IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No. FSD 172 of 2016 (IMJ)

IN THE MATTER OF MERIDIAN TRUST COMPANY LIMITED

BETWEEN

(1) MERIDIAN TRUST COMPANY LIMITED
(2) AMERICAN ASSOCIATED GROUP LTD

Applicants

AND

(1) EIKE FUHRKEN BATISTA DA SILVA (AKA EIKE FUHRKEN BATISTA)
(2) 63X INVESTMENTS LTD
(3) 63X FUND
(4) 63X MASTER FUND
(5) MAPLES CORPORATE SERVICES LIMITED

Respondents

IN CHAMBERS

Appearances:	Mr. G Halkerston of Counsel instructed by Ms. L Hatfield and Mr. J McGee of Solomon Harris
Before:	The Hon. Justice Ingrid Mangatal
Hearing:	27 and 28 October 2016
Decision/Ruling Delivered:	28 October 2016
Reasons for Decision Delivered:	11 November 2016

HEADNOTE

S.11A of the Grand Court Law (2015 Revision) – Injunctive and Disclosure Orders Granted as Protective Measures in aid of Foreign Proceedings to be Commenced.

REASONS FOR DECISION

1. Before the Court are applications for a worldwide freezing order (**WFO**) and ancillary disclosure relief arising from what the applicants claim is a remarkable fraud.

2. The core of the alleged fraud is the ramping up of the value of shares in a commodities company, in this case an oil company, by the dissemination of falsely positive information about the prospects of profitable commercial production and the deliberate suppression of information that would have permitted investors to form a negative view of the prospects of the business.

THE PARTIES

3. The First Applicant (**Meridian**) is a company incorporated under the laws of Nevis and is the trustee of a Nevis trust known as the Chrisly Trust (**the Trust**) which, through its investment adviser, invested some USD 17 million in the alleged fraudulent scheme described below. The Trust is for the benefit of an elderly, disabled beneficiary, Dr Paul Tien (the **Beneficiary**), and various family members of the Beneficiary.

4. The Second Applicant (**American**) is a company incorporated under the laws of the Cayman Islands which also holds investments for the Beneficiary. American, through its investment adviser, invested some USD 4 million in the alleged fraudulent scheme described below.

5. The First Respondent (**Batista**) is a Brazilian national. The Applicants allege that Batista was the mastermind of a multi-billion-dollar fraud, conducted between 2009 and 2013. The essence of the fraud was that Batista induced investors around the globe, in particular the USA, to invest money in his oil exploration company, OGX, on the basis of a series of fraudulent misrepresentations, including promises of immense oil discoveries (alongside suppression of negative information), and promises to provide finance to OGX on request. Formerly a publicly-traded company in Brazil, OGX's name changes were set

out in the Affidavit of Mr. De Aroujo, a forensic accountant and Certified Fraud Examiner at Yip & Associates in Miami, Florida who has given detailed evidence on behalf of the Applicants. The Applicants say that the promises made were false, as Batista knew them to be. OGX collapsed in October 2013 and investors were unable to recover their money. However, prior to and since the collapse, the Applicants allege Batista has been dissipating his assets (including the proceeds of the alleged fraud) to offshore and other jurisdictions, including the Cayman Islands and Switzerland, in an attempt to evade creditors.

6. Batista (along with his associates) is the subject of a number of civil, regulatory and criminal proceedings in Brazil. Of particular note is the fact that a freezing order is in place against Batista's assets in support of the Brazilian criminal proceedings in the sum of BRL 162.6 million (USD 50.8 million). This order is currently limited to assets located in Brazil. In the course of the criminal proceedings, it has been alleged by the Brazilian authorities that Batista has continued to dissipate his assets.

7. The Second, Third, and Fourth Respondents (together, the **Cayman Companies**) are companies incorporated under the laws of the Cayman Islands. The Applicants allege that the Cayman Companies are controlled and beneficially owned by Batista and operate as his private investment fund vehicles for assets beneficially owned by Batista. The Applicants allege that the Cayman Companies were used by Batista to dissipate the proceeds of the fraud. Where context requires, the Cayman Companies are referred to individually and respectively as **63X Investments**, **63X Fund**, and **63X Master Fund**.

8. The Applicants refer to Batista and the Cayman Companies together as the **Respondents**.

9. The Fifth Respondent (**MCSL**) is a company incorporated under the laws of the Cayman Islands. MCSL is the registered agent of the Cayman Companies and their local corporate services provider. It is joined as respondent to the disclosure application described below. No wrongdoing is alleged against MCSL.

10. The Brazilian companies concerned were part of an oil exploration group, OGX, which the Applicants allege to be controlled and substantially owned by the alleged key fraudster, Batista. The Applicants maintain that OGX's business, if there was a real business, was focussed mainly in Brazil with some other activities in South America. Between 2009 and 2011 OGX's market value and Batista's wealth grew incredibly. In October 2010, OGX had a market capitalisation of some USD 41 billion and by 2011, Batista's personal wealth was valued at USD 30 billion, putting him in the top ten of Forbes' global "rich list".

11. But these numbers did not, the Applicants claim, reflect the true value of OGX and it is part of their case that Batista knew this to be the case. They say that in fact with extremely limited commercial reserves and production prospects, OGX was worth next to nothing. The Applicants have adduced evidence from an expert in the oil industry in order to confirm that this is the position.

12. When negative news did begin to emerge in 2012, Batista, it is alleged, spun further lies to prop up his ailing company until it finally defaulted on its debts and entered Brazilian insolvency restructuring processes in October 2013.

13. The Applicants maintain that, not only did Batista prop up the company by his lies at this stage, he also sold a large amount of shares in OGX and took steps to move hundreds of millions of dollars out of the reach of creditors, such as by transferring assets to friends and family.

14. Batista's fraud, and asset dissipation, the Applicants argue, led to the abuse of namely the Cayman Companies owned by him. Documents produced by the Brazilian prosecution authorities and apparently collated from tax declarations of Batista indicate that on 29 May 2013 (some four months before OGX was to collapse and at a time when Batista was liquidating his shares in the company), Batista transferred USD 572 million of his personal assets to the credit of 63X Fund in the Cayman Islands (the **Cayman Transfer**).

15. The evidence is that the Cayman Companies banked in the Bahamas. They may have banked in the Cayman Islands too, but there is to date, no evidence yet of this to hand.

16. The Applicants have obtained evidence that in the last days of the collapse of his empire, Batista tried to move USD 100 million from a Bahamas account to accounts in Florida but that dissipation of assets was frustrated by the intervention of bankers (the **Attempted Transfer**). Having been frustrated, Batista, the Applicants allege, transferred at least USD 90 million to a trust in Switzerland (the **Swiss Transfers**).

17. As a result of his alleged fraud, Batista (along with his associates) has been the subject of a number of civil, regulatory and criminal proceedings in Brazil. Many of these proceedings are ongoing and there is in place a domestic freezing injunction to the value of USD 60 million in support of Brazilian criminal proceedings currently limited to Batista's domestic assets. The Applicants contend that the evidence suggests that Batista has nevertheless continued to dissipate his assets.

18. The Applicants claim to be victims of Batista's fraud. Via their investment adviser in Florida they invested some USD 21 million in bonds issued within the OGX structure, specifically by an Austrian OGX company. Those bonds were ultimately close to worthless.

19. The Applicants have indicated that they intend to sue Batista, the Cayman Companies, and others associated with the OGX fraud, in Florida. Specifically the plan is to issue proceedings upon the conclusion of applications for freezing orders and information disclosure, initially in the Cayman Islands and the Bahamas.

20. The lawsuit in Florida is based upon the alleged fraudulent and criminal conduct of Batista and the assistance given to him by the Cayman Companies and others. The Applicants will aver that investors in the United States - in Florida particularly - were specifically targeted by Batista, and in one bond issue 78% of the OGX bonds were sold to US investors. The intended claims are set out in a draft Complaint which is before the

Court (the **Complaint**). The Applicants have provided expert evidence on the strength of the key claims in the Complaint as a matter of Florida law.

21. The claims in Florida will be for some USD 63 million, namely for the underlying basic loss of some USD 21 million and for treble damages under Florida statutes.

22. Mr. Halkerston, who ably presented the arguments on behalf of the Applicants, submits that the relief sought by the Applicants to freeze the assets of the Cayman Companies up to USD 21 million falls squarely within the scope of the statutory jurisdiction as explained by the recent Grand Court cases which have considered and applied section 11A of the Grand Court Law (2015 Revision).

23. The application as against Batista seeks an order beyond that which has been granted on the limited Cayman case law to date in relation to the fairly recent section 11A statutory powers, namely a WFO against a foreign party to proceedings which are to take place in a third jurisdiction. However, the Applicants submit that on a review of the existing Cayman and English authorities that limb of the application is clearly appropriate and proper under section 11A.

24. There is a novel and discrete issue, namely can the Grand Court freeze assets for claims based upon treble damages under US law? That turns on whether such a judgment would be enforceable at common law. Shortly put, the point has not been decided in Cayman or in England. It is the Applicants' case that a freezing order for the full amount of the Applicants' claim in Florida is permitted as a matter of principle and is appropriate on the facts of this case.

25. The Applicants have been very mindful, in my view, of their duty of full and frank disclosure in the present *ex parte* application which concerns highly complicated background facts which took place over a number of years. For this reason, the Applicants have set out, in an actual Appendix to their skeleton arguments, an extensive summary of all matters which they say they are aware of which are material to the Court's discretion whether to grant relief and, if so, on what terms.

26. The Application is for a WFO against Batista and the Cayman Companies and an ancillary Disclosure Order against MCSL.

27. The Application is brought in aid of proceedings intended to be instituted in Florida, USA (the **Florida Claim**).

28. The Florida Claim constitutes a fraud claim against Batista, the Cayman Companies, and a number of Batista's family members and associates. Mr. Halkerston indicates that the present Application specifically focused on four of the causes of action in the interests of proportionality, namely fraud, conspiracy to commit fraud, breaches of the Florida Civil Remedies for Criminal Practices Act (**CRCPA**, also known as **Florida RICO**), and conspiracy to commit breaches of Florida RICO.

29. The Application is made pursuant to section 11A of the Grand Court Law (2015 Revision), which places on a statutory footing the jurisdiction of the Grand Court to grant interim relief in aid of foreign proceedings.

30. The Applicants also indicate that they intend to apply in the Bahamas for disclosure in the days immediately following any grant of a WFO and disclosure order in Cayman (the **Bahamas Disclosure Application**). The Applicants' position is that the evidence discloses that Batista's funds, or some of them, including proceeds of the fraud, were dissipated to (or via) Bahamian banks. In particular, the Applicants intend to seek disclosure from (i) POBT Holdings Limited, (ii) UBS (Bahamas) Ltd., (iii) UBS Trustees (Bahamas) Ltd., (iv) BSI Overseas (Bahamas) Ltd., (v) Amber Trust Ltd, (vi) BSI AG; (vii) Itau Bank & Trust Bahamas Ltd., (viii) Itau Bahamas Nominees Ltd, (ix) Itau Bahamas Directors Ltd, and (x) The Winterbotham Trust Company Limited. The present Application and/or the Bahamas Disclosure Application might result in further disclosure or other relief being sought in the Bahamas or elsewhere.

THE LAW

31. Section 11A of the Grand Court Law (2015 Revision) provides as follows.

> ***"Interim relief in the absence of substantive proceedings in the Islands***
> *11A.*
> *(1)The Court may by order appoint a receiver or grant other interim relief in relation to proceedings which-*
> *(a) have been or are to be commenced in a court outside of the Islands; and*
> *(b) are capable of giving rise to a judgment which may be enforced in the Islands under any Law or at common law.*
> *(2)The Court may, pursuant to this section, grant interim relief of any kind which it has power to grant in proceedings relating to matters within its jurisdiction.*
> *(3)An order under subsection (1) may be made either unconditionally or on such terms as the Court thinks fit.*
> *(4)Subsection (1) applies notwithstanding that –*
> *(a) The subject matter of those proceedings would not, apart from this section, give rise to a cause of action over which the Court would have jurisdiction; or*
> *(b) The appointment of the receiver or the interim relief sought is not ancillary or incidental to any proceedings in the Islands;*
> *(5) The Court may refuse an application for the appointment of a receiver or the grant of interim relief if, in its opinion, it would be unjust or inconvenient to grant the application.*
> *(6) In exercising the power under subsection (1), the Court shall have regard to the fact that the power is –*
> *(a) Ancillary to proceedings that have been or are to be commenced in a place outside the Islands; and*
> *(b) For the purpose of facilitating the process of a court outside the Islands that has primary jurisdiction over such proceedings.*
> *(7) The Court has the same power to make any incidental order or direction for the purpose of ensuring the effectiveness of an order granted under this section as if the order were granted in relation to proceedings commenced in the Islands.*
> [...]
> *(10) In this section, "interim relief" includes an interlocutory injunction."*

THE GATEWAY

32. There is, therefore, a gateway test in section 11A (1): there must be proceedings which have been (or are to be) commenced in a foreign jurisdiction, which are capable of giving rise to a judgment enforceable in the Cayman Islands.

33. If the gateway test is satisfied, the Grand Court has a wide discretion, as to the central question of whether it would be unjust or inconvenient to grant the application (section 11A (5)).

Unjust or inconvenient

34. In ***Classroom Investments v China Hospitals Inc.*** [2015] Unreported, 15 May 2015, (***"Classroom"***), Smellie CJ accepted that judicial authorities on section 25 of the English Civil Jurisdiction and Judgment Act 1982 (which is in similar but not identical terms to section 11A) were relevant to a section 11A application.

35. In particular, Smellie CJ approved (at paragraph 25), the guidance of Millett LJ in the English Court of Appeal in ***Credit Suisse Fides Trust SA v Cuoghi*** [1998] QB 818, (***Cuoghi***):

> "[the] *court should in principle be willing to grant appropriate interim relief in support of substantive proceedings taking place elsewhere, and* [...] *it should not be deterred from doing so by the fact that its role is only an ancillary one unless the circumstances of the particular case make the grant of such relief* ***inexpedient****"* (emphasis added)

36. It was recognised by Smellie CJ that notwithstanding the difference in nomenclature between "*inexpedient*" (in the English statute) and "*unjust and inconvenient*" (in the Cayman Law) the approach of the Cayman Court and the English Court as to whether to grant relief will be the same.

37. The principles to be distilled from the authorities were set out by Smellie CJ in ***Johnson & Johnson v Stephen Medford and anor*** [2015] unreported, 29 June 2015, at paragraph 29 (***"Johnson & Johnson"***) as follows:

> *"(i) Where assets are located outside the jurisdiction of the foreign Court which is seized of the substantive proceedings, the Court of the jurisdiction where they are located should not hesitate in an appropriate case to grant appropriate orders;*
> *(ii) The question is whether it is "just and convenient" to grant the protective orders. The jurisdiction is not one to be exercised only in exceptional*

circumstances; it will suffice if it is expedient in the interest of justice to do so.

(iii) *Whilst this Court should always be cautious in granting a free-standing freezing injunction, it should not be timid to grant such relief so long as there is a good arguable case and there is a real risk of dissipation of assets which could frustrate that case."* (Emphasis added)

Unjust or inconvenient: (i) assets in the jurisdiction

38. As to the first point, in ***Johnson & Johnson***, Smellie CJ referred to this principle and stated(paragraph 29):

> *"In this case, while the Defendants are not personally within the jurisdiction of this Court, there is nonetheless cogent evidence of assets under their control being within the jurisdiction and such circumstances in an appropriate case, will provide sufficient basis for the grant of relief"*

39. However, it should be noted that it is not the case that an applicant in Cayman must be able to point to assets located in the Islands, in particular where the respondents are Cayman entities and the applicant is seeking disclosure to ascertain the whereabouts of assets. Indeed, this was expressly considered by Smellie CJ in ***Classroom*** at paragraph [41]:

> *"Also, the fact that* [the respondents'] *assets may be said not to be in Cayman is nothing to the point. As Millett LJ pointed out in Cuoghi, where disclosure is needed, that is most appropriately requested from the Court of a defendant's home jurisdiction; without disclosure an applicant may not be able to apply to local courts for effective orders against assets abroad* [...]"

40. This also reflects the approach under English law, where it is clearly established that *Mareva* relief can be granted in relation to assets of the defendant wherever situated. See ***Cuoghi*** and the work of Steven Gee Q.C. *Commercial Injunctions,* 6th Edition at 12-035.

41. In the present case, there are assets in the Cayman Islands. However, it is the Applicants' case that it is likely that a significant proportion of the Respondents' assets have been siphoned off to other (as yet unknown) jurisdictions.

Unjust or inconvenient: (ii) expediency

42. There are a number of considerations which are pertinent in the present Application and are relevant to the Grand Court's exercise of discretion of whether to grant relief and on what terms, *viz.*

42.1 the jurisdiction of the Cayman Court over the Respondents;

42.2 the availability of relief in other jurisdictions; and

42.3 the presence of a parallel criminal freezing order.

Jurisdiction

43. As to the jurisdiction of the Cayman Court where the defendants are Cayman companies over whom the Cayman Court has personal jurisdiction, Smellie CJ in ***Classroom*** considered that:

> *"this Court is not exercising an exorbitant jurisdiction, and to consider it exorbitant merely because the main proceedings are in* [a foreign court] *would be contrary to the policy underlying section 11A – namely; to aid foreign proceedings (which policy is expressly referred to in section 11A(6)). Indeed, the fact that the Defendants are Cayman companies makes it "most appropriate that protective measures should be granted by those courts best able to make their orders effective", i.e. the Cayman Court – see Cuoghi".*

44. As to respondents who are not Cayman entities, in ***Classroom***, Smellie CJ approved (at paragraph 36) the following passage from Walker J in the English High Court in ***Mediterranean Shipping Co v OMG International Ltd & Ors***, [2008] EWHC 2150 (Comm) at paragraph [4] where Walker J found that the Chinese defendant, Ningbo, did not have a significant presence in the UK, but in relation to which there was strong evidence that it was involved in an international fraud:

> *"If Ningbo had been a company incorporated in this country or with a significant presence in this country, I would have had no hesitation in granting the worldwide freezing order that is sought. That is because the material that has been put before me shows cogent evidence of fraud on the part of Ningbo. It is fraud with an international character and which, subject to the points that I shall mention shortly, would clearly, in my view, warrant a worldwide freezing order. Ningbo, however, is not a*

company incorporated in this country, nor is it a company with any significant presence here"

45. A freezing order was nevertheless granted. It was expressly recognised in ***OMG International*** that an important factor in the exercise of discretion was that the English court was the only court that could provide the necessary disclosure and freezing relief (in particular because a New York attachment order was liable to be set aside).

46. This is part of the wider enquiry outlined by Smellie CJ in ***Johnson & Johnson*** at [29]:

> *"First, would this Court grant relief if it were itself seized of the substantive proceedings, and second, would the fact that the substantive proceedings are overseas make the grant of relief inexpedient, unjust or inconvenient?"*

47. This in turn tracks the test as enunciated by Lawrence Collins LJ in ***ETI Euro Telecom International NV v Republic of Bolivia & Anor.*** [2009] 1 W.L.R. 665 at paragraph 72.

48. The English Court of Appeal in ***Motorola Credit Corpn. v Uzan*** *(No 2)* [2003] EWCA Civ 752 identified five particular considerations which the court should bear in mind when considering inexpediency. The first four concern comity and the overlap with orders of the primary court. The Applicants submit that no such issue arises on present facts, because neither Florida nor Brazil has power to grant WFOs as an interim remedy. The fifth indicia of '*inexpediency*' identified by the Court of Appeal in ***Motorola*** is where a respondent has only 'tenuous' links to the court granting the injunction, such that there are doubts over the injunction's enforceability. Nevertheless, the Court in ***Motorola*** upheld the freezing order over a foreign respondent because the presence of assets in the jurisdiction meant that the Court could police and enforce the order. (See paragraphs 125 and 128).

49. The Applicants have asked the Court to also note that there are a number of examples of the English Court granting such relief over foreign respondents where there are assets in the jurisdiction. One example, as well as ***Motorola*** itself, is ***JSC v Skurikhin***, (two decisions [2012] EWHC 3916 (Comm); [2014] EWHC 2254(QB)) where a Russian

defendant was the beneficiary of an offshore trust owned by LLPs in England (over which the English Court could appoint a receiver). WFOs were granted against the Russian defendant (except in relation to China, Cuba and Belarus, where the evidence was that the Russian Court could order extraterritorial relief) and the LLPs. Cases in which WFOs have been *refused* instead tend to concern the situation where the applicant cannot establish a good arguable case that the respondent controls assets in the jurisdiction. However, exceptionally, even where there is uncertainty over whether there might be assets in the jurisdiction, the English Court has granted WFO relief on a temporary basis in order for there to be disclosure as to assets: ***Republic of Haiti v Duvalier***. [1990] 1 QB 202.

50. It was submitted that in the present case, the Court has jurisdiction over the Cayman Companies. Batista, however, is resident in Brazil. The Applicants submit that the Cayman Court is best placed to grant and police a WFO as against Batista and the Cayman Companies. In particular, it is submitted that there is solid evidence of an international fraud and international dissipation orchestrated by Batista which ties Batista to the Cayman Islands. In particular, Batista used the Cayman Companies, which are beneficially owned and controlled by him, as an integral part of the fraud. And, on any view, they submit, Batista has assets within the jurisdiction.

Availability of relief in other jurisdictions

51. As to the availability of relief in other jurisdictions, there is a distinction to be drawn between those cases where the injunctive relief sought (for instance a WFO) is available in the primary court or the court of the defendant's residence, and those cases where such relief is not available. In circumstances where the applicants have already sought relief in the foreign court and been refused, this is a material consideration to the exercise of the Cayman Court's discretion. However, as observed by Smellie CJ in ***Classroom*** at [42]:

> "*the fact that relief was not obtained in Hong Kong as against* [the respondents] *is again nothing to the point. Had* [the applicant] *sought relief there, and been refused, that would have been a material consideration, but as Lord Bingham CJ observed in* Cuoghi, *even if the foreign Court had refused relief, the fact that the defendant is present in*

its home jurisdiction might nonetheless weigh in favour of granting relief there. Further, in Refco, *Morritt LJ was by no means certain that earlier* dicta *necessarily meant that the home court would be precluded from granting relief where the foreign court had not exercised a jurisdiction to grant relief. Likewise, in* Refco, *Potter LJ did not consider that earlier cases had decided that even a refusal of relief in the foreign court would necessarily mean that the home court should not grant it. Finally, in* Friction Dynamics, *Neuberger J considered it could well be appropriate to grant relief even where a foreign court had actually refused it."*

52. The situation where an applicant could seek (and apparently had sought) a WFO in the court of the defendants' residence was considered in ***Johnson & Johnson***, where the Grand Court was asked to grant a WFO and related disclosure orders relating to the assets outside of the Islands of Canada-resident defendants (the **Medfords**) to New York litigation connected to the alleged manufacture of counterfeit goods by the defendants:

52.1 The Plaintiffs had obtained evidence that the Medfords had funnelled proceeds of their alleged fraud through Cayman accounts at Royal Bank of Canada to Barbados and Jersey.

52.2 The Plaintiffs sought, pursuant to section 11A, a WFO and disclosure orders as to the Medfords' worldwide assets.

52.3 The Grand Court granted a freezing order but limited the order to assets within the Islands and the disclosure order to those domestic assets. In so limiting the interim relief the Court noted that the Medfords were resident outside Cayman and the granting of extra-territorial relief is exceptional and on the facts would be exorbitant.

52.4 It was noted that the lack of jurisdiction of the New York Court related specifically to assets within Cayman.

52.5 It was expressly recognised that the New York Plaintiffs had sought relief in Canada against the Canada-resident defendants.

53. The Applicants note that the Courts of Canada have a long-established jurisdiction to grant a WFO over domiciled residents.

54. However, the (different) situation where the 'home' court did not have the jurisdiction to grant a WFO was considered by the English Court of Appeal in ***Motorola Credit Corpn. v Uzan (No 2)***. Proceedings in New York were brought against four defendants, three of whom were resident in Turkey. One of the Turkey-resident defendants, the first defendant, had assets in England, specifically a large property. The Court upheld the grant of a WFO over the first defendant.

55. The key issue was whether it was inexpedient to grant a WFO. The Court of Appeal noted:

55.1 The policing of international fraud requires the Court to provide whatever assistance it properly can, within the limits of comity, meaning that the wide powers of section 25 might prove extremely popular with international litigants.

55.2 However, policing is only expedient if the Court granting the injunction has power to enforce its orders if disobeyed.

55.3 The Court identified specific factors to be considered in the context of comity. These included whether the proposed order would overlap or be inconsistent with an order of the primary court or other jurisdictions and whether such a conflict might be likely in respect of future orders.

55.4 If the primary court or the court of the defendant's residence could grant a WFO but refused to do so then it may well be inexpedient to grant relief, but that consideration did not apply if those courts did not have the jurisdiction to grant such orders.

55.5 The Court of Appeal refused to discharge the WFO against the first defendant. The English Court would not be devoid of enforcement if the WFO was disobeyed because of the existence of significant assets within the jurisdiction.

56. As identified in ***Motorola***, the key issue is whether the order sought can be meaningfully enforced by the Court. In my view, the decision in ***Johnson & Johnson*** is an application of the fact-specific balancing factors in the assessment of an application under section 11A. I accept the submission of Mr. Halkeston that ***Johnson & Johnson*** did not purport to identify a legal bar on the application of WFO relief against respondents domiciled outside of the Islands.

57. The Applicants submitted that the present situation is far closer to ***Motorola*** than to ***Johnson & Johnson***: Batista has assets within Cayman and neither Brazil nor Florida can grant a WFO; accordingly, the Cayman Court is the only court which can grant and police a WFO in support of the Applicants' claim which concerns a fraud (and dissipation) on a worldwide scale.

The relevance of parallel criminal freezing order

58. In domestic situations English Courts have supported the use of civil freezing orders in parallel to criminal freezing orders. See ***Cancer Research UK Limited v Morris*** [2008] EWHC 2678 (QB), King J at [23]; ***Faya Limited v Butt*** [2010] EWHC 3461 (Ch), Mann J at [23]-[25].

59. It has been recognised that criminal orders and civil orders achieve different ends and as the civil plaintiff has no control over a criminal order remaining in place, absent a parallel civil freezing order the plaintiff would be at risk if the criminal order was discharged or varied.

60. In the present case, there is a Brazilian freezing order in place in support of Brazilian criminal proceedings. At present it affects Batista's assets in Brazil only.

Unjust and inconvenient: (iii) Good arguable case and real risk of dissipation

Good arguable case

61. As to the meaning of "good arguable case" on the merits, Smellie CJ in ***Classroom*** approved Mustill J's definition in ***Ninemia*** [1984] 1 All ER 398, in which his Lordship described a good arguable case as:

> "[...] *one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success".*

62. In deciding whether the case reaches the required standard, the Court will take into account the *apparent* strength of the case and may assess the apparent plausibility of statements in affidavits.

63. A "*good arguable case*" is the minimum jurisdictional requirement. The Court's view of the merits of the claimant's case are important factors in the Court's ultimate exercise of discretion in whether to grant the relief and if so on what terms.

64. The Applicants say that they plainly have a good arguable case and submit, moreover, that the merits are strong.

Risk of dissipation / real risk that a judgment may go unsatisfied

65. As to the risk of dissipation, Smellie CJ in ***Classroom*** (paras 61 and 63) outlined the following principles:

65.1 The test is that referred to by Kerr LJ in ***Ninemia,*** namely whether, on the whole of the evidence before it, the Court is of the view that the refusal of a freezing order would involve a real risk that a judgment or award in favour of the plaintiff would remain unsatisfied.

65.2 The applicant must show a real risk that the respondent will engage in activities outside the usual course of its business with the effect of dissipating its assets and making it more likely that a judgment in the plaintiff's favour would go unsatisfied.

65.3 The applicant must adduce 'solid evidence' of a real risk of the judgment remaining unsatisfied unless the respondent is prevented from dealing with assets within the jurisdiction.

65.4 'Solid evidence' is judged on a case-by-case basis. It may be possible to infer risk of dissipation from the surrounding circumstances. The court must investigate not only the plaintiff's case but also the merits of any respondent's evidence presented in opposition.

65.5 Risk may be more readily inferred where the respondent is a holding company without any substantial physical presence or operations within the jurisdiction; the requirement to show a real risk of dissipation might have to yield where assets are held by a Cayman entity through a string of subsidiaries across the globe.

66. It is also noted, as argued by Counsel, that the English cases support the proposition that if there is a good arguable case in support of an allegation that the defendant has acted fraudulently or dishonestly then it is often unnecessary for there to be any further specific evidence on risk of dissipation for the court to be entitled to take the view that there is sufficient risk to justify granting *Mareva* relief.- see ***Madoff Securities International Ltd. V Raven*** [2011] EWHC 3102 (Comm) at [169].

67. In the present case, the Applicants argue that they have solid evidence that before the nature and scale of Batista's alleged misrepresentations were uncovered, Batista took steps to move certain assets out of his name in an apparent attempt to evade creditors, including through the use of the Cayman Companies (as described below: **Batista's Asset**

Dissipation). Moreover, Batista's Asset Dissipation appears to have continued in further efforts to safeguard his assets after allegations surfaced in Brazil with the commencement of the Brazilian criminal investigations.

Timing of the application

68. Batista's fraud was complex and technical in nature and took place over a number of years. Batista's Asset Dissipation was on a global scale and utilised offshore structures in conditions of utmost secrecy. It has been necessary, the Applicants proffer by way of explanation, to undertake significant preparatory work, including expert technical and legal evidence in respect of a multitude of jurisdictions, in order to be in a position to issue this application and the Florida Claim. While timing is a relevant issue in the context of any equitable relief, the context in which timing is considered, Counsel submits, is different for freezing orders compared to other injunctions and equitable relief generally. Delay may evidence that an applicant does not consider that there is a real risk of dissipation or the delay may be such that the Court considers that the order sought would be futile. Delay is simply one factor to be taken into account in assessing the competing factors in favour of granting a freezing order or those factors that militate against granting an order.

69. The principles were summarised by Flaux J in ***Madoff Securities International v Raven*** at [156]:

> *"It seems to me that the following principles relevant to the present application can be discerned from those two cases.*
>
> *(1) The mere fact of delay in bringing an application for a freezing injunction or that it has first been heard inter partes, does not, without more, mean there is no risk of dissipation. If the court is satisfied on other evidence that there is a risk of dissipation, the court should grant the order, despite the delay, even if only limited assets are ultimately frozen by it.*
>
> *(2) The rationale for a freezing injunction is the risk that a judgment will remain unsatisfied or be difficult to enforce by virtue of dissipation or disposal of assets (see further the citation from* ***Congentra AG v Sixteen Thirteen Marine SA, The Nicholas M*** *[2008] EWHC 1615 (Comm),*

[2009] 1 All ER (Comm) 479 below). In that context, the order for disclosure of assets normally made as an adjunct to a freezing injunction is an important aspect of the relief sought, in determining whether assets have been dissipated, and, if so, what has become of them, aiding subsequent enforcement of any judgment.

(3) Even if delay in bringing the application demonstrates that the claimant does not consider there is a risk of dissipation, that is only one factor to be weighed in the balance in considering whether or not to grant the injunction sought."

70. Flaux J also referred to the judgment of Cooke J in ***Antonio Gramsci Shipping Corp v Recoletos*** [2011] EWHC 2242 (Comm) at [28]-[29]:

"[28] ... Up to now, therefore, Mr Lembergs may have felt secure, in the absence of any proceedings against him in England, when such were being pursued against Mr Stepanovs, and although alerted to the matters covered by the evidence of Messrs Meroni, Kveps, Pedera and Stepanovs, there is nothing like the commencement of proceedings to bring home to an individual the risk of a judgment against him and the consequent potential loss of assets. It could be said that, in every case where there is a letter before action, the defendant is alerted to the possibility of a claim and the need for dissipation of assets if the defendant is minded so to do in order to make himself judgment-proof. However, time and again the courts have granted freezing orders on commencement of proceedings following exchanges of correspondence where the merits of the claim have been fully debated and the defendant thereby undoubtedly alerted.

[29] In my judgment it is no answer for a defendant to come to the court to say that his horse may have bolted before the gate is shut and then to put that forward as a reason for not shutting the gate. That would be to pray in aid his own efforts to make himself judgment proof - if that, indeed, is what has occurred - and to avoid the effect of any court order which the court might make. If he can show that there is no risk of dissipation on other grounds, that is one thing. If he can show that the claimants do not consider that there is such a risk by virtue of the delay in seeking the order, that again is a relevant factor. However, if the court is satisfied about those matters in favour of the claimant, there is no reason why the court should not shut the gate, however late the application, in the hope, if not the expectation, that some horses may still be in the field or, at the worst, a miniature pony."

71. The Applicants submit that the timing of the application poses no impediment to the grant of relief. The evidence suggests that there is a very real risk of dissipation if the Florida

Claim came to Batista's attention and that consequently any Florida judgment would remain unsatisfied. The Applicants' evidence indicates that it has taken considerable work and time to get to the stage at which they could be ready to issue proceedings in Florida and, prior to that step, roll out ancillary relief applications across several jurisdictions. Whilst some assets may have already dissipated, there may well be assets remaining which are of sufficient value to be material to the Applicants in protecting their ability to enforce a judgment.

Insufficient assets within the jurisdiction

72. As to a *worldwide* freezing order, there must also be reason to believe that the Respondent's assets within the jurisdiction may be insufficient to meet the Applicant's claims. This was confirmed in ***Classroom***, citing the classic test in ***Derby v Weldon (Nos. 1 & 2)***.

73. The Applicants are currently unaware of the exact asset position of the Respondents at present. While there might be significant assets in the Islands, it appears likely that the bulk of the Respondents' assets have been transferred elsewhere (on the evidence, most likely Switzerland via Bahamas). Hence, they submit, the application for disclosure from the Respondents and MCSL is of utmost importance.

Disclosure

74. The authorities, and in particular ***Classroom***, recognise that ancillary orders for disclosure, directed at identifying what has become of missing funds in order to take appropriate steps in other jurisdictions, are sensible and proportionate (***Classroom*** at [55]). Disclosure orders are vitally important aspects of a freezing order and have long been a standard feature of freezing orders. As outlined by Robert Goff J in ***A v C***:

> *"The defendant may have more than one asset within the jurisdiction – for example, he may have a number of bank accounts. The plaintiff does not know how much, if anything, is in any of them; nor does each of the defendant's bankers know what is in the other accounts. Without*

information about the state of each account it is difficult, if not impossible, to operate the Mareva injunction properly."

75. Indeed, for this reason, orders for disclosure ancillary to injunctive relief have been described by Millett LJ in ***Cuoghi*** as *"the most valuable part of the relief"* and by Smellie CJ in ***Classroom*** as the relief *"which really makes the order effective"*.

76. Smellie CJ in ***Classroom*** also approved the principle enunciated in ***Algosaibi v Saad Investments*** [2011 (1) CILR 178], CA; that disclosure orders ordinarily followed freezing orders as the purpose was to police the injunction.

77. To the extent that disclosure against a third party is not considered to be ancillary within the meaning of section 11A, the Applicants argue that the Court also has a ***Norwich Pharmacal*** jurisdiction where a person, through no fault of his own, gets "mixed up" in the wrongful acts of others so as to facilitate their wrongdoing. Per Lord Reid in ***Norwich Pharmacal***, such a person is under an obligation to give "full information".

78. In the present situation, the Applicants seek ancillary disclosure from the Respondents in the form set out in the Draft Order. As to MCSL, the Applicants submit that disclosure against MCSL is ancillary within the meaning of section 11A, alternatively that MCSL, as the registered agent of the Cayman Companies, is plainly 'mixed up' in the wrongdoing by Batista and his attempt, using the Cayman Companies, to make himself judgment-proof and to defraud his creditors. No allegation of wrongdoing is made against MCSL and the information that is sought against them is customary in applications concerning companies used as the vehicles of fraud.

THE EVIDENCE

79. This is an extremely complicated claim, involving voluminous affidavits and numerous lever arch files have been provided to the Court, with numerous affidavits and exhibits from a wide range of persons across several jurisdictions.

80. Mr Thomas Antonio de Araujo, a forensic accountant and Certified Fraud Examiner at Yip & Associates in Miami, Florida, has reviewed the information supplied by the other affiants and has performed his own independent investigation and analysis of the allegations made in the Florida Claim. His Affidavit dated 18 October 2016 provides a full narrative of Batista's alleged fraud, the loss suffered by the Applicants, and Batista's worldwide dissipation of assets.

81. Mr Kevin John Murray, an experienced Florida litigation attorney based in Miami, Florida, has submitted an affidavit dated 20 October 2016 summarizing the Florida legal issues relevant to the Florida Complaint. He opines that there is a good arguable case that the Florida Court has jurisdiction over Batista and the Cayman Companies and that causes of action against Batista and the Cayman Companies are established to the requisite standard of good arguable case.

82. Ms Judith Ellen Neiwirth, the chief investment adviser at Gables Capital Management, had the stewardship of the Meridian and American investment portfolios and made the relevant investments on behalf of the Applicants. In her affidavit dated 13 October 2016, she details her reliance on the representations by Batista and his accomplices on which she relied in making investments on behalf of Meridian and American and the loss suffered by reason of the investments.

83. Mr Brian Thomas Windham, Senior Director and consulting engineer in the international firm of consultants FTI Consulting has submitted an affidavit dated 18 October 2016 concerning the technical detail of certain recoverable oil representations and states that these representations were false and that Batista could not have reasonably believed in the truth of the representations.

84. Mr Richard Edmund Blaksley at GPW & Co Ltd (**GPW**), a business intelligence firm based in London, has submitted an affidavit dated 17 October 2016 summarising GPW's investigations. This includes details of his interviews with Ms Malu Gaspar, an

investigative journalist and author of a biography of Batista, "*Tudo ou Nada*," published on 15 November 2014 and other materials authored, or procured and identified by her, from *inter alia* the Brazilian criminal authorities. This affidavit primarily concerns Batista's control over the Cayman Companies and the dissipation of Batista's assets.

85. Mr Ernest Patrick Dover, Managing Director of Meridian and director of American, provides information on behalf of the Applicants and provides the necessary undertakings.

86. Mr Marcello Augusto Lima de Oliveira, a Brazilian lawyer, provides an expert opinion on aspects of Brazilian law, including the Brazilian proceedings against Batista and the freezing orders made in support thereof.

Applying the principles from the cases to the instant facts

The Gateway test

87. I accept that the gateway test under section 11A has been met. The Florida Claim, which is capable of giving rise to a judgment enforceable in the Islands, will be initiated as soon as the First to Fourth Respondents are served with any Order of this Court. The Applicants set out at paragraphs 290-302 of their skeleton arguments the various possibilities as to how the WFO might be varied depending on Batista's participation in the Florida Claim (which, on the evidence which they set out they say he is likely to defend). I am prepared to accept for the moment and at this stage of the application that a judgment under RICO in Florida for treble damages could be enforced in the Cayman Islands at common law. Although it is not clear from the judgment whether any point was taken or addressed directly about it, I derive some support for that acceptance from the decision of Smellie CJ in ***Johnson v Johnson*** where at paragraph 13, the Chief Justice describes the relief sought in New York as including awards of compensatory and punitive damages, accounts of profits, cost and interest and at paragraph 36 he indicated that he would grant the injunctive and ancillary relief disclosure orders sought by the plaintiffs in that case, limited as to the amount of statutory damages to be recoverable in the New York action.

88. In addition to substantive claims against the Cayman Companies as asserted under Florida law, the Cayman Companies and any assets of those companies would arguably be available to assist the enforcement of any judgment against Batista. The Grand Court has jurisdiction to freeze the assets of the Cayman Companies as non-cause of action defendants based upon the ***Chabra*** jurisdiction - ***Algosaibi v Saad Investments*** [2011 (1) CILR 178], CA.

Unjust or inconvenient (i) assets within the jurisdiction

89. As a matter of law, it is not necessary to be able to point to assets within the jurisdiction. However, I accept that there are assets within the jurisdiction. There are the shares in the Cayman companies, and as a practical matter, assets owned by the Cayman companies.

Unjust or inconvenient: (ii) inexpedient

Jurisdiction; the availability of relief in other jurisdictions

90. The Grand Court has personal jurisdiction over the Cayman Companies. The Grand Court can control the application of assets of the Cayman Companies wherever they are located given that they are companies incorporated within its jurisdiction.

91. Batista, of course, is not resident in the jurisdiction. Batista is resident in Brazil. The primary proceedings are to take place in Florida. The Applicants submit that it is appropriate on the facts of this case to grant a WFO over the assets of Batista wherever they are located, save of course, to the usual caveat that the injunction sought will not have extra-territorial effect if the assets of Batista within the Islands are in excess of the maximum sum ordered to be frozen.

92. I accept that the following points are of particular relevance to this request:

92.1 This is the policy underlying section 11A: see ***Classroom*** at [40];

92.2 This is a fraud case.

92.3 There is solid evidence that Batista has taken steps to attempt to put assets out of the reach of creditors.

92.4 The Cayman Companies have been historically valued as holding assets considerably in excess of the maximum sum sought to be frozen. The Applicants' case is that the Cayman Companies are beneficially owned by Batista. However, it appears likely that these funds might have been dissipated.

92.5 There is significant evidence that Batista is acquainted with and has used sophisticated offshore structures and entities to hold assets beneficially owned by him.

93.6 The strong evidence is that the offshore structures have been used as a conduit for the transfer of assets by Batista to further his dissipation of assets.

92.7 The courts of Brazil cannot order a freezing order over the domestic or foreign assets of Batista in aid of the Florida Claim. No such steps can be taken in Brazil until after there has been a judgment in Florida.

92.8 The Florida courts cannot grant a WFO as a pre-judgment interim remedy.

92.9 No other civil court is in a better position to freeze and police the freezing of the assets of Batista pending the determination of the Florida Claim.

92.10 There is an order of the Brazilian criminal court freezing Batista's assets up to approximately USD 60 million. That order is only enforceable over assets in Brazil although there is permission given to the Brazilian authorities to take steps to apply the order internationally.

93. The English Courts have granted WFOs pursuant to section 25 of the English Civil Jurisdiction and Judgment Act 1982 over parties who are not resident in England when the primary litigation is abroad. A key issue for the Courts has been whether there could be a sanction for disobedience of the WFO as the Court in general does not seek to grant orders that are incapable of enforcement. I accept that there can be effective sanction when the foreign respondent has assets within the jurisdictions.

94. The Applicants' submit that unlike ***Johnson & Johnson***, and I accept that submission, this is an appropriate case for the grant of a WFO against a non-resident respondent, namely Batista, pursuant to the section 11A jurisdiction for the following reasons:-

94.1 The decision in ***Johnson & Johnson*** was not a decision on jurisdiction. In that case there were proceedings pending in Canada, where the Respondents to the section 11A were resident. WFO relief could be granted there against them.

94.2 There does not appear to have been evidence in ***Johnson & Johnson*** that there were assets or significant assets within the Islands. The Cayman accounts seemed to be a conduit for money laundering.

94.3 Neither the primary court, Florida, nor the court of Batista's residence, Brazil, has the jurisdiction to grant a WFO pending the determination of the Florida Claim.

94.4 As in ***Motorola,*** there are assets in the Islands to permit the enforcement of any order, namely the shares in the Cayman Companies and, in practical terms, ultimately any assets of those companies.

The Brazilian freezing order

95. The Brazilian criminal freezing order, in the amount of approximately USD 60 million, requires consideration for the purposes of comity, particularly in light of the ***Motorola*** principles. I accept Mr. Halkerston's submission that in domestic situations English

Courts have supported the use of civil freezing orders in parallel to criminal freezing orders - the orders achieve different ends and as the civil plaintiff has no control over a criminal order remaining in place, absent a parallel civil freezing order the plaintiff would be at risk if the criminal order was discharged or varied.

96. There is no practical risk, in the short term at least, of the parallel criminal and civil orders being in conflict. The evidence is that the Brazilian criminal trial will not take place until 2019 or 2020 - see the affidavit of Mr. Oliviera at [63]. A conflict of orders could not be expected until and unless either a civil court or a criminal court orders that payments be made by Batista from assets which are the subject of a freezing order. If that situation occurs in the future I accept that it can be the subject of case management, on evidence. It is not a reason to reduce the effectiveness of any order of this Court.

Evidence possibly obtained illegally

97. As part of its enquiry into the evidence in support of an *ex parte* application for a WFO, the Court of course has to address the admissibility and weight of evidence which might have been obtained unlawfully.

98. It is incumbent on a party relying on such evidence in an *ex parte* application to identify that evidence may have been obtained in a manner that engages the criminal law - ***St Merryn Meat Limited v Hawkins*** [2001] CP Rep 116, Geoffrey Vos QC sitting as a Deputy Judge of the High Court at [7]. See also Steven Gee QC, *Commercial Injunctions* (Sixth Edition, 2016, Sweet & Maxwell), at 8-010.

99. The Court has the power to exclude evidence obtained illegally and/or attribute less weight to it. The principles were summarised by the English Court of Appeal in ***Imerman v Tchenguiz*** [2010] EWCA Civ 908; [2011] Fam 116 at [170]-[177]:

> *"170 After all, the use in court as evidence of material which has been improperly obtained (whether in breach of confidence, tortiously, or even criminally) is permissible, though such use may be refused by the court or permitted only on terms. Subject to certain exceptions, notably information obtained by torture, the common law does not normally*

concern itself with the way evidence was obtained when considering admissibility: see ***R v Sang*** *[1980] AC 402 , relying on* ***Kuruma v The Queen*** *[1955] AC 197 . Accordingly, in the present case, it appears to us that information derived from the documents obtained, albeit unlawfully, from Mr Imerman's computer records is, subject to questions of privilege and relevance, admissible in the ancillary relief proceedings. However, just because it is admissible, it does not follow that the court is obliged to admit it.*

171 Thus, it appears that, as a matter of common law, a judge often has the power to exclude admissible evidence if satisfied that it is in the interests of justice to do so: ***Marcel v Comr of Police of the Metropolis*** *[1992] Ch 225 , p 265, per Sir Christopher Slade. Where the CPR apply, the position is even clearer: see* ***Jones v University of Warwick*** *[2003] 1 WLR 954 . In that case, relying on CPR r 32.1(2) , which provides in terms that the court can exclude evidence, as well as the overriding objective in rule 1.1 , the Court of Appeal held that the trial judge had a discretion as to whether or not to admit highly relevant evidence obtained in an underhand manner. Although they upheld his decision to admit the evidence, it is quite clear from the reasoning that the court had power to exclude it in the light of the way in which it had been obtained."*

100. As outlined by the Applicants, evidence provided to Mr Blaksley may have been obtained as a result of prior criminal actions under Brazilian law. This does not render such evidence inadmissible, but the Court can exclude such evidence or attach less weight to it because of its provenance.

101. Mr Blaksley also obtained information, documentation and evidence from Ms Gaspar, a Brazilian journalist, who has written a book about Batista and the collapse of OGX. Ms Gaspar, as an investigative journalist, has been unwilling to disclose sources of information for professional reasons.

102. The evidence is that:

i. Ms Gaspar obtained information as to banking and business activities of Batista from sources close to him.

ii. Ms Gaspar obtained the Asset Schedule, prepared by the Brazilian Federal Police, from Judge Flavio Roberto de Souza. Judge de Souza has been removed from the Batista criminal proceedings as a result of alleged improprieties.

103. Mr Oliveira's evidence is that provision of the above categories of information to Ms Gaspar may have constituted a criminal offence under Brazilian law:

i. The provision of the Asset Schedule by Judge de Souza may have constituted the offence by him of acting contrary to "functional secrecy" pursuant to Article 325 of the Brazilian Criminal Code. The receipt of information in such circumstances by Ms Gaspar may not have constituted a criminal offence even if the provider committed a crime.

ii. The provision of confidential business information by an employee of OGX could constitute the offence of unfair trade competition contrary to Article 195(XI) of Federal Law no. 9.279/96.

104. Even if the obtaining of the information did constitute a criminal offence, the Applicants submit that on the facts of this case it is just and fair that the evidence provided to Mr Blaksley is accepted by this Court on this application as being admissible and persuasive. I accept that submission.

105. In addition, I am aware that the provision of information from inquiry agents and investigative journalists is commonplace in international fraud cases, particularly since absent evidence from such sources, it can often be impossible for victims of complex cross-border fraud to have any opportunity to track and preserve the fruits of the fraud to meet future judgments. As Mr. Halkerston submitted, shortly put, fraudsters do not conduct their business in a transparent manner. Complaints of impropriety can on balance seem hollow given the reason why obtaining the evidence was necessary.

106. The manner in which the evidence was obtained may also affect the weight the Court gives to that evidence. In that context, I accept that what Ms Gaspar told Mr Blaksley (as contained in his evidence) is detailed and clearly comes from several sources very close to the business and banking activities of Batista. The Applicants' evidence also sets out

reasons why this evidence is consistent with other evidence obtained by the Applicants in preparation for this application.

107. I find that there seems little doubt as to the authenticity of the Asset Schedule. Part of the schedule listed "donations" (i.e. dissipations of assets), which formed the basis of subsequent applications by the Brazilian authorities to freeze the assets of Batista. The evidence is persuasive as to the attempts by Batista to siphon off assets prior to the collapse of OGX, his use of the Cayman Companies to facilitate that process, and the fact that Batista is likely to have assets to meet any judgment obtained in the Florida proceedings.

Unjust and inconvenient: (iii) Good arguable case and real risk of dissipation

Good arguable case

108. The Florida Claim and the Affidavits in my judgment plainly meet the standard of a good arguable case.

109. There is substantial evidence in support of the Applicants' case that Batista has committed the fraud as alleged, by way of a series of misrepresentations, including by omission.

Risk of dissipation / real risk that a judgment may go unsatisfied

110. There is solid evidence that Batista has taken steps to evade creditors and to dissipate his assets. The Applicants draw attention to the conclusion of Mr de Araujo that the evidence strongly suggests that before the nature and scale of Batista's alleged misrepresentations were uncovered, Batista took steps to move certain assets out of his name in an apparent attempt to evade creditors, including through the use of the Cayman Companies. The Brazilian criminal authorities have alleged that Batista's Asset Dissipation appears to have continued notwithstanding the criminal proceedings and Brazilian freezing orders made against him.

The timing of the application

111. I accept that the extent of the preparatory work that has been undertaken by the Applicants in investigating the factual issues, considering the legal issues in various jurisdictions, collating evidence and preparing to issue proceedings in Florida, the Cayman Islands and the Bahamas has been substantial.

112. Applying the tests in ***Madoff*** and ***Antonio Gramsci***, the time it has taken to allow the Applicants to be in a position to make this application does not undermine the merits of the application. To use the metaphor in ***Antonio Gramsci Shipping***, while some of the horses may have bolted, there may be horses (or ponies) which are of sufficient value to be material to the Applicants in protecting their ability to enforce a judgment.

113. What is critical is not the time it took to bring this application. Instead, the crucial matter is that the application was made on a proper *ex parte* basis before Batista and the Cayman Companies know of: (a) of the Florida Claim; and (b) the ability of the Courts of the Cayman Islands, the Bahamas and elsewhere to offer assistance to identify and freeze their assets pending the fraud trial. I accept that there is strong evidence of Batista's willingness to move assets around the world's financial system in efforts to put his interests before his creditors.

The Applicants duty of Full and Frank Disclosure

114. Each of the affidavits filed herein have detailed sections regarding full and frank disclosure. There is also an Appendix One to the skeleton arguments dedicated to this issue. The skeleton arguments themselves occupied some one hundred and two pages, and the Appendix One, ranged from pages 103-127. In particular, Mr. de Aroujo's full and frank disclosure relates to the Defences raised by Batista in Brazilian civil proceedings where Batista was sued by a group of minority shareholders in OGX (through a special purpose vehicle), and defences raised by him in the press. In these defences Batista essentially asserts reliance on others; the fact that he lost more money than anyone; and that oil is a risky business. The legal defences were also analysed by Mr. Murray (in respect of how they would translate to defences in the Florida Claim) and

by Mr. Oliviera in respect of matters of Brazilian law. I have read and absorbed all of the matters raised in detail, including those mentioned above, and taken them into account in making my decision.

Insufficient assets within the jurisdiction

115. There is reason to believe that the Respondents' assets within the jurisdiction may be insufficient to meet the Applicant's claims. The Applicants draw attention to the evidence of Batista's Asset Dissipation, and in particular the Attempted Transfer and the Swiss Transfers, referred to previously. While there might be significant assets in the Islands, it appears likely that the bulk of the First to Fourth Respondents' assets have been transferred elsewhere.

116. As explained in ***ETI Euro Telecom International NV v Republic of Bolivia & Anor*** [2009] 1 WLR 665, referred to at paragraph 34 of ***Classroom***, the first stage is to consider whether this Court would grant interim relief if the substantive proceedings were in fact being conducted here in the Cayman Islands. The second is to consider whether the fact that the substantive proceedings are abroad make it inexpedient for the purposes of section 11A to grant the relief.

117. It is clear to me that if the substantive proceedings were being brought here I would grant the relief sought. I am further satisfied that there is no factor that would render it inexpedient or unjust or inconvenient for me grant the relief sought.

Disclosure

118. I am of the view that the ancillary order for disclosure, directed at identifying what has become of Batista's dissipated assets, is necessary and proportionate.

119. As regards MCSL, I accept that disclosure against MCSL is ancillary within the meaning of section 11A (in particular, see subsections (1), (2) and (7)), alternatively that MCSL,

as the registered agent of the Cayman Companies, is in essence 'mixed up' for the purposes of the ***Norwich Pharmacal*** jurisdiction in the wrongdoing by Batista and his attempt, using the Cayman Companies, to make himself judgment-proof and to defraud his creditors.

CROSS UNDERTAKING IN DAMAGES

120. Meridian is acting in a representative capacity as trustee of the Trust. It is licensed by the Nevis government to provide fiduciary, corporate management and administration services in Nevis. Meridian provides such services to a broad range of clients and its business is not limited to acting in the capacity of trustee of the Trust.

121. Meridian and American jointly support the Application with an undertaking in damages to compensate the Respondents or any third party for any damage caused by the orders if ordered to do so upon an inquiry. The Applicants have placed funds in trust with their Cayman attorneys and state that they are willing to place so much of these funds with the Court by way of fortification as may be ordered.

122. The financial assets held by Meridian as trustee of the Trust and American are stated to be approximately USD 97 million as of 9 September 2016 (and USD 96 million as at 20 October 2016, per the 2nd Affidavit of Mr. Dover, sworn 26 October 2016).

123. Mr Dover has confirmed that the revocability of the Trust poses no impediment to the cross-undertaking.

124. In these circumstances, the Applicants request that the assets available to respond to the cross-undertaking as to damages be limited to the assets held within the Trust, and the Draft Order makes provision for such a limitation. American is wholly owned by the Trust and therefore the offer of the limited cross-undertaking would extend to all the assets of that company.

125. In the exercise of its discretion the Court can limit the cross-undertaking in damages when the applicant seeking freezing order relief is acting in a representative capacity and when the applicant has no personal interest in the proceedings. The principle has been recently considered by the English Court of Appeal in ***JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*** [2015] EWCA Civ 139 per Lewison LJ, esp. [68]-[69] and [81] - [86].

126. The Court can limit the cross-undertaking when "*the applicant has no personal interest in the litigation and is bringing the action on behalf of others*". [68]

127. Such a decision is a matter of discretion for the judge granting the injunction. I accept that this is an appropriate case in which to exercise this discretion and I accede to this request at this stage, to limit the cross-undertaking to the assets held within the Trust.

128. However, Mr. Dover's second affidavit makes it clear that American's assets may be of negligible value. Accordingly, it is Meridian, a company incorporated under the laws of Nevis, who is the substantial party giving the cross-undertaking. In those circumstances, I considered it appropriate for the undertaking to be fortified in the sum of USD 1.5 million.

Service, Procedure and Timetabling

129. There is no requirement for leave to serve the Cayman Companies. However, leave to serve Batista outside of the Cayman Islands is required pursuant to GCR O.11, rule 1(n). That rule provides for service out of the jurisdiction if "*the claim is brought for any relief or remedy pursuant to section 11A of the Grand Court Law (2008 Revision) (as amended by the Grand Court (Amendment) Law 2014).*"

130. Leave to serve out requires the Applicant to satisfy the ***Seaconsar*** test as applied by the Court of Appeal in ***Kenney and CC International Limited v Ace Limited*** [2015 (1) CILR 367]. The jurisdictional issue is satisfied by the issue of the Originating Summons herein.

131. The Court needs to be satisfied that the Originating Summons raises a serious issue to be tried. In that the Court is satisfied that the Applicants have established a good arguable case which warrants the grant of *ex parte* freezing order relief, the Court is clearly satisfied that there is a serious issue to be tried.

132. Counsel, Mr. Halkerston, helpfully provided Notes comparing the Draft Freezing Orders with the standard form of Freezing Order, under GCR O.11, rule 1(n) as well as commenting on the Draft Disclosure Order. The terms of both Orders were discussed in detail in Chambers.

133. In all of the circumstances, I felt it appropriate to make the Orders along the lines discussed and signed by me.

HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT