mar as Purchasing Solutions was only acting as its agent.

4. Baha Mar had at least one other purchasing agent and that goods procured by such agent were also stored at Suddath's warehouse.

5. Purchasing Solutions acted as an agent of Baha Mar and was obliged to (and did) disclose the limits of its agency to all Vendors.

6. Purchasing Solutions had no authority to authorize payments to Vendors. No orders for any items were made until Baha Mar had reviewed and approved the proposed order to the relevant vendors. All funds paid to Purchasing Solutions were paid against detailed funding requests, which gave Baha Mar a full accounting of what the funds were for accompanied with copies of the relevant invoices and a detailed spreadsheet outlining the costs by project location (Reference is made to paragraphs 15-18 of the Affidavit of Mike Williams).

7. Purchasing Solutions entered into an agreement with Suddath for transportation and in theory warehousing services. Pursuant to which Purchasing Solutions was only required to order and ship the products to Suddath's bonded warehouse in Jacksonville, Florida. Shipping costs billed to Purchasing Solutions (but for the account of Baha Mar) only covered shipment to the Jacksonville warehouse. Storage and onward shipment were billed direct to Baha Mar. Once the goods were shipped to Florida, they were warehoused under the separate arrangement between Suddath and Baha Mar. Purchasing Solutions was not a party to this separate agreement and never arranged onward transportation from Florida to Nassau. Suddath did not store any goods in the name of Purchasing Solutions.

8. The assignment between Baha Mar and Essex only covers the furniture, fixtures, operating supplies and equipment items to the extent that they were designated for the residential condominium units. The agreement between Purchasing Solutions and Baha Mar covered a much wider range of items. Prior to the date of the assignment, Baha Mar stopped meeting all funding requests, including fees owed to Purchasing Solutions under clause 5 of their Agreement. The assignment only in fact assigns to Essex' "rights, title and interest" in the goods the subject of the assignment (and remedies for breach) but does not assign ancillary rights under the agreement between Baha Mar and Purchasing Solutions such as the right to an account. Furthermore, clause 8 of the assignment contained an "entire agreement" provision, preventing the importing of any additional elements to the assignment.

9. Essex was well aware of the outstanding funds owed to Vendors as the schedule to the Notice of Assignment gave a detailed account of the residential goods and also indicated clearly that about a further USD $2,000,000.00 worth of goods remained to be procured and/or paid for. Further in 2015, Purchasing Solutions had re-invoiced the bills totaling over USD $2,000,000.00 from Vendors to Essex in accordance with instructions from Baha Mar but Essex refused to pay.

10. The exercise of the lien by Suddath was not due to any sums being owed by Purchasing Solutions to Suddath but because of sums due from Baha Mar (alternatively Essex) to Suddath.

11. In April 2016 (and earlier), Purchasing Solutions provided detailed information to Essex regarding the outstanding funds (see the affidavit of Mike Williams at paragraph 30).

[56] Learned Counsel Mr. Turnquest contended that on the basis of the demonstrated failure of Essex to fully disclose material facts as it was required to do, the Order ought to be discharged.

[57] In response to these submissions, Learned Counsel Mr. Bethell referred to an Exhibit of Mr. Williams labelled "Certificate" marked "JMW -1" filed on 31 August 2018: the Agreement. Article 1 deals with the Purchasing Agent's (i.e. Purchasing Solutions) Responsibilities. It states:

> **"The Purchasing Agent shall be neither a vendor nor a distributor of any of the Items, but shall merely provide services to arrange for the purchase and installation for the account of the Owner. In executing procurement contracts, purchase orders, and other documents for the purchase of Items for the Project, the Purchasing Agent is acting as the Owner's agent; however, the Purchasing Agent shall have authority to act on behalf of the Owner only to the extent provided in the Agreement unless otherwise modified by written agreement. "**

[58] Article 4.1 of the Agreement provides as follows:

> **"The Purchasing Agent shall maintain good accounts and records of all transactions performed on behalf of the Owner. The Owner and the Owner's accountants <u>shall</u> be allowed access to audit and copy the accounts and records related to such transactions. The system of management of the accounts and records shall be subject to the approval of the Owner."**

[59] Under the Agreement, Purchasing Solutions is mandated to allow Essex, the assignor of Baha Mar, access to their records and to perform audit to verify how the Owner's money is spent and how they have stored or otherwise dealt with its acquired property.

[60] Essex sues Purchasing Solutions for, among other things, an accounting of (a) all items ordered for the residential condominiums units; (b) the vendors from whom such items were ordered; (c) the payment status of items ordered, including evidence of any deposits and/or payments made; (d) the production status of items ordered; (e) the physical location of items ordered; and (f) all amounts paid to Purchasing Solutions in connection with its services under the Agreement.

[61] Put another way, Essex sues Purchasing Solutions for accounts and records that it is entitled to under the Agreement, to which it alleges, that despite correspondence, Purchasing Solutions have yet to provide and/or permit the owner's accountants to have access to: see Hanna 2nd affidavit – Exhibits LH2 and LH3.

[62] As I dissect the two affidavits of Mr. Williams, the President of Purchasing Solutions, he is essentially challenging the Statement of Claim, not Hanna 1st affidavit which supported the *Ex Parte* Summons for leave to serve out of the jurisdiction. As learned Counsel Mr. Bethell correctly postulated, the averments in his affidavits seek to vilify the pleadings in the Statement of Claim as being incorrect and/or improper. In my view, these are all matters for Purchasing Solutions' Defence and will be dealt with at trial.

[63] In further addressing the issue of material non-disclosure, it is not in every case where there is material non-disclosure, would a Court discharge the Order.

[64] In **Robelco Limited et al v Svoboda Corporation** BVIHCV2007/0311 [unreported], judgment delivered on 28 January 2008, dealing with an ex parte injunction, where, in my opinion, the threshold is higher than in an application for service out of the jurisdiction, I stated at para. 50:

> **"It is trite law that because the injunction was obtained ex parte, the Applicants had a duty to make full and frank disclosure to the Court of all material facts and to present fairly to the Court matters which the Respondents might rely upon by way of defence: Gee on Commercial Injunctions 5th Ed."**

[65] At paragraphs 54-57, I continued:

> **"54. It is common ground that an injunction could be discharged if there is material non-disclosure. A consequence of applications for interim injunctions being made without notice is that the applicant who seeks the injunction is under a duty to give full and frank disclosure of any defence or other fact going against the grant of the relief sought. The case of Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac *[1917] 1 K.B. 486,514* per Scrutton L.J. is supportive of the point that the applicant has a duty to make "a full and fair disclosure of all the material facts." The duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made inquiries. The extent of the inquiries that will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application and (b) the order for which the application is made and the probable effect of the order on the defendant.**
>
> **55. In deciding in a case where there has been non-disclosure whether or not there should be a discharge of an existing injunction and a re-grant of a fresh injunction, it is important that the Court assess the degree and extent of culpability with regard to the non-disclosure, and the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the Court. If the duty to disclose is not observed, the Court may discharge the injunction.**
>
> **56. In addition, a Court must take all the relevant circumstances into account when it is determining the consequences for the breach of the duty to make full and frank disclosure. The circumstances should include the gravity of the breach. It should also include the excuse or explanation offered, and the severity and duration of the prejudice occasioned to the defendant. This latter should involve the consideration whether the consequences of the breach were remediable and were in fact remedied. The Court must also bear in mind the overriding objective and the need for proportionality in accordance with the overriding objective of CPR 2000.**
>
> **57. <u>Suffice it to say, the discharge of the order is not automatic on a finding of any material non-disclosure. The Court has a discretion to discharge the order or not to discharge it. It may also decide to grant fresh injunctive relief if it determines that justice requires it to protect the applicant. The Court should note that, by its very nature, an application without notice usually requires a lawyer to take instructions and prepare drafts and pleadings in some haste. The Court should weigh this against the need to uphold and enforce the duty to disclose as a deterrent to those who withhold material facts. Ultimately, an interlocutory injunction may be discharged for serious and culpable non-disclosure.</u>**[Emphasis added]

[66] Analyzing the law and the facts of the instant application, I am of the considered opinion that there was no material non-disclosure of the part of Essex to result in a discharge of the order granting leave to serve out of the jurisdiction. In fact, I am still puzzled to figure out what other relevant material Essex should have disclosed. It brought a case in contract against Purchasing Solutions. If there are third parties involved, Purchasing Solutions ought to join those parties. Having said that, I agree with learned Counsel Mr. Bethell that the threshold for an application like the present, is lower than, for instance, in a freezing order. The cases of **The Republic of Angola et al v Perfectbit Limited et al** [2018] EWHC 965 (Comm) and **Bancredit Cayman Limited v Pellerano** [2010] (1) CILR 400 are sound authority for the proposition that the bar is lower for leave to serve out of the jurisdiction as opposed to freezing orders.

[67] For completeness, this Court also relies on the submissions advanced by learned Counsel Mr. Bethell (at paragraphs 15 to 25 of its written submissions dated 4 January 2019) to show that Essex has made full and fair disclosure to the Court when it obtained the Order to serve out of the jurisdiction.

[68] For all of the reasons stated above, I do not find that any of the matters raised by Purchasing Solutions constitute material non-disclosure. They are all fit for a Defence and amount to there being a serious issue to be tried. What is crystal clear is that Essex has a contractual right for an accounting/audit as expressly provided for in the Agreement.

[69] I can end here because if there is a serious issue to be tried, then Essex would have satisfied the test in its application which was before me on 26 March 2018. But I shall press on with the third issue.

Discussion: Issue 3

[70] The next ground of challenge raised by learned Counsel Mr. Turnquest is the following: that having regards to all the circumstances of the case, it is not a proper

case for service out of the jurisdiction within Ord. 11 r. 4 and the Court in its discretion should have refused to grant leave for such service.

[71] Mr. Bethell, in his attractive arguments, submitted that the question for the court's consideration when faced with the issue of leave to serve proceedings out of the jurisdiction under Ord. 11 are correctly stated by the House of Lords in **Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran** [1993] 4 All ER 456. The House of Lords held at page 457:

> **"When considering an application for leave to allow service of proceedings out of the jurisdiction under Ord. 11 r. 1(1) the court, before exercising its discretion to grant leave, had to consider (i) whether there was a good arguable case that the court had jurisdiction under one of the paragraphs of r1(1), and (ii) whether there was a serious issue to be tried so as to enable exercise of the discretion to grant leave under r 4(2). In particular, the test of the strength of the case on the merits which a plaintiff had to establish for the grant of leave to serve proceedings out of the jurisdiction was merely whether the evidence disclosed that there was a serious issue to be tried, not whether he had a good arguable case."**

[72] Learned Counsel Mr. Bethell submitted that Essex has satisfied both limbs of the two-stage test in **Seaconsar**, and the Order granting leave to serve the writ outside of the jurisdiction was properly made.

[73] He countered the assertions of learned Counsel Mr. Turnquest that that quite apart from the duty of disclosure, Essex also had to show that it had a good arguable case as in **III Dune Capital Partners 7 Inc** [supra]. At the end of the day, Mr. Turnquest agreed that the correct test was laid down by the House of Lords in **Seaconsar**.

[74] I will now consider this application against the backdrop of the two-stage test which was laid down in **Seaconsar**.

Whether there is a good and arguable case that court has jurisdiction

[75] In accordance with Ord. 11 r. 1(1) (f) (iii), Essex applied for and was granted leave to serve notice of the Writ outside of the jurisdiction.

[76] Its claim for breach of contract, breach of fiduciary duty and conversion falls squarely under the said rule. The Court had before it, the Hanna 1st affidavit which detailed the nature of the relationship between Essex and Purchasing Solutions in which Purchasing Solutions acted as a purchasing agent for Baha Mar, under the Agreement, which was later assigned from Baha Mar to Essex. The Agreement contains a forum selection clause which states that disputes will be resolved by a court of competent jurisdiction in the Commonwealth of The Bahamas.

[77] The Hanna 1st affidavit stated that when Essex commenced proceedings against Purchasing Solutions in another jurisdiction, Purchasing Solutions vigourously objected on the basis that the Agreement required the parties to conduct all litigation in The Bahamas. Ultimately, the foreign court dismissed the action on the grounds of *forum non conveniens* and stated that Essex may refile the action in a court of competent jurisdiction in the Commonwealth of The Bahamas.

[78] As already stated, Essex' claim is particularized at paragraphs 5 to 27 in Hanna 1st affidavit which does not need to be replicated. Unquestionably, Essex has a good and arguable case that the Supreme Court of The Bahamas has jurisdiction over disputes relating the Agreement.

Whether there is a serious issue to be tried

[79] Purchasing Solutions argued that there are no serious issues to be tried.

[80] As it relates to the merits of the case, the test for the Court to consider is whether there is a serious issue to be tried. I agree with Mr. Bethell that any consideration of whether there is a 'good and arguable case' on the merits, is misconceived. Learned Counsel Mr. Turnquest relied on **III Dune Capital Partners 7 Inc**. [supra] which suggests that the Court must consider whether Essex has a good and arguable case on its merits. To my mind, the test is whether there is a serious issue to be tried as expounded in **Seaconsar**.

[81] In **Seaconsar**, the English House of Lords determined that a plaintiff is not required to establish a good and arguable case on the merits. Lord Goff of Chieveley, who in delivering the unanimous decision on behalf of the Court, stated at page 467:

> **"The invocation of the principle of forum conveniens springs from the often expressed anxiety that great care should be taken in bringing before the English court a foreigner who owes no allegiance here. But if jurisdiction is established under r1(1), and it is also established that England is the forum conveniens, I can see no good reason why any particular degree of cogency should be required in relation to the merits of the plaintiff's case."**

[82] As Mr. Bethell correctly submitted, the House of Lords in **Seaconsar** in fact, overturned the decision of the Court of Appeal on the matter before it, holding that the Court of Appeal had erred by holding that Seaconsar had to establish under either sub-paragraphs (d)(i) or (ii) of Order 11 rule 1(1), a good arguable case on the merits: see page 467, paras. g and h.

[83] Essex argued that pursuant to the Agreement with Baha Mar, Purchasing Solutions was responsible for the procurement, shipment, and storage of certain items. Baha Mar assigned the agreement to Essex as it related to certain of those items. Essex alleges that Purchasing Solutions has breached the agreement by failing to pay a number of vendors, failing to pay a warehouse for storage of the items, and failing to comply with a request for a full accounting. The details of Essex' case are set out in Hanna 1st affidavit: see paras: 5 to 22 and in the Statement of Claim which is contained both in the Notice of Writ of Summons and in the Writ of Summons. Thus, says Mr. Bethell, there is a serious issue to be tried.

[84] Learned Counsel Mr. Turnquest asserted that there is not a serious issue to be tried, however provide no real support for this contention. Instead, Purchasing Solutions relied on what it purports are material non-disclosures by Essex but I have already addressed that issue.

[85] In my opinion, there is a serious issue to be tried as it relates to the alleged breach of the Agreement and the allegations highlighted by Purchasing Solutions which

are proper for a Defence and, in my considered opinion, do not amount to material non-disclosure.

Conclusion

[86] Finding that Essex has satisfied the provisions of Ord.11 rule 1(1)(f)(iii) and has shown that there is a serious issue to be tried, I hereby affirmed the Order which I made on 26 March 2018 granting leave to Essex to serve out of the jurisdiction. I therefore dismiss the application to discharge the *ex parte* Order which I made on 26 March 2018 with costs to Essex to be taxed if not agreed.

[87] In order to actively manage cases, I will affirm that the conditional appearance entered on 26 April 2018 becomes unconditional and Purchasing Solutions file and serve its defence by 1 March 2019. Essex is at liberty to file its Reply within 14 days thereafter and Case Management will take place on Wednesday, 1 May 2019 at 10.00 a.m. Trial dates are now confirmed for Tuesday, 10 November 2020 with a time estimate of four (4) days.

[88] Last but not least, I am immeasurably grateful to both Counsel for their comprehensive written as well as oral submissions.

Dated this 15th day of February, A.D. 2019

Indra H. Charles
Justice