COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2020/CLE/gen/000594

BETWEEN:

SATISH DARYANANI

Plaintiff

AND

(1) LEON GRIFFIN
(2) BISWAJIT PATI
(3) TREASURES BAHAMAS LIMITED
(4) BJC BAHAMA JEWELLERY COMPANY LIMITED
(5) COTTON HOUSE BAHAMAS DEVELOPMENT PARK CORP.
(6) PARK LANE JEWELLERS LTD.

First Defendants

(1) JITENDER KESWANI
(2) RAJ CHANDIRIRAMANI
(3) TREASURES INTERNATIONAL LLC

Second Defendants

RULING

Before:	The Hon. Mr. Justice Loren Klein
Appearances:	Damian Gomez QC, Owen Wells for the Plaintiff Alfred Sears QC, Moreno Hamilton for the 1st, 3rd - 6th of the First Defendants Ms. Hope Strachan for the 2nd of the First Defendants Raynard Rigby for the 1st, 2nd of the Second Defendants Dwyan Rodgers for the 1st of the Second Defendants (submitting affidavit only)
Hearing Dates:	8 July 2020, 14 July 2020, 16 July 2020, 28, 29 December 2020, Final written submissions and affidavits filed 6 August 2021

Civil practice and procedure—Interlocutory injunction—Alleged breach of contract—Sale of goods on consignment — Bailment—Retention of title—American Cyanamid principles—Balance of Convenience—Equitable Considerations—Clean Hands Principle—Equitable tracing—Injunction to preserve specifically identifiable assets—Multiple filings of affidavit evidence—Conflicting affidavit evidence.

INTRODUCTION & BACKGROUND

Introduction

[1] This is an application for an interlocutory injunction which, in substance, sought to restrain the sale of the inventory of jewellery and other luxury goods supplied by the plaintiff on consignment to a chain of well-known retail stores located in downtown Nassau and on Paradise Island operated by the defendants.

[2] The commercial context is a tripartite business arrangement for the sale of retail goods involving a US-based businessman of East Indian ethnicity, a Bahamian entrepreneur and several East Indian merchants. The dispute arose after an already frayed and volatile business relationship disintegrated owing to difficult economic conditions created by the Covid-19 pandemic. Things fell apart when the plaintiff accused the defendants of breaching the 2019 Agreement governing the parties' commercial dealings, and as a result the plaintiff commenced litigation.

[3] It generated an acrimonious interlocutory skirmish that regrettably dragged on for over a year and involved the filing of multiple affidavits as each party tried to smear out the reputation of the other. There were cross-allegations of sharp business dealings, commercial sabotage, illegal tax practices, illicit activities and an 11th-hour *volte-face* by one of the defendants that drew sharp divisions between the defendants themselves.

[4] After a series of truncated oral hearings and the lodging of several rounds of written submissions (the most recent of which the parties agreed should be considered on the papers), I nonetheless felt constrained on the particular facts of this matter to refuse the application for the injunction, for the reasons which I set out below.

Procedural background

[5] The application for the injunction has its genesis in a generally indorsed writ of summons filed 30 June 2020. It claims, *inter alia*, as "*against the Defendants and each of them*" the sum of $23 million said to be due as a result of breaches of an Agreement dated 2 October 2019 or alternatively a 'parol' contract dated 6 December 2016. It also sought the return to the plaintiff of all unsold jewelry and goods supplied to the defendants that were still in their possession and control.

[6] That same day, 30 June 2020, the plaintiff filed a summons for interim relief supported by the affidavit of Anthony McKinney QC, also filed 30 June 2020. As shall presently emerge, this was the first of numerous affidavits filed by the parties. As originally framed, the summons sought, in material terms, the following relief:

> "(1) An order until trial or further order restraining the Defendants whether by themselves, their servants and agents or anyway howsoever from doing any or all of the following acts:-
>
> (a) operating any retail business activity at any of the stores or outlets known as or otherwise called (1) ParkLane Luxe situated at Lightbourne Building, Bay Street and Frederick Street; (2) Pink Flamingo, situate at the corner of Bay Street and Charlotte Street; (3) Bahama T-Shirt Company #3 situate on Prince George Wharf, Bay Street, (4) Bahama Mama situate at the International Bazaar, Bay Street, (5) Diamond Centre situate at the International Bazaar, Bay Street; (6) Bamboo Nation situate at Unit #2, Marina Village, Paradise Island; (7) Baker Estate situate on the south eastern corner of Bay Street and Frederick Street; and (8) Park Lane Jewellers situate at Unit #21 Marina Village, Paradise Island;
>
> (b) selling, alienating or otherwise dissipating in any way any of the assets of the Defendants not exceeding $23,000,000;

(c) selling, alienating or otherwise dissipating any of the unsold inventory supplied on consignment to the Defendants by the Plaintiff howsoever and wheresoever stored by the Defendants or their servants or agents."

(2) An order that the Defendants within 7 days of service of the order do serve on McKinney, Turner and Co., Oakbridge House, 13 West Hill Street, Nassau, The Bahamas, an account of inventory supplied by the Plaintiff to the Defendants on consignment including the record of sales together with verification bank account statements from the bankers of the Defendants related to the proceeds of the sale."

(4) Further, or alternatively, an Order appointing a Receiver manager of the Third, Fourth, Fifth and Sixth named First Defendants until trial or further order; …".

[7] The statement of claim ("SOC") was filed on 24 July 2020. An amended version was filed 10 September 2020, and the thrust of the amendments was to plead the breach of a bailment relationship between the plaintiff and the defendants. As will be explained shortly, the defendants are divided into two groups: the first-named defendants are persons and entities connected to Leon Griffin, and the second-named defendants consist of the operators of several of the retail stores and a US company that is said to be owned by one of them. The SOC alleges discrete breaches of the 2019 Agreement as against the two sets of defendants, and I reproduce some of the material allegations as follows:

"9. The First named Defendant and the Third through Sixth named First Defendants unlawfully breached clauses 1, 4, 5, 6, 7, 8 and 9 of the said Deed of Contract, more particularly referred to in paragraphs 1, 6, and 7 hereof in that:

(a) the Plaintiff was never appointed as a Director of any of the Third through sixth named Fifth Defendants or any of them;
(b) the Plaintiff was deprived of access to the bank accounts of the Third through Sixth named First Defendants;
(c) The Defendants failed to treat the Plaintiff as owner of the goods supplied by him to the said Defendants;
(d) The Defendants failed to cooperate with the Plaintiff in his demand for repayment of the debts created in clauses 6 and 8 of the said Deed of Contract;
(e) The defendants failed to provide any or any proper and effective controls over the Second Defendants so as to ensure the repayment of the debts owed by the First and Second named Second Defendants to the Plaintiff;
(f) The Defendants failed to treat with the Plaintiff to contract as contemplated by clause 7 of the said Deed of Contract;
(g) The Defendants, in breach of clause 7, cooperated with the Second Defendants to prevent the Plaintiff from taking possession of the jewelry referred to in clause 8 of the said Deed of Contract;
(h) In breach of clause 9, permitting the First and Second named Second Defendants to participate in the operation and management of the stores more particularly referred to in clause 9 of the said Deed of Contract, and after the 1st day of February A.D., 2020 the Parklane Lux and Parklane Marina Stores."

10. The First and Second named Defendants unlawfully and in breach of clauses 6,7, and 8 of the said Deed of Contract failed to make any monthly payments for the repayment of $15,000,000 and interest thereon and failed to yield up the Parklane Lux and Parklane

> Marina stores to the Plaintiff contrary to clause 6 of the said Deed of Contract, and failed to desist from participating in the operation and management of Bahamas Treasures 1, 2, & 3 and the Diamond Center notwithstanding the absence of the Plaintiff's approval in respect of their said participation in the operation and management of the said stores more particularly referred to in paragraph 9 of the said Deed of Contract. The Defendant and each of them failed to take possession of goods delivered to them by the Plaintiff.

[8] Further, at paragraph 13, the plaintiff made the following allegation as against both sets of defendants:

> "…the Plaintiff has supplied numerous items of jewelry and other products on consignment to the First named First Defendants and to the Third through Sixth named First Defendants and to the First and Second named Second Defendants on the condition that the said Defendants would pay the Plaintiff the value of each such item upon the sale of such item. In breach of the said condition, the said Defendants have failed to account properly or at all about the sale of such items and have failed to pay for the said jewelry and other items and products."

[9] The relief sought against the two sets of defendants is also separately claimed. In respect of the first defendants, the main relief sought is damages, an accounting of the unsold goods and chattels, return of the goods and an order for payment of such sums by the first defendants as "*may be found owing pursuant to such account and inquiry*." As against the first and second of the second named defendants, the plaintiff specifically claims the sum of $15,000,000.00, in addition to the other remedies claimed in respect of the first-named defendants.

[10] I have set out the material parts of the statement of claim because it is trite that an interlocutory injunction is ancillary to a substantive cause of action, and the court must consider the application against the background of the rights asserted and the substantive relief sought in the main action. In this regard, it is important to note at the outset that the application for injunctive relief seems to conflate the position of the two sets of defendants, even though the allegations of breaches of the rights and/or duties said to be owed by them are different. I shall return to this point a little later in this Ruling.

Protagonists

[11] Because of the number of parties involved in these proceedings, and without meaning any disrespect, it will be convenient to refer to the individuals by their initials and the corporate entities by acronyms after the first mention. It is also useful to attempt to explain the relationship among the parties, as far as may be distilled from the documents.

[12] The plaintiff Satish Daryanani ("SD") is a citizen of the United States of America, and apparently has been a supplier of jewellery and related items to the first and second of the second-named defendants—Jitender Keswani ("JK") and Raj Chandiriramani ("RC"). JK is allegedly part owner of Treasures International LLC ("TI-LLC"), a US company and the third named of the second defendants (the "No. 2 defendants"). However, as will be seen, there is some doubt as to who is the real owner of that company. Leon Griffin ("LG") is a Bahamian businessman and is the first-named of the first defendants (the "Griffin defendants" or "No. 1 defendants"). He owns the jewellery and souvenir stores listed at paragraph 1(a) of the plaintiff's summons and the third to

sixth corporate first defendants (Treasures Bahamas Limited ("TBL"), BJC Bahamas Jewellery Company Limited ("BJC"), Cotton House Bahamas Development Park Corp., ("CHB"), and Park Lane Jewellers Ltd. ("PLJ")). Apparently, TBL is supplied with some of its merchandise through TI-LLC, allegedly via SD. Biswajit Pati ("BP"), the second named of the No. 1 defendants, is a consultant to LG.

The affidavit evidence

[13] As indicated, there were numerous affidavits filed in these proceedings, a total of 19 in all spanning a period of more than a year. The plaintiff filed a total of nine affidavits, all sworn through his counsel Anthony McKinney QC ("AM"). For the Griffin defendants, LG filed four responsive affidavits, and there were three affidavits filed on behalf of BP. For the No. 2 defendants, RC filed two affidavits and, late in the proceedings, JK also filed an affidavit, after retaining different counsel. Ironically, the second RC affidavit was partly in response to the JK affidavit, which contradicted the position adopted by the No. 2 defendants in the first affidavit and drew battle lines between him and the other defendants.

[14] The evidence filed in these proceedings was illustrative of the kind of scenario referred to by Browne, L.J. in *Alfred Dunhill v Sunoptics SA* [1979] F.S.R. 337 (at 373), in which the plaintiff was "…*concerned to omit nothing that might assist to show that they had at least a good arguable case*", and to which the defendants responded in kind. The defendants objected to the multiple filings of affidavits on behalf of the plaintiff, and the court did in fact give directions for there to be no further filings without leave. However, it became necessary as a matter of fairness and justice to give leave to the defendants to file responsive affidavits to evidence adduced late in the proceedings. Not all of the affidavit evidence is relevant to the application for injunctive relief, and I will only refer to the portions that are material. But it is important to recount the affidavit evidence in some detail to understand the tangled web of factual allegations out of which this application arises.

First AM affidavit

[15] The first AM affidavit in support of the application (filed 30 June 2020) sets out the relevant factual background from the plaintiff's point of view and explained the grounds for the application. These grounds were not included in the summons itself. According to the plaintiff (and I emphasize that many of these allegations are disputed), on or about the 6 December 2016, SD entered into what is referred to as a "parol contract" with LG, TBL, and TI-LLC for the development and operation of retail stores to sell luxury goods consisting of diamonds, perfumes, watches, sunglasses, jewellery, gifts, souvenir T-shirts and similar products.

[16] It is further stated that LG incorporated the companies listed as the corporate first defendants to facilitate the operation of the stores which were to be used for retailing the goods. Additionally, a number of retail stores were commissioned to be managed and operated pursuant to the agreement by the second defendants as "agents" of both the plaintiff and first defendants, as follows: (1) ParkLane Luxe, located at the Lightbourne Building, Bay and Frederick Street; (2) Pink Flamingo, located at the corner of Bay and Charlotte Street; (3) Bahama T-Shirt Company, located on Prince George Wharf, Bay Street; (4) Bahama Mama, located at the International Bazaar, Bay Street; (5) Diamond Centre, located at the International Bazaar, Bay Street; (6) Bamboo Nation, located at

Marina Village, Paradise Island; (7) Baker Estate, located at the corner of Bay and Frederick Street; and (8) Park Lane Jewellers, located at Marina Village, Paradise Island.

[17] SD alleges that between the period 6 December 2016, when the original agreement was made, and 2 October 2019 (the significance of which date will be explained shortly), he supplied the first and second defendants with an inventory of jewellery and other luxury products worth several millions of dollars. This inventory was supplied by him and third-party suppliers, whom he says only supplied goods because he agreed to act as guarantor of the payments by the defendants. He also says that he financed the outfitting of the stores by advancing monies for that purpose. He alleged further that the defendants generated large sales from the said inventory, some of which was sold in breach of the terms of the contract and that the defendants failed to provide proper accounting for the sales.

[18] By 2019, concerns about the operation of the retail businesses had come to a head. These included his concerns about accounting and payment to him upon the sale of the consigned goods, the alleged failure of the defendants to pay demurrage expenses and charges for goods being landed, failure to insure goods, and concerns over payment of rents due to landlords of the shops that were being operated. This led to SD, LG and the second defendants, JK and RC, entering into an Agreement dated 2 October 2019 ("the 2019 Agreement"), which provided for a compromise and settlement of the issues and concerns with the 2016 agreement and set out terms on which the retail operation was to continue.

The October 2019 Agreement

[19] The 2019 Agreement is central to the application before the court. Considerable differences have developed over its interpretation, although the court clearly cannot embark on a definitive construction of its terms for the purposes of this application. I summarize some of the main features below.

[20] It is a tripartite agreement between SD ("the financier/supplier"), JK and RC ("the consignees/operators") and LG ("the owner"). In the round, it provides for all the earlier disputes between the financier and the consignees/operators "*concerning the accounting of the said principal agreement and the sale and payment of the said products*" to be settled on the terms outlined in the 2019 Agreement. The Agreement was also said to be a preliminary act to settling a formal franchise or other agreement to govern the parties' relationship, and it was intended to replace the 2016 agreement, which was said to be rendered "null and void".

[21] Pursuant to clause 6, the consignees/operators (JK, RC, and TI-LLC) agreed to treat the value and goodwill of the Parklane Lux and ParkLane Marina (said to be valued at $7.5 million) as a loan to them to be repaid over a 10-year period at 11% per annum by monthly installments of $103,312.51, commencing 15 November 2019. Failure to pay for at least three consecutive months entitled the "owners" and "financier" to demand immediate payment of the balance, enter into possession of the stores and cancel the arrangement with the consignees/operators to operate the two stores in question, subject to the release of all operating material. This clause also provides that the "owner" shall have no liability for the payment of any sum due to the financier/supplier "*except supervision and controls will be done to ensure that the payment reaches the financier/supplier*."

[22] At clause 8, there was an acknowledgement that there was $7.5 million of goods "*laying in the name of Treasures International*" as consignment goods on the premises of Parklane Lux and Parklane Marina. The value of these goods was to be repaid to the financier/supplier within 10 years, in equal monthly instalments of $62,500.00, beginning 1st November 2019. Again, any default for three consecutive months entitled the financier/supplier to invoke the right to the return of the goods and to all other legal remedies.

[23] SD alleges further that the defendants have breached that agreement by failing to pay the instalments and by breaching other terms. He says that since 2 October 2019 the defendants have failed to make the monthly payments as required pursuant to the contract, and that he has not been paid in full by the Griffin defendants in respect of inventory supplied on consignment. According to the plaintiff's statement of account exhibited to the affidavit, the defendants owe him some $30,214,335.92, apparently inclusive of the legacy debt.

[24] He also alleges that the first defendants failed to appoint him as a director of the two corporate first defendants (Treasures Bahamas Limited and Park Lane Jewellers Ltd.), and failed to provide him with banking and accounting records of the companies, as required under the terms of the agreement. He deposed that "*unless the Defendants are restrained they will deprive the Plaintiffs (sic) of his proprietary interest in the inventory sold on consignment terms and of other monies due to the Plaintiffs as a consequence of loans advanced to the Defendants since the 6th day of December A.D., 2016*".

First LG affidavit

[25] On 8 July 2020, LG filed an affidavit in his personal capacity and as president and "beneficial owner" of the third to sixth corporate first defendants. He disputes much of what is contained in the affidavit of SD.

[26] Firstly, he denied that he was a party to any agreement in 2016 with SD and indeed stated that he never met SD until October 2019. Further, he indicated that his companies were not formed pursuant to that earlier agreement, and neither were they supplied with any inventory between 2016 and 2019 as alleged. He did, however, enter into the 2019 Agreement, as he says the plaintiff sought his assistance (because of his experience as the owner of several local jewellery companies) in managing the commercial relations with the No. 2 defendants and recovering monies owed under the original contract.

[27] He also denied that the first-named defendants breached the Agreement or that there was any risk of dissipation of the assets or goods. In fact, he countered that it is the plaintiff who breached the Agreement by engaging in various unsavoury business practices and underhanded dealings, as is revealed from the following extracts:

> "20. There is no risk or 'real danger' of dissipating of assets or luxury goods, as alleged by Mr. McKinney in paragraph 6, because the Plaintiff was in fact paid all the monies due to him under the agreement payable for the term of 2 October 2019 to March 16, 2020 (when the business were closed under the Bahamian Government Emergency Orders) for COVID 19, contrary to the assertion of Mr. McKinney in paragraph 17. The last full payment was made to the Plaintiff on March 20, 2020 and in fact the Plaintiff has been paid nearly Two Million Dollars, specifically US

$1, 786,245.00 for the period October 2, 2019 to March 2020. The payments could not have been made after March 2020 due to closure of the businesses by the COVID Emergency Regulations. A copy of the schedule of payments made to the Plaintiff between October 2019 and March 2020 are now produced and shown to me marked as exhibit "L.G.1".

21. It was the plaintiff that breached the October 2019 agreement in several ways during the period of October 2, 2019 to March 2020 in the following respects:

a. The plaintiff verbally told me that he could falsify invoices "like he does in St. Thomas" to avoid paying import duties. This was of great concern to me and I along with my consultant, Mr. Biswajit Pati, told the Plaintiff in no uncertain terms that I do not condone such actions. I later discovered that the invoices that the Plaintiff forwarded to all of us for inventory were prepared in such a way that they raised the suspicion of the Bahamas Customs Department which resulted in delays in clearing inventory from the Port. I and the other Defendants were so concerned about the fact that the Plaintiff seemed to engage in falsely undervaluing imported goods that we insisted that the Plaintiff sign an Affidavit and an Addendum to the October 2019 agreement undertaking that he would produce a true inventory of goods being imported for my businesses. […]

b. I am informed by the Second Defendants that the Plaintiff sought out Second Defendants numbers 1 and 2 on separate occasions individually and sought to get them to undermine and double cross Mr. Pati and I to oust us from my business so that he (the Plaintiff) could take over my businesses completely. The Second Defendant refuse (*sic*) to cooperate with the Plaintiff on his proposal to interfere with my businesses.

c. The Plaintiff also tried to persuade me to undermine Mr. Pati and the Second Defendant. I refused to cooperate with the Plaintiff's request to attack Mr. Pati and the Second Defendants.

d. [..]

e. The plaintiff commenced this action when the October 2019 agreement makes it clear that in the event that Jitender Keswani and Raj Chandiriramani are delinquent or default on payments then the Plaintiff and I would be entitled to demand immediate payment of the entire balance. I note that the Plaintiff commenced this action without consulting me and without considering clause 6 of the October 2019 contract.

f. […]

g. The Plaintiff, in breach of the condition precedent in clause 6 of the October 2, 2019 Agreement, is obligated to cooperate with me in the demand of any outstanding arrears, take possession of the stores after giving the Second Defendants the requisite notice subject to what is reasonable in the circumstances."

22. There is no risk that any funds will be dissipated from our accounts or that any of the goods from the stores will be dissipated. The plaintiff is one of approximately thirteen (13) other vendor that supply us with goods for the stores. If necessary, my companies and I are willing to return goods that have been delivered by the Plaintiff to us and which have not been sold to address any dispute with the Plaintiff, without any reputational loss to my businesses and erosion of the confidence of my other suppliers, which will cause irreparable harm."

[28] The affidavit concludes by asserting that the plaintiff had not made out a good and arguable case for an injunction, that there was no real risk of dissipation of any assets, and that in any event the plaintiff did not come to the court with clean hands in seeking injunctive relief.

[29] Before leaving this affidavit, it is appropriate to refer to the Addendum to the 2019 Agreement, made by Deed executed 12 March 2020, and which was exhibited to the affidavit. This did not vary the parties' rights and obligations under the main agreement, but provided in material part as follows:

> "5. That the financier/supplier, his said servants or agents including his wife Veena Satish Daryanani ("the said servants and/or agents") of the first part shall forever and henceforth make a true and correct declaration to the Bahamas Customs Department, the U.S. Customs Department and any other governmental border agency ("the said border agencies") relevant to the exportation and importation of any and all the said products which are subject to and under the owner both individually and collectively from any and all responsibility, for any actions, costs, claims, and demands which flow or may flow from any declarations made by the financier/supplier his said servants or agents from and to the said border agencies as it relates to the import and/or export of the said products.
>
> 6. The Financier/supplier his said servants or agents shall in all respects provide to the said border agencies as and where requested any and all documents, information, invoices and receipts in connection with the importation and or export of any of the said products as necessary for the inquisition, investigation, action or claim by the consignees/operators, the owner and/or the said border agencies and shall in all respects cooperate with them towards any such investigative action or undertaking in connection with the said products and of the said agreement."

Third AM affidavit

[30] The plaintiff filed a third affidavit on 13 July 2020, mainly in response to the LG affidavit. The third affidavit exhibits what purports to be letters/emails from several suppliers in the US to the plaintiff indicating their wish to be joined in the action. However, no application was ever made for this purpose. Through his counsel, SD denied the allegations that he participated in evading taxes or falsifying invoices and indicates that he only swore the affidavit and the addendum to the contract because of "WhatsApp" text messages from the defendants that they would stop paying monies unless he swore the affidavit.

[31] In fact, the plaintiff accused the third-named first defendant (TBL) and the second named defendants of falsifying invoices to reduce tax liabilities to both the Government of the Bahamas and the United States. In support of this, he exhibited a *Tribune* article from May 2017, which reported alleged breaches of both customs and immigration requirements by JK and RC, and which forced them to enter into compromises and penalty payments with the Bahamian authorities to enable them to continue to operate. At one point during 2016, the pair was refused work permits and required to leave The Bahamas, although it appears that this decision was later rescinded. The plaintiff also exhibited copies of US Customs Certificates from 2010 and 2011, which indicate that they had also been penalized and fined by US Customs for failure to declare merchandise on entering the United States.

Affidavits of BP

[32] Mrs. Strachan, counsel for BP, the second-named of the first defendants, also opposed the grant of the injunction. However, I need not dwell on her contribution in opposition to the injunction application, as in fact BP applied to be struck out from the proceedings on the grounds that, as a consultant to LG, he was neither a necessary nor proper party to these proceedings. He filed two short affidavits in these proceedings, the essence of which were to indicate that, apart from serving as consultant for the first defendants (LG and TBL), and the second-named defendants, he was not a party to either the 2016 Agreement or the October 2019 Agreement and no relief is sought against him.

[33] However, in further support of BP's case, and in opposition to the injunction, Ms. Strachan filed the affidavit of Vishal Dewalia, a gemologist with TBL. That affidavit was to bring to the attention of the court that subsequent to the October 2019 agreement, it was agreed that the Diamond Center would be put under the operational control of the plaintiff himself and his staff of three, specially brought in for that purpose. Apparently, the plaintiff personally brought in the inventory for that store, and Ms. Dewalia indicated that the value of the inventory of that store stood at $3,958,933.65, after a detailed inventory conducted by the plaintiff's wife, Veena Daryanani, on 18 March 2020.

Fourth affidavit of AM

[34] The fourth affidavit of AM (filed 14 July 2020) was sworn in response to the Dewalia affidavit. The plaintiff disputed Ms. Dewalia's credentials as a gemologist, and while it was conceded that the plaintiff assumed operational control of the Diamond Center, it alleged that LG on 15 January 2020 removed and dismissed the plaintiff's employees, thereby depriving the plaintiff of operational control. This, the plaintiff says, further contributed to the fear that the jewelry and other items might be "*lost through the misconduct or negligence of the first and second defendants*."

Affidavit of RC

[35] The No. 2 defendants filed the affidavit of RC on 13 July 2020, in "*strong opposition*" to the AM affidavits, which were said to contain "*materially misleading innuendos and assertions*". Like the first defendants, they also denied that they violated the terms of the agreement by the failure to pay as alleged by the plaintiff, although they admitted that some interruption was caused by the Covid-19 pandemic. They similarly accused the plaintiff of underhanded tactics and business dealings designed to undermine the Agreement.

[36] I set out a few of the material paragraphs below.

> "5. I together with Jitender Keswani, Leon Griffin and Satish Daryanani, the Plaintiff, are parties to an agreement dated 2nd October 2019. By the terms of that agreement, I and Jitender Keswani are the consignees/operators. Over the course of the relationship with the Plaintiff we received numerous jewelry items on consignment with the full understanding between all of the parties that we will render payment to the Plaintiff by way of a monthly payment of $103,312.51. Arising from the global COVID-19 pandemic and the Emergency Order issued by the Competent Authority of the Bahamas, the various stores were closed and as a result payment could not be made under the terms of the said agreement. It must be noted that this

was the first time it that there was a non-payment, which was principally out of our control.

6. At no time was the jewelry, the subject of the said agreement, in peril. They remain safe in our custody and are in the stores. At present, the sole store that is opened for business is located on Frederick Street, Park Lane. As one can imagine, the business is slow and nonetheless, we remain committed to rendering payments when the volume and level of business resume.

7. We will be happy to return to the Plaintiff the goods and jewelry which were consigned to us upon payment of the Value Added Taxes that we paid when the goods were imported. We will not have the ability to recover on the VAT payments once the goods are returned to the Plaintiff.

[…]

10. In our capacity as consignees/operators, over the course of the relationship in the United States of America with the Plaintiff, we received jewellery and rendered payments for all jewellery invoices during this time. The October agreement was entered in good faith by us, after the harassment and embarrassment of the Plaintiff. It came about with the help of the First Defendant who assisted us to achieve a fair agreement to move forward doing business with the Plaintiff. The Plaintiff and the Second Defendants brought their points and past disagreements to the table and arrived at a settlement. It must be fully understood that the claims the subject matter of the October agreement originated in the USA.

11. After the October agreement was executed, the Plaintiff attempted on numerous occasions to sabotage the business and hurt the day to day operations. Because the business always depended on supplies from the Plaintiff, I am fully satisfied that his motives of sabotage were intended and designed to paralyze the business through influencing other vendors who supplied us with goods. The intimidating acts of sabotage employed by the Plaintiff occurred on at least three separate instances. When we discovered the acts of the Plaintiff it became clear that he had a premeditated plan of action even before entering into the October agreement.

12. The October agreement required monthly installments which were paid on time from October 2019 to March 2020. The Plaintiff was physically present in the Bahamas as late as 13th March 2020, before operations ceased due to COVID-19. The plaintiff was in communication through phone calls and WhatsApp messages through April 2020 about the standing of operations due to COVID-19. All that time, it is now clear to me that the Plaintiff was planning to use the global pandemic as a means to launch his bogus and unfounded claims to steal the operations.

13. The claim of defaulting payment from October 2019 is false and one set up in bad faith. The plaintiff is fully aware that payments have only not been made for the three months of April, May and June 2020. To suggest that payment were not made from October 2019 shows that the Plaintiff is seeking to undermine the October agreement. When the Plaintiff communicated with us in April 2220 at no time did he make a demand for payment pursuant to the October agreement.

14. The Plaintiff's claim of dissipation of the goods from the premises is not only false and misleading but is exaggerated because during the COVID-19 lockdown no one

was permitted to access the locations and more importantly, the vaults in the said locations. It is also important to note that the consignees were on lockdown in the United States. On these facts, it was and remains impossible to sell the jewelry or dissipate the said jewelry because of the current pandemic.

[..]

25. It must be noted that Treasures International LLC, is a corporation established and operating in the United States of America and has no business operations in The Bahamas. That company is a vendor and provides goods and merchandise to the shops in The Bahamas. Under the October agreement it was to pay $7.5 million to the plaintiff for the goods. If the Plaintiff wishes these goods, they must first be returned to Treasures International LLC in the USA."

[37] RC also averred that the application for an injunction by the plaintiff would jeopardize the livelihood of almost 100 employees. Further, the affidavit points out that the plaintiff's goods only account for approximately 30-35% of the goods in the stores.

Affidavit of Jitender Keswani

[38] Although Mr. Rigby appeared in this matter on behalf of both JK and RC, and the RC affidavit was filed on their behalf, a notice of change of attorney was filed by Meridian Law Chambers on 30 March 2021, indicating that they now represented JK. On 4 May 2021, they filed an affidavit on behalf of JK and the third-named of the second defendants (TI-LLC). This affidavit took a 180-degree turn from the RC affidavit. I set out the relevant parts below.

"3. My sister, Poonam Keswani, and I are the only shareholders in the Third named Second Defendant. We each own fifty percent (50%) of the said Third named second Defendant.

4. The Third named second defendant and I before 2016 started selling jewellery and other goods in The Bahamas through the corporate First Defendants who were then owned by Mr. John Cates.

5. During the course of 2016, I made a decision to stop working and doing business with Mr. Cates and his business, ITS—Island T-shirt Company. Third named Second Defendant contracted with Third Named First Defendant and I then persuaded Leon Griffin to be substituted for Mr. Cates as the shareholder of the said corporate First Defendants.

6. The Third named Second Defendant contracted with each of the First Defendants. By a written Franchise Agreement dated the 6th day of December, A.D., 2016 the Third named Second Defendant contracted with the Third named First Defendant. I now produce marked as Exhibit "JK 1" a true copy of the Franchise Agreement and I beg leave to refer thereto.

7. On the 2nd of October, A.D. 2019, the Plaintiff and the First named First Defendant, Leon Griffin and I executed a contract. The said contract purported to affect the interest of the Third named Second Defendant even though it was not a party to the contract dated the 2nd day of October, A.D., 2019, and even though my said sister had not been consulted and she did not give her consent to the same.

8. Upon my sister learning of the Contract dated the 2nd day of October, A.D. 2019, she strongly opposed any suggestion that same affected the terms and conditions of the Franchise Agreement. I now produce marked as Exhibit "JK 2" a true copy of a letter from my sister Poonam Keswani dated the 1st day of April, A.D. 2021, and I beg leave to refer thereto.

9. I have read the Writ of Summons herein filed on the 30th day of June A.D., 2020, and the Amended Statement of Claim herein filed on the 10th day of September, A.D. 2020, and the Particulars herein filed. I confirm and admit that the Third named Second Defendant and I are liable and indebted to the Plaintiff in the sum of $33,982,096.83.

10. I also confirm that the First Defendants and each of them are similarly liable and indebted in the sum of $33,982,096.83 to the Plaintiff in respect of each of the claims set out in the said Statement of Claim filed herein. This is especially so as they have had sole custody of all accounts and funds in respect of business and have failed to disclose such information to me in breach of the said Franchise Agreement and in breach of the contract dated the 2nd day of October, A.D. 2019.

11. On or about a date before 2016, I as a director of the Third named Second Defendant approached the Plaintiff and offered the services of the Third named Second Defendant and me in the sale of jewelry and other chattels. The Plaintiff agreed and supplied us with jewelry and other items. The Plaintiff never transferred title in any of his jewelry or other goods until the jewelry or other goods were sold and accounted for with him.

12. Unbeknown to me, I subsequently learned in or about 2019 that for a number of years since approximately the end of 2017, we, that is to say, the Second named Second Defendant, the Third named Second Defendant, the First Defendants and I failed to account for monies earned from the sale of the Plaintiff's jewelry and other chattels.

13. After the 2nd day of October, A.D. 2019, we, that is to say, all of the Defendants failed to accurately give an account to the Plaintiff for the monies earned from the sale of his jewelry and other chattels. However, as previously stated for some time the First Defendants and the Second named Second Defendants have practiced autonomy and had sole custody and control of the said accounts and money in respect of the business.

14. Further, after the 2nd day of October, A.D. 2019, the Plaintiff was paid less than he was entitled to be paid, and he complained to each of the Defendants about our failures to pay him what he was entitled to be paid. I also expressed this concern and made my frustrations in respect of withholding of information and failure to account and pay the Plaintiff and other vendors by the First Defendants.

15. Since March 2020 we, the Defendants, have not made any payments to the Plaintiff. Since March 2020, the Plaintiff's jewelry at the Diamond Center store was moved to Parklane Lux store. Sales of a portion of the said jewelry have exceeded $1,000,000.00. I now produce marked as Exhibit "JK 3" pictures of examples of the sold jewelry items, and I beg leave to refer thereto.

16. I hereby confirm that the Third named Second Defendant and I, consent to the jewelry of the Plaintiff now in the possession of the First Defendants being immediately returned to the Plaintiff or to his order."

[39] JK alleged further that BP had been keeping the books and records of the defendants (save for TI-LLC) and that financial information has been withheld from him and "his counsel". Notwithstanding this, he purports to produce as an exhibit (via a jump drive) documents, which he says were obtained in his capacity as an officer of the corporate first defendants and operator of several of the stores prior to March 2020, the record of the inventory for all the stores operated by the defendants in the Bahamas, and a report on profits. (I should mention that the court did not find it necessary to consider these documents for the purposes of this application.)

[40] It is also important to refer to one of the exhibits to the JK affidavit, which is a letter dated 1 April 2021 from JK's sisters, Poonam Keswani, addressed to Mr. Dwyan Rodgers of Meridian Law Chambers. She writes in her capacity as "President" of Treasures International LLC, indicating that the Board of TI-LLC was never consulted and never passed a resolution giving JK permission to enter into the 2019 Agreement and supersede or replace the 2016 Franchise Agreement.

[41] As indicated, the 6 December 2016 Agreement ("the Franchise agreement"), is exhibited to that affidavit, and the agreement is between TI-LLC ("the Franchisor") and TBL, ("the Franchisee"). JK signed on behalf of the franchisor in his capacity as President of TI-LLC, and LG signed as President of TBL. The agreement was a comprehensive one for the operation of a franchise by TBL in conjunction with TI-LLC to sell jewellery and luxury products, supplied by the franchisor, in several of TBL's stores on commercial terms between them. It was to last for 3 years, and was due to expire 6 December 2019 in any event, even if it had not been superseded by the October 2019 agreement.

[42] Curiously, this agreement bears the same date as the alleged parol contract to which the plaintiff pleads he was a party. But the 2016 franchise agreement is an agreement under seal and the plaintiff is not ostensibly a party. However, and strikingly, it is noted that the first preambular paragraph of the 2019 agreement provides as follows:

> "WHEREAS:
>
> A. The ***Financier/Supplier*** and the ***Owner*** are parties to a Franchise Agreement dated the 6th day of December, A.D., 2016 ("the principal agreement") made between Treasures International LLC of the one part and Treasures Bahamas Limited of the other part for the development, operation of retail outlets specializing in the sale of diamonds, perfume, watches, sunglasses and all jewelry related products, gifts and souvenirs and other similar luxury products ("the said products")." [Emphasis supplied.]

As will be recalled, the financier/supplier is SD and the owner is LG. So the provenance and parties to the 2016 agreement remain shrouded in some doubt.

Riposte to JK affidavit

[43] Not surprisingly, both RC and the Griffin defendants trained heavy fire at the JK affidavit. In his second affidavit, filed 6 August 2021, RC stated that:

> "6. I am shocked that Mr. Keswani states in his Affidavit that he and the Third-named Second Defendant are indebted to the Plaintiff in the sum of $33, 9832,096.83.

This statement is opposite those made by Mr. Keswani in proceedings commenced in the Southern District of the New York case styled as Jitender Keswani, Plaintiff vs. Sovereign Jewelry, Inc. Et al, Defendants – 20 Civ. 08934. Mr. Keswani stated under oath that he paid Mr. Daryanani "in ten years over $25 million." Mr. Keswani also shared in the Court under oath that the Plaintiff was ruining his reputation and sought an accounting from the Plaintiff.

7. Since the filing of these proceedings, it was discovered that Mr. Keswani was selling inventory of jewelry and not accounting for the sales. An audit/investigation is being conducted by BakerTilly Gomez to determine the extent of those "sales". It is projected that hundreds of thousands of dollars of sales were conducted by Mr. Keswani with no accounting to Treasures Bahamas Limited. Occasioned by this conduct, Mr. Keswani was terminated from his position on 30 July 2021. There is now produced and shown to me marked as "RC-2" a true copy of his termination letter."

[44] LG swore a fourth affidavit, filed 6 August 2021 in which he also contradicted many of the assertions in the JK affidavit. He alleged that JK was acting in concert with SD to bring the court action against him, and levelled very serious allegations against the business dealings of JK. I set out a few select passages below.

"13. After the country closed in March 2020 our entire businesses were shut down and not allowed to operate by order of the Government of The Bahamas under the emergency Covid 19 powers. Mr. Daryanani took advantage of this fact and filed this action against me. Based on what has transpired recently, we are very confident that Mr. Keswani secretly acted in concert with Mr. Daryanani to bring this court action against me. Mr. Keswani has attended the court hearings and submitted documents through his previous attorney for months "playing both sides" whilst being a named Defendant in this action.

14. During the period of October 2019 to March 2020, Mr. Keswani was not able to move funds around like he used to through the help of the accountant he hired who is named as Mr. Navendu Biswal. Mr. Keswani and Mr. Biswal made multiple payments to unknown vendors and allowed cash expenses without trace or records to support the same. […] [*Examples are given in the affidavit which are not reproduced here.]*

15. Mr. Keswani is known to hide from vendors and creditors via phone, emails or personally. This is clearly shown in multiple emails attached on the exhibits. He has made multiple commitments and duped the vendors to supply merchandise but he runs away from the obligation when it comes to payment dumping the liability on me. This has been his modus operandi since he started working in the Bahamas in 2009. He has done it with many Bahamian people and American vendors.

16. Mr. Keswani claims to have knowledge of over millions of dollars in sales but he has not considered that I have expenses to run my operations as well as employees and severances and other Government obligations that need to be paid before anything else."

17. Mr. Keswani has siphoned funds using a USA system to charge customers and move inventory out of The Bahamas to his own company. There are many other ways he has moved funds with the help of Mr. Biswal for his own personal needs. […] [*Examples are given in the affidavit which are not reproduced here*.]

[45] He deposed further that:

"24. Mr. Keswani and the Plaintiffs also continue to take steps to tarnish my reputation whilst these proceedings are extant by using their connections to have stories published in the Punch and the Tribune newspapers against us. […]

25. In spite of their efforts to harm me and my businesses, the Plaintiff and Mr. Keswani continue to contradict themselves. The present matter was commenced by the plaintiff against me, Mr. Keswani and others. Surprisingly, in one of the newspapers articles and in his recent Affidavit, the court will see that Mr. Keswani admits that he and Treasures International LLC are indebted to the Plaintiff in the sum of $33.98 million dollars. Mr. Keswani also admits to failing to give proper accounting to the Plaintiff of monies earned from selling his goods.

26. In contrast to the position that was taken in these proceedings, Mr. Keswani filed a case in the United States District Court. Case 1-290-cv-08934-KPF. In the transcript exhibited to this Affidavit, the Court will note the following:

a. At page 4, Mr. Keswani clearly admits in the court of law in the United States that he paid from his regular account and requested an audit for the last 10 years from M. Daryanani.
b. At page 5, Mr. Keswani clearly admits in the court of law in the US that he already paid Mr. Daryanani and he kept on requesting Mr. Daryanani for a statement.
c. At page 7, when the Honourable Judge Kathering Polk Falia asked Mr. Keswani if the agreement between him and Sovereign Jewelery was oral, written or both, Mr. Keswani repled that it was a combination of both.
d. At page 9, Mr. Keswani admits that there was no agreement.
e. At page 18, Mr. Keswani indicates that he paid Mr. Daryananai over $25 million dollars in the last 10 years.
f. At page 20, Mr. Keswani states states that Mr. Daryanani was trying to take advantage of him and sabotage his business.
g. At page 30, Mr. Keswani admitted to the court that Mr. Daryanani is a thief, and he (Mr. Daryanani) never paid his bill for the last 20 years and that this was the reason for filing a lawsuit against him in the United States.
h. At page 30, when the court confirmed with Mr. Keswani that apart from the audit, he also wants $66 million dollars, he replied yes and that he also wants an audit.

27. In summary, Mr. Keswani has made contradictory statements in two different actions in two different jurisdictions. I am advised that this may amount to perjury. Similarly, Mr. Daryanani has made contradictory statements. He swore an affidavit in these proceedings stating that he owns Treasures International LLC when this is not true.

> 28. This action and the other actions are attempts by Mr. Keswani and Mr. Daryanani to tarnish my reputation, engage in self-help outside of these proceedings and to interfere with my business."

[46] The affidavit also draws reference to two other legal disputes before the Supreme Court which are connected to the parties in this matter, and which the defendants alleged bore the stamp of interference from the SD faction. The first is the matter of *BJC Bahama Jewellery Company Ltd. v Dove Properties Ltd. and Sir Garet O. Finlayson* [CLE/gen/346 of 2021]. This was a landlord/tenant dispute in which the Plaintiff obtained an injunction in May of 2021 (before another Judge) allowing it to retrieve several millions of dollars' worth of jewellery, which were stored in a warehouse being rented by BJC, after the landlord locked them out. The lockout was presumably at the behest of a letter from SD indicating that he was in fact the owner of the jewellery stored in the warehouse.

[47] In another matter (*Navendu Biswal v. BJC Jewelry Company Ltd. and Treasures Bahamas Ltd.* [COM/lab/00048 of 2020], which arose out of an unlawful dismissal claim, the plaintiff executed a writ of *fieri facias* ("*Fi Fa*") against the Parklane Lux and seized jewellery valued in excess of $500,000.00. This was done pursuant to a default judgment for some $98,000.00 against the defendant in the action. The defendants allege that this was in fact a backdoor attempt to access to some of the jewellery that was the subject matter of this claim. The latter matter ended up before this court and, on 5 July 2021, I set aside the default judgment and the writ of *Fi Fa*, and ordered the return of the jewellery.

The other affidavits

[48] It is not necessary to refer to the other affidavits in any detail, but a few need to be mentioned for completeness and a few salient points highlighted.

[49] The second affidavit of LG was filed 4 January 2021 (although an unsworn copy was provided to the court on 23 December 2020) and was lodged in response to the plaintiff's sixth affidavit. It disputed the bailor/bailee arrangement which the plaintiff asserted in its reply arguments and the amended writ. It contended that the arrangement which the Griffin defendants had with the second defendants and plaintiff was a consignment contract, which provided for the sale of the goods and was therefore not a bailor/bailee arrangement. LG indicated further that he had a limited role in the historical disputes between the plaintiff and second defendants and functioned like a "mediator" in the formation of the October 2019 agreement. The affidavit sought to shine further light on the plaintiff's alleged doctoring of invoices for import purposes, and in this regard he deposed as follows:

> "10. The Plaintiff would normally come into our office with invoices made out to Sovereign Jewelry Inc., for jewelry that was allegedly purchased or supplied to the Plaintiff. His representation to us was that the prices on the Sovereign Jewelry invoices were the prices of items supplied to us under the consignment contract. We have subsequently discovered that the invoices that the Plaintiff provided to us were different from the invoices he had provided to the Customs Department of the Bahamas to clear the goods upon entry and the invoices that he had received from his suppliers of the jewellery which would normally be made to Parklane Jewellers. […]

> 12. Based on the pattern of transactions with the Plaintiff, I have been advised by my attorneys and I do verily believe that there are questions regarding whether the Plaintiff's claim is tainted with illegality and/or whether the Plaintiff is coming to the court with clean hands."

[50] As an example of this, the affidavit exhibits counterpart invoices sent to the defendants and to The Bahamas Customs Department, and points out that in the case of a specific item of jewellery (a necklace) it was valued at $19,000.00 in the invoice submitted to the defendants from the plaintiff, while the same item was invoiced at $4,750.00 in the invoice submitted to Customs (a difference of some $15,000.00 in the representation of the value of the item).

[51] It is against this background of highly contentious, contradictory and sometimes mutating facts that I go on to consider the legal principles and their application to the circumstances of this case.

DISCUSSION AND ANALYSIS

Legal Principles and Submissions

[52] As originally cast, the summons for interlocutory relief sought both a freezing injunction in respect of the assets of the defendants (up to a value of $23 million) and a prohibitory injunction preventing the sale of the goods. It was therefore not surprising that some of the initial arguments were directed to resisting a freezing injunction. Mr. Sears, for the Griffin defendants in particular, contended that there was no risk of the defendants removing the assets or disposing of them so as to render them unavailable or make them untraceable, and that the plaintiff had not provided the "solid" evidence necessary to establish such risk (*Z Ltd. v. A-Z* [1982] QB 558; *Thane Investments Ltd. v Tomlinson & Ors.* [2003] EWCA Civ. 1272).

[53] However, as the dust settled and the parties developed their submissions, it became clear that it would not become necessary to decide any part of the application according to *Mareva* principles. In fact, counsel for the plaintiff (at the hearing on 29 December 2020) indicated that he would only be pursuing paragraph 1(c) of the summons on behalf of the plaintiff—the injunction to prevent the sale of the unsold inventory.

[54] It was common ground, therefore, that the question was to be decided according to the well-rehearsed principles laid down by the House of Lords in *American Cyanamid Co. v Ethicon Ltd.* [1975] 1 All ER 504. These are often explicated by way of a structured four-part test as follows: (i) whether there is a serious issue to be tried; (ii) whether damages would be an adequate remedy; (iii) whether the 'balance of convenience' favours the plaintiff or defendant; and (iv) consideration of any special factors that might affect the exercise of the court's discretion.

[55] The general principles regarding the grant of interlocutory relief have been admirably summarized by Mr. Christopher Hancock, QC (sitting as a High Court judge) in the recent case of *O. Brien and another v. TTT Moneycorp* [2019] EWHC 1491 (Comm.), which was cited by Mr. Rigby, and which I am happy to adopt:

> "(1) Sections 37(1)-(2) of the Senior Courts Act 1981 state that the High Court may by order grant an injunction in all cases in which it appears "just and convenient" to do so, and any such order may be made either unconditionally or on such terms as the Court thinks just.

> Interim injunctions are therefore discretionary but the discretion is to be exercised judicially in light of the overriding objective in CPR 1.1.
> (2) Applying the well-known approach deriving from *American Cyanamid* [1975] AC 396, (HL), the onus is on the applicant to establish: first, that there is a serious question to be tried; second, that damages would not be an adequate remedy for the applicant if the injunction were refused; and third, that the balance of convenience favours the grant of the interim injunction. These tests are usually applied by reference to the seven guidelines extracted from *American Cyanamid* by Browne LJ in Fellowes & Son v Fisher [1976] 1 QB 122 (CA) at 137.
> (3) On an application for an interim injunction, the Court should not attempt to resolve "*critical disputed questions of fact or difficult points of law*" on which the claim of either party may ultimately depend, particularly where the point of law "*turns on fine questions of fact which are in dispute or are presently obscure*": *Sukhoruchkin v Van Bekestein* [2014] EWCA 399 at [32] (Sir Terence Etherton C).
> (4) In the exercise of its discretion to grant an injunction, and consistently with the overriding objective, the Court will not grant an injunction where it would be futile or serve no purpose: *Mosley v News Group Newspapers* [2008] EWHC 687 (QB).
> (5) A mandatory injunction is less likely to be granted on an interim basis. This is because, where other factors appear to be evenly balanced, the Court "should take whatever course seems likely to cause the last irremediable prejudice to one party or the other": *National Commercial Bank Jamaica Ltd. v Olint Corp. Ltd.* (Practice Note) [2009] 1 WLR 1405 (PC). A mandatory injunction requiring a party to take some positive step at an interlocutory stage will usually carry a greater risk of injustice if it turns out to have been wrongly made. It is therefore legitimate in such cases to require a "high degree of assurance" that the interim relief would ultimately be granted at trial: *Shepherd Homes Ltd. v Sandham* [1971] Ch. 340 at 351 (Megarry J.).
> (6) Furthermore, where the grant of interim relief will have the practical effect of giving the application the final relief that it is seeking in the case, the Court will be more reluctant to grant such relief: *Films Rover Ltd. v Cannon Film Sales Ltd.* [1987] 1 WLR 670 at 680.
> (7) Where an interim injunction is granted, the usual practice is to make this subject to a condition requiring the applicant to offer a cross-undertaking to pay damages for any losses sustained by reasons of the injunction in the event that it transpires that it ought not to have been granted."

[56] The only slight modification to be made to this statement of principles is that the reference to s. 37 of the UK Senior Courts Act 1981 is to be substituted with s. 21 of the Supreme Court Act, which provides for the court to grant an interlocutory injunction or appoint a receiver in all cases "*in which it appears just and convenient to do so*". Secondly, the procedural rules governing the grant of injunctions in this jurisdiction are to be found in Order 29 of the *Rules of the Supreme Court* ("RSC") 1978.

(i) Whether there is a serious issue to be tried

[57] The plaintiff contended that the evidence discloses one or more serious issues to be tried, namely whether the defendants have breached the terms and conditions of the contract and their duty to account to the plaintiff. Several other arguments were deployed by the plaintiff in support of the proposition that there were triable issues, either in the alternative or in addition to the breach of contract argument, but I will deal with those in turn.

[58] The defendants countered that the plaintiff had not made out a serious or arguable case, although for different reasons. The Griffin defendants submitted that the plaintiff had not raised any seriously triable issues against them because, firstly, it was unclear what case the No. 1 defendants had to meet based on the pleadings. Mr. Sears pointed out that the agreement in fact casts LG as a co-enforcer with SD of the terms of the contract, particularly as against the No. 2 defendants, and consequently the claims against him and his status as a defendant were dubious. In this regard, the No. 1 defendants filed an application for further and better particulars on 7 August 2020, which was answered by the plaintiff on 14 September 2020, but those are not relevant to these proceedings.

[59] Secondly, it was contended that the agreement does not provide for the plaintiff to take any unilateral action against the defendants, and certainly not without satisfying certain preconditions, such as making a demand and complying with the notice period, which they say have not been met. In this connection, it will be recalled that the agreement provides for the financier and "*owners*" (a term which is undefined and problematic in the agreement) to take action in concert to enforce the obligation under cl. 6. The Griffin defendants argue that the action is premature as the enforcement mechanism have not been properly triggered, and accordingly accuse the plaintiff of breaching the Agreement in this regard.

[60] The No. 2 defendants also asserted that there was no serious issue to be tried. They argued in this regard that: (i) they have made payments pursuant to the agreement and are not in breach; (ii) the action is premature for non-compliance with the enforcement terms of the contract; and (iii) that in any event they have a "*strong defence to the Plaintiff's claims in the writ of summons*", namely that the Emergency Orders had the effect of rendering the agreement impossible to perform. In essence, they were arguing frustration.

Conclusions on issues to be tried

[61] I am prepared to accept, based on the evidence and submissions, that there are serious issues to be tried in respect of both sets of defendants as to whether there have been any breaches of the Agreement. In coming to this conclusion, I have borne in mind that the first requirement of the *American Cyanamid* test does not impose a very high threshold for the claimant to meet. As Lord Diplock said in that case [pg. 407G]:

> *"The use of such expressions as "a probability", "a prima facie case" or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The Court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried."*

[62] Several later cases also make the point that the question of what constitutes a serious issue is not to be investigated to any great extent. For example, in *Mothercare Ltd. v. Robson Brooks Ltd.* [1979] F.S.F. 466, at 474, Sir Robert Megarry V.C. said: "*All that has to be seen is whether the plaintiff has prospects of success which, in substance and reality, exists*." Similarly, in *Alfred Dunhill Ltd. v Sunoptics SA* [1979] F.S.R. 373, Megaw L.J. said: "*It is irrelevant whether the court thinks that the plaintiff's chances of success in establishing liability are 90 per cent or 20 percent*."

[63] While I accept that LG is accorded a supervisory role in the agreement together with SD, it is also clear that he has an independent contractual relationship with SD in respect of the retail arrangement

that does give rise to triable issues. For example, cl. 9 provides for LG to operate Bahamas Treasures 1, 2 and 3 and the Diamond Center, which the *financier/supplier* is obligated to keep in supply of goods. Indeed, it is specifically stated that the No. 2 defendants are *not* to have any dealings with these stores. Further, while there are few details as to the terms of the commercial arrangement between the plaintiff and the Griffin defendants, the SOC alleges that the Griffin defendants (as well as the No. 2 defendants) were supplied with numerous items of jewelry and goods on consignment for which they have failed to pay or properly account. In fact, the 1st affidavit of LG acknowledges that certain payments were made between 2 October 2019 to 20 March 2020, presumably pursuant to this commercial arrangement. However, there is a dispute over what was paid and what is owed, and whether there has been any breach in this regard. Further, the terms of the 2019 agreement do provide for the plaintiff to be appointed as a director of the companies and to have access to financial records and accounting, which the plaintiff complains have not been done. The defendants do not dispute that the directorship appointments were not made, but allege that this was because the plaintiff was disinterested.

[64] As to the No. 2 defendants, their financial obligations are more clearly outlined in the agreement, and the specific instalment amounts and payment schedule are set out. But again, there is a dispute about what was paid and whether in fact there has been any breach. On the other hand, the assertion by the No. 2 defendants that they intend to rely on a frustration defence undermines, rather than helps, their contention that there is no serious issue to be tried, as the validity of that defence can only be tested at trial. Moreover, the 11th-hour affidavit filed by RC has only further muddied the waters. It has raised questions as to validity of the 2019 Agreement and the ownership of TI-LLC, all of which are triable issues.

[65] Further, the Agreement itself gives rise to several interpretive issues which cannot be resolved here. For example, there is considerable disagreement over the use and application of the term "*owners*" in the Agreement. Although, LG is described as the "*owner*" in the parties clause, there are several references in the Agreement to the "*owners*", although that term is not defined. A few examples will suffice:

> cl. 4: "The consignee/operators shall assume full responsibility for the day to day operations of Parklane Lux, Parklane Marina and Bahamas Logo Shop on behalf of and under the authority of and subject to the ***owners.*** The ***owners*** shall remain the financier/supplier and once the products have been legally into (*sic*) [*it is suggested that "imported" is missing after "legally"*] the Bahamas shall be deemed to be the *owners* for the purposes herein. The consignees shall ensure that proper accounting records are maintained and are provided to the ***owners*** on a monthly basis and/or as often as the same are requested and shall not withhold any information necessary from the ***owners*** that is pertinent to determining the state of accounts and the products and services in their possession on consignment at any given time."
>
> cl.6: "[…] Any delinquency or default in payment as agreed or failure to pay at least Three (3) payments consecutively shall entitle the ***owners*** and financier to demand immediate payment of the entire balance owed, to enter into possession of the shop and cancel their arrangement with the consignees/operator to operate the Park Lane and Parklane Marine Stores with immediate effect after notice to the release all the operating materials, subject to what is considered reasonable in the circumstances."

cl. 14: "Any cancellation of this agreement shall be made upon giving Six (6) months' notice to the ***owner***."

[66] Mr. Sears argued that these references, although admittedly ambiguous, intend to describe LG both as owner with respect to his businesses and to include him in the collective "owners" in the wider sense of having a role in supervising the commercial agreement along with SD in respect of the No. 2 defendants. Mr. Gomez contends that it is not consistent, on a wholistic reading of the agreement, to regard LG as included in the concept of "owners", as cl. 7 seems to constitute him an agent for the plaintiff in the operation of the Griffin stores. Further, he contended that cl. 4, reproduced above, seems to be a retention clause in favour of the "financier/supplier" (SD), as "*owners*". Mr. Sears and counsel for the other defendants dispute this, and counter that if this were the case, there would be no need to "deem" him the owner of the imported goods, and the several references imposing discrete obligations on the "*owners*" and "*financier/supplier*" would be confusing.

[67] In my judgment, there are a myriad of issues, both factual and legal, arising from this agreement which are suitable for determination at trial. The discrepancies and patent conflicts in the affidavit evidence are matters which have to be tested on examination and cross-examination of the parties. In this regard, the court bears in mind the warning that it should not "*attempt to resolve critical disputed questions of fact or difficult points of law*" at this stage (see, *Sukhoruchkin v Van Bekestein* [2014] EWCA 399 at [32] (Sir Terence Etherton C).

Other arguments

[68] In addition to the breach of contract argument, in oral submissions Mr. Gomez claimed that the defendants are bailees of the goods. Therefore, the plaintiff's right to the goods was said to crystallize immediately upon breach of the bailment agreement. In support of this argument, he cited the case of *Stellar Chartering and Brokerage Inc. v Efibanca-Ente Finanziario Interbancario SpA* ("The Span Terza") (No. 2) [1984] 1 WLR 27. That case basically decided that on cancellation of a charterparty, the ownership of the proceeds of sale of oil bunkers (which had been paid for by the charterers prior to the ship being arrested, condemned and ordered to be sold) remained in the charterer and the ship's owner only had possession of them as bailee. He also referred to a line of bailment cases in which the courts gave effect to retention of title clauses ("ROTs") in favour of the supplier until the goods were paid for (see, for example, *Clough Mill Ltd. v. Martin* [1984] 3 All ER 982).

[69] The defendants argued that, in the first place, there was no bailment relationship, as the defendants clearly had the ability to sell the goods to a third party, which is inconsistent with the conventional understanding of a bailment. Second, there was no clear ROT clause (if any at all) in the October 2019 agreement. Mr. Sears protested further that this line of argument was directed to the merits of the claim and the substantive remedy (return of the goods), while the application was only for an injunction preventing sale. Further, the defendants argued that as a matter of procedure it was not permissible for Mr. Gomez to take the bailment point, as in fact it only emerged in a recognizable form in the amendments to his statement of claim, which was made subsequent to the injunction claim.

[70] As to the first criticism, Mr. Gomez drew the attention of the court to a line of cases, ending in the Supreme Court case of *PST Energy 7 Shipping LLC v. OW Bunker Malta* [2016] UKSC 23. These

cases illustrate that the common law concept of bailment has evolved beyond the traditional notion of possession of goods by a bailee, to be restored to the bailor upon expiry of the agreed period of possession or after the stipulated use. In fact, as illustrated by the cited case, a bailment could extend to scenarios where, for example, there was a licence for the bailee to consume or otherwise dispose of the goods, or where the bailee was constituted an agent of the bailor for the sale.

[71] Mr. Gomez is certainly right to point out that merely having the ability to pass title to a third party does not negate a bailment relationship, and that modern authority recognizes many situations that do not fit neatly into the prototypical models identified in the early cases (see for example, the six classes of bailment identified by Holt CJ in *Coggs v Bernard* (1703) 2 Ld Raym 909).

[72] But even assuming a relationship of bailment exists with respect to the unsold goods that remain in the possession of the defendants, I agree with Mr. Sears that this overreaches the claim for interlocutory relief, in that it seeks to argue a basis for the return of the goods, which is a remedy to be given only *after* breach is established. To the extent that Mr. Gomez was seeking to argue a right to an injunction based on an alleged breach of a bailment relationship, it adds very little to the breach of contract argument, as any bailment obligations would in any event arise out of the contract.

[73] Additionally, and presumably as an alternative basis for the injunction, Mr. Gomez asserts a claim in equitable tracing, in respect of what are identifiable assets being claimed. He cites in support a passage from *Polly Peck International Plc v. Nadir (Asil) (No. 2)* [1992] 4 All ER 769, in which Lord Scott stated that: "*If identifiable assets are being claimed, the interlocutory relief sought will not be a Mareva injunction but relief for the purpose of preserving intact the assets in question until their true ownership can be determined.*" Availability of this relief was held to be subject to the approach prescribed by *American Cyanamid.*

[74] While the principles discussed in that case are undoubtedly correct, I am not persuaded that a proprietary tracing remedy is apposite the facts of this case, nor does it properly arise out of the pleaded case. In *Polly Peck*, the substantive claim pleaded was one of constructive trust and the question was whether the Central Bank of Northern Cyprus (one of the defendants) had knowledge that the funds transferred to it from a private bank (also a defendant) was in breach of fiduciary duties to the claimant or potentially a dishonest diversion of the claimant's funds, such as to subject the Central Bank to liability as a constructive trustee. On that basis, the court granted an injunction on *Cyanamid* principles to restrain the use of a specified amount of foreign currency (GBP) that was held to be subject to a tracing claim. No issue of a constructive trust arises here as the terms on which the goods are held are clearly contractual, and there is no basis for any resort to an equitable tracing claim. In the circumstances, I do not find that the resort to a tracing claim is helpful in resolving the application before the court.

(ii) Whether damages an adequate remedy

[75] In assessing the position as to the adequacy of damages available to either party, I start by examining the position of the defendants if the injunction were granted, and it later turns out to have been wrongly granted.

[76] The chief complaint of the defendants is that the injunction would damage the goodwill of the businesses and might even result in the permanent closure of the stores, which would affect the

livelihood of over 100 persons. It is trite law that the loss of business goodwill is generally treated as irreparable damages (see, *Evans Marshall & Co. Ltd. v Bertola SA* [1973] 1 All ER 992].

[77] Secondly, the goods are supplied on consignment pursuant to the terms of the 2019 Agreement. This not only obliges the retailers to pay the supplier for the goods sold, and in the case of the second-named defendants contains terms for the payment of legacy debt, but it also obligates the supplier to keep the retailers in supply of goods. If the plaintiff were to fail at trial, he could also be on the hook for substantial damages claimed by the defendants and, indeed as events have turned out, the No. 2 defendants filed a counterclaim for damages. The plaintiff seems to take the view because the defendants are in possession of jewellery and other items supplied by him said to be worth millions, they have sufficient security in terms of any damages the court may order as a result of an injunction being granted. I do not agree that the goods can be treated as security, as they are held pursuant to the terms of the Agreement. Further, the court is not in a position to assess whether the unsold inventory would be sufficient to cover any potential losses, which as mentioned might not be compensable.

[78] Furthermore, it is trite that there is a duty on an applicant applying for an interim injunction to provide cogent and specific evidence of his financial position and ability to meet any damages. In *Brigid Foley Ltd. v Ellott* [1982] R.P.C. 433, Sir Robert Megarry said:

> "…I would emphasize that in application for injunctions, especially since *Cyanamid*, one of the important matters always to be dealt with is the ability of the plaintiff to meet an undertaking in damages.

[79] Although multiple affidavits were filed by local counsel on behalf of the plaintiff, none contained an undertaking in damages in respect of the injunction sought, and no information was provided as to the plaintiff's means to pay any damages. Obviously, the position is not helped by the fact that the plaintiff is neither domiciled nor resident in The Bahamas. In fact, the defendants made much of the point that the plaintiff did not personally file any affidavit evidence in these proceedings. This was in contradistinction to the position taken in the *BJC Bahamas Jewellery Company Ltd. v Dove Properties Ltd.* matter, where he described himself in affidavits personally sworn in those proceedings as president of Sovereign Jewellery Company Inc. and Treasures International LLC, both US companies.

[80] SD's ownership of this company is not only disputed by the affidavit of JK, but in the third affidavit of AM filed on SD's behalf it is specifically stated that "*the principal beneficial owners*" of the third-named second defendant are the second defendants No. 1 and 2, and that the plaintiff "*has no interest in the said Third named second defendant*." Thus, the plaintiff's own evidence in this matter contradicts his sworn evidence on oath filed in other proceedings in the Supreme Court—and which was also put before this court in evidence.

[81] The other side of the coin is whether the plaintiff could be adequately compensated in damages if the defendants were not restrained from selling the goods and the plaintiff were to succeed at trial. The defendants also did not offer a cross-undertaking in damages, although they did offer to return the goods, subject to conditions, such as the payment of VAT. Mr. Gomez argued that in any event a cross-undertaking as to damages by the defendants would be illusionary, having regard to the state of the businesses following the Covid pandemic. This, he said, was evidenced by the failure of the

defendants to clear goods off the docks, failure to maintain insurance and the alleged shortages in the payments to the plaintiff. He referred in particular to a letter from the first-named defendants, which was exhibited to the affidavit of Vishnal Dewalia filed by the first of the second-named defendant, dismissing the plaintiff's agent Mr. Yashmani, in which it was said:

> "The Covid pandemic is presently affecting business in the country in a negative way. Our parent company has been shut down since the 15th March 2020 and this has impacted the ability to sustain the usual level through staff and salaries."

[82] I do not believe anyone would seriously doubt that the Covid-19 pandemic caused an economic downturn and that businesses involving retail sales were hard hit. However, I am not prepared to find that the depressed economic conditions due to Covid-19 inexorably translates into an inability of the defendants to pay any damages that might be awarded if the injunction were refused and the plaintiff's claim eventually succeeded. The defendants represented before the Court that the plaintiffs' goods only accounted for roughly 35% of their inventory, and although these constitute high-value goods, the court has no idea what percentage of the defendants' turnover is derived from these goods. I also accept that, as with the plaintiff, there is also no indication of the defendants' financial capacity to pay, although they are all businessmen.

[83] Additionally, because the plaintiff's injunctive claim fails to adequately distinguish between the separate obligations and liabilities of the two sets of plaintiffs, it would be completely speculative on the evidence to form any view as to how damages might fall as between the two sets of defendants. As mentioned earlier, the plaintiff's claim for $23 million in the writ is against "*each and all*" of the defendants, when it is clear from the amended SOC that $15,000,000 of this is legacy debt owed by the No. 2 defendants. There is, therefore, no evidence as to the specific amount being claimed as against the No. 1 defendants. I am not at all persuaded differently by anything in the affidavit of JK, as his allegations are inconsistent with the plaintiff's pleaded case against the first defendants and the 2019 Agreement.

[84] In all the circumstances, I entertained doubts as to the adequacy of the respective remedies available in damages to either party, having regard to a lack of cogent evidence of the ability of either party to pay, and the fact that the defendants' loss might not be compensable or extremely difficult to quantify in the case of loss of goodwill or closure of business by the grant of an injunction. I therefore move on to consider the balance of convenience.

(iii) *Balance of convenience*

[85] Any doubt as to the adequacy of remedial damages is resolved by the court looking at the matter in the round, what is called the balance of convenience, or sometime balance of justice. It is a protean phrase. In C*yanamid*, Lord Diplock said "*It would be unwise to attempt even to list all the various matters which may need to be taken into consideration, let alone to suggest the relative weight which is to be attached to them*."

[86] In *National Commercial Bank of Jamaica v. Olint Corp. Ltd.* [2009] UKPC 16, speaking for the Privy Council, Lord Hoffman said [para. 17]:

> "[17] In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out the injunction should not have been granted or withheld, as the case may be. The basic principle is the same, namely, the court should take whichever course of action seems likely to cause the least irremediable prejudice to one party or the other."

[87] Mr. Gomez did not lodge any written submissions on the balance of convenience, but in his oral submissions argued that the balance of convenience was in favour of the plaintiff. He contended that as the plaintiff's goods only accounted for roughly 35 percent of the inventory, the defendants' businesses would not have to close as result of the injunction; they would only be prevented from selling the plaintiff's goods. Further, the 3rd Affidavit of AM averred that the state of emergency and its economic fallout meant that the injunction would "*benefit the Defendants by reducing their liabilities to the Plaintiff and other suppliers*." It was further contended that as the defendants were in possession of multimillion dollars' worth of the plaintiff's goods, it was the plaintiff who stood to lose, as the goods could be spirited away or sold and the plaintiff would lose his proprietary interest in the goods.

[88] The defendants argue that the balance of convenience favours them and that they are more at risk of suffering irreparable damage to their business goodwill and reputation. In the first affidavit of RC, it was alleged that the jobs of over 100 persons would be put in jeopardy if the injunction were granted. Both sets of defendants reject the claim that there is any risk of the goods being dissipated, and in fact offered to return the goods subject to certain conditions. As pointed out by Mr. Rigby, on the plaintiff's own facts, the goods remained in the possession of the defendants for as many as nine months (if not longer) between the time of the alleged breach and when the claim was made, and at no time was the plaintiff concerned that they would be dissipated.

Special factors

[89] On behalf of the No. 2 defendants, although it is a point that equally applies to the No. 1 defendants, Mr. Rigby argues that in assessing the balance, the court must be alive to the fact that to grant the injunction would "*essentially end the litigation without the need for a trial on the terms of the October agreement*." He contended that the injunction would be final in nature, similar to the result described by Lord Diplock in the case of *NWL v Woods (No. 2)* [1979] 1 WLR 1294:

> "Where…the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighting the risks that injustice may result from his deciding the application one way or the other."

Conclusion on balance

[90] In my view, although the evidence is not all to one side, the balance of convenience comes down in favour of maintaining the *status quo* and against the grant of an injunction. In *American Cyanamid,*

Lord Diplock said that it was a counsel of prudence to take such measures as are calculated to preserve the status quo where the factors which the court takes into consideration are rather evenly balanced.

[91] On the evidence before this court, and accepting that not all of it can be taken at face value, it seems that the defendants are more likely to suffer irremediable prejudice than the plaintiff by the grant of injunctive relief. Even though the defendants' position is that the plaintiff's goods only account for about 30% of their inventory, it is obviously high-value goods, and by their own evidence the inability to sell could affect their ability to remain viable.

[92] I am also not convinced that there is the risk of the defendants dissipating or spiriting away the goods in the manner alleged by the plaintiff. Even though the relationship between the parties has obviously been rocky and there have been allegations of wrongdoing on both sides, it is clear that there was a sufficient element of trust to enable the plaintiff to enter into the relationship with the No. 2 defendants, and that he in fact trusted the first-named of the No. 1 defendants to the point where he was given responsibility under the Agreement to assist the plaintiff in superintending the agreement vis-à-vis the second named defendants. Further, the practical effect of the injunction would be tantamount to a termination of the 2019 agreement, as the inability to sell the goods would undermine its very purpose.

Equitable considerations

[93] Even if I were not convinced that the balance was in favour of the defendants, the defendants have also relied on a number of equitable consideration which they say militate against the grant of the injunction. An injunction is an equitable remedy granted in the discretion of the court and it is trite law that the court can look to wider equitable considerations, such as the conduct of the parties.

[94] In this regard, both sets of defendants argue that the plaintiff's conduct should disentitle him from any favourable exercise of the court's discretion to grant interlocutory relief. Mr. Sears in particular argued that the plaintiff had failed to make full and frank disclosure of a number of facts, including his own breach of the agreement. At the end of the day, as the matter was heard *inter partes* and all of the issues ventilated before the court, the lack of disclosure was not a significant consideration for the court. Mr. Rigby also argued that the plaintiff had been guilty of delay in sitting on its hands for some 7 months before seeking injunctive relief. However, I would not have found that such delay worked significant prejudice against the defendants in the circumstances of this case.

[95] Both sets of defendants filed supplemental submissions on the "clean hands" principle, contending that the plaintiff has come seeking equity while he himself is in breach of the agreement. Mr. Rigby referred the court to *Fiona Trust & Holding Corp and others v Privalov and others* [2008] All ER (D) 292, where Mr. Justice Andrew Smith quoted with approval the statement of Lord Scott in *Grobelar v News Group Newspapers* [2002] UKHL 4 All ER 732, at para. 90:

> "…it is a long-established practice that an equitable remedy should not be granted to an applicant who does not come before the court with 'clean hands'. The grime on the hands must, of course, be sufficiently closely connected with the equitable remedy to which he ordinarily would be entitled. And whether there is or is not a sufficiently close connection must depend on the facts of each case."

[96] The Griffin defendants referred to a passage from David Bean's "*Injunctions*" (7 ed.), para. 2.2.1, where it is stated:

> "The behaviour of the Plaintiff may argue against an injunction. 'He who comes to equity must come with clean hands': accordingly, the application of a party with unclean hands is likely to fail. The uncleanliness may consist of untruthful evidence (*Armstrong v Sheppard & Short Ltd.* [1959] 2 QB 384), or the use of 'deplorable means' in pursuing an objective (*Hubbard v Vosper* [1972] 2 QB 84)…"

[97] The defendants point to several alleged breaches of the October 2019 agreement by the plaintiff and conduct which they think should debar relief. In particular, the No. 1 defendants made heavy weather of the allegation that the plaintiff's inclination to falsify invoices in respect of imported goods led to the necessity to add a March 2020 addendum to the agreement, which was intended to protect the defendants. The defendants are right to point out that the collateral agreement contains terms which are most unusual to find in a commercial agreement, as they appear tantamount to an admission that goods had been falsely invoiced.

[98] However, if false invoicing occurred (and the court does not have to make any finding in this regard), while that would be reprehensible and perhaps a matter for national authorities, I would not find on the facts of this case that it is sufficiently connected with the relief sought to deny the plaintiff any claim to equitable relief. Firstly, the defendants are not contending that the agreement is tainted with illegality and thereby unenforceable on the grounds of public policy owing to any alleged false invoicing (i.e., the "*ex turpi causa* defence"). Secondly, the situation seems to be historical and no longer an issue between the parties, in that the addendum was a compromise that was acceptable to the defendants.

[99] The defendants also argue, however, that the agreement provides that before any enforcement action can be taken against the second defendants, a joint written demand has to be made by the plaintiff and first-named of the first defendants, with reasonable notice, and that this was not done. There was no evidence before the court that such a joint written demand was made, although Mr. Gomez sought to refer to a demand letter written to Mr. Griffin (in fact dated after the claim had been filed), but which was not formally put into evidence. In *Measure Bros Ltd. v Measures* [1910] 2 Ch. 248 [at 245] Cozens-Hardy, M.R. said: "…*the plaintiffs who are seeking equitable relief by way of injunction, cannot obtain such relief unless they allege and prove that they have performed their part of the bargain hitherto and are ready and able to perform their part in the future*."

[100] The court has already noted the inconsistencies and contradictions in what are material facts in the plaintiff's evidence, and these are cause for some concern. It clearly does not sit well with the Court for the plaintiff to state on oath in one matter before the Supreme Court that he is the owner of TI-LLC, and in the application before this court to state through counsel that he has no interest in that entity. In fact, that entity is listed as a defendant and the plaintiff is in fact seeking leave to serve notice of the proceedings on the defendant outside the jurisdiction.

[101] Even if I had come to a different conclusion on the balance of convenience, or if I am wrong in my finding in that regard, I would have denied injunctive relief on equitable grounds. The plaintiff's ostensible breach of the contract's enforcement mechanism and the contradictory evidence filed

before the court are behaviours that have a sufficient nexus to the relief sought so as to constitute unclean hands.

CONCLUSION AND DISPOSITION

[102] This has not been an easy application to decide. One of the reasons is that the imposition of equitable relief often turns closely on the particular facts of a matter. In this case, however, it was difficult to form even a provisional view as to the true state of the facts, which were shape-shifting and morphed as the allegations and cross-allegations multiplied. The iterative filing of affidavit evidence also inordinately extended the proceedings, with the regrettable result that the passage of time greatly diminished the value of any claim for interlocutory relief.

[103] While there may be chinks in the evidence and material presented by both sides, I am persuaded in the round, and for the reasons that have been given, that the balance of convenience does not lie in favour of granting the injunction and would therefore dismiss it. The costs are those of the defendants to be taxed if not agreed.

Postscript

[104] The court sadly records that during the course of these proceedings the first and second-named of the First Defendants, Biswajit Pati and Mr. Leon Griffin, met their untimely demise. Mr. Pati was shot and later died on 13 August 2021 and Mr. Griffin was shot dead on 23 December 2021.

[105] I should also record, for completeness, that just prior to the delivery of this Ruling, the parties approached the court based on new material with an application for the appointment of joint receivers and managers in respect of the corporate first defendants, which was either agreed by consent or not opposed by counsel, and granted by the court. It was also indicated that the agreement might resolve many of the outstanding issues between the parties. In light of the protracted and acrimonious procedural history of this matter, this was an auspicious development, and I say no more.

28 January 2022

Loren Klein
Justice