Neutral Citation Number: [2024] EWCA Civ 959

Case No: CA-2024-000013, CA-2024-000013-G & CA-2024-000013-J

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Simon Tinkler (sitting as a Deputy High Court Judge)
[2023] EWHC 3394 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/08/2024

Before:

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE COULSON
and
LORD JUSTICE MALES

- -

Between:

MEX GROUP WORLDWIDE LIMITED	**Appellant/ Claimant**
- and -	
1) STEWART OWEN FORD **2) BRIAN ROBERT CORMACK** **3) COLM DENIS SMITH** **4) MICHAEL GOLLITS** **5) MELVILLE CONSULTING PARTNERS LIMITED** **6) MELVILLE CONSULTANCY LIMITED** **7) REGAL CONSULTANCY INTERNATIONAL LIMITED** **8) CSM SECURITIES SARL** **9) VON DER HEYDT & CO AG** **10) VON DER HEYDT INVEST SA** ~~**11) MEX SECURITIES SARL**~~ **12) VIACHESLAV VOLOTOVSKIY**	**Respondents/ Defendants**

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Thomas Grant KC, Caley Wright & Daniel Petrides (instructed by **Quillon Law LLP**) for the **Appellant**
Olivier Kalfon & James Kinman (instructed by **Howard Kennedy LLP**) for the **4th & 9th Defendants**
The **10th Defendant** did not appear and was not represented
The **Other Defendants** took no part in the appeal

Hearing dates: 22, 23 & 24 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 8 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE MALES:

1. This is an appeal by the claimant against the decision of Mr Simon Tinkler, sitting as a Deputy High Court Judge ('the judge'), to set aside, as against the 4th, 9th and 10th defendants (together, 'the respondents'), a worldwide freezing order made without notice by Mr Justice Lavender on 20th October 2023. The freezing order was made pursuant to section 25 of the Civil Jurisdiction and Judgments Act 1982 (as amended) ('the CJJA') in aid of substantive proceedings in Scotland in which the claimant makes allegations of conspiracy against all the defendants.

2. Section 25 as currently amended provides:

> '**Interim relief in England and Wales and Northern Ireland in the absence of substantive proceedings**
>
> (1) The High Court in England and Wales or Northern Ireland shall have power to grant interim relief where—
>
> (a) proceedings have been or are to be commenced in a 2005 Hague Convention State other than the United Kingdom or in a part of the United Kingdom other than that in which the High Court in question exercises jurisdiction; and
>
> (b) they are or will be proceedings whose subject-matter is within the scope of the 2005 Hague Convention as determined by Articles 1 and 2 of the 2005 Hague Convention (whether or not the 2005 Hague Convention has effect in relation to the proceedings).
>
> (2) On an application for any interim relief under subsection (1) the court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it.'

3. The approach of the English court to an application under section 25 is to consider, first, if the facts would warrant the relief sought if the substantive proceedings were brought in England; and then, if so, whether the fact that the court has no jurisdiction apart from section 25 makes it inexpedient to grant the interim relief sought (*Refco Inc v Eastern Trading Co* [1999] 1 Lloyd's Rep 159, 170-1).

4. The judge held that (1) the claimant had established a good arguable case on the merits of its claim, but (2) had failed to show a sufficient risk that the respondents would unjustifiably dissipate their assets. He held also that (3) it was 'inexpedient' to grant a freezing order in view of the absence of any connection with England and Wales, and (4) the freezing order should in any event be set aside as the claimant had failed in its duty of full and frank disclosure when making the without notice application to Mr Justice Lavender. Accordingly he set aside the freezing order as against the respondents. It remains in place against the other defendants, some of whom have jurisdiction challenges yet to be heard and who took no part in the application to set the order aside.

5. On appeal the claimant challenges each of the second, third and fourth of these conclusions and seeks to rely on evidence not available in the court below which has been obtained as a result of a search order in the Scottish proceedings. The 4th and 9th defendants (together described as 'the HK defendants' as they are represented by Howard Kennedy LLP) resist the appeal and the application to adduce new evidence, and contend by way of respondent's notice that the judge ought to have held that the claimant had no good arguable case on the merits. The 10th defendant ('VdHI') was represented in the court below but has subsequently entered an insolvency procedure in Luxembourg and has taken no further part in the appeal.

6. The judge agreed to suspend the setting aside of the freezing order so as to give the claimant an opportunity to apply to this court for permission to appeal. That suspension was subsequently continued, first by Lord Justice Nugee and then by Lady Justice Andrews, who granted permission to appeal. The freezing order therefore remains in place until the termination of this appeal.

Background

7. I set out here a short summary of the background to this appeal. It is intended to enable the issues in this appeal to be understood, but is not anything like a full account of what are highly complex and contentious dealings. Needless to say, the true facts will be for the Scottish court to determine.

8. The claimant, Mex Group Worldwide Ltd, is a Hong Kong-based company. It is the holding company of a group of companies trading under the name of MultiBank. Its sole shareholder is Mr Naser Taher. The MultiBank companies provide trading platforms for investors dealing in derivatives and are authorised to provide financial services in 14 jurisdictions not including the United Kingdom.

9. The 4th defendant, Mr Michael Gollits, is a German national resident in Germany. He is the CEO of the 9th defendant, Von der Heydt & Co AG ('VdH AG'), an investment management company registered and regulated in Germany. VdHI is a company registered and regulated in Luxembourg. It acts as the fund manager of UCITS (which stands for 'undertaking for collective investment in transferable securities') funds. There is a degree of common ownership between the two Von der Heydt companies. The ultimate beneficial owner of VdHI is Mr von Boetticher, who is also the 60% owner of VdH AG.

10. None of the respondents has any assets or presence in England or Wales, or for that matter in Scotland.

11. Other defendants include Mr Stewart Ford, Mr Colm Smith, and a Luxembourg company called CSM Securities Sarl ('CSM'). Mr Ford and Mr Smith are long-standing personal friends and business associates.

12. Mr Ford has the unenviable distinction of having been fined £76 million by the Financial Conduct Authority and prohibited for life from being engaged in activities regulated by it. He appealed unsuccessfully against that determination, and was found by the Upper Tribunal to be a man whose 'conduct demonstrated a consistent failure by him to act with integrity', who 'consciously and deliberately set aside his regulatory responsibilities in pursuit of entrepreneurial ambition', whose 'actions

were driven by his desire to maximise and preserve financial gain for himself without regard for the impact this would have on investors', and who had been guilty of 'deliberate concealment … of material information … [which] itself demonstrates a clear lack of integrity' (*Ford v Financial Conduct Authority* [2018] UKUT 358 (TCC) at [645] to [647]). Mr Smith is an Irishman resident in Luxembourg.

13. The claimant's case is that although CSM is nominally owned and controlled by Mr Smith, it is in reality a joint venture between him, Mr Ford and Mr Gollits, and that the name 'CSM' represents the initials of their first names (Colm, Stewart, Michael). This is denied by Mr Gollits, who says that 'CSM' stands for 'Colm Smith Multi-Assets' and that he has no interest in the company.

14. The claimant's case is that the defendants engaged in an unlawful means conspiracy to injure its interests by causing a company called Mex Securities Sarl ('Mex Securities') to renege on a lawful and binding agreement recorded in a Consent Order of the High Court of Justice of the British Virgin Islands dated 14th December 2020. The Schedule to that Consent Order recited that the claimant had advanced funds to Mex Securities by way of loan and that the outstanding balance due was €36,385,509.52; and provided for this sum to be paid to the claimant, which it was. It provided also that the claimant would assign its claims against VdH AG to Mex Securities.

15. The ownership and control of Mex Securities is in dispute. The respondents say that it was owned and controlled by the claimant; the claimant denies this, saying that the company was under the control of Mr Smith.

16. The background to the Consent Order was that in December 2020 Mr Gollits sought on behalf of VdH AG to withdraw funds from Notes issued by Mex Securities. He did so on the ostensible ground that newly introduced regulations in Luxembourg meant that it had become unlawful for UCITS funds to trade in gold and precious metals, so that funds invested in this way had to be withdrawn. (In fact the regulations in question were not new but had been in place for some years). The claimant says that this was a breach of assurances previously given by VdH AG that funds would not be withdrawn from the Notes until their maturity, and gave rise to a claim against Mex Securities.

17. Between about 8th and 16th December 2020 there were negotiations in Dubai between Mr Naser Taher and Mr Colm Smith, acting on behalf of Mex Securities, in which a settlement of this claim was negotiated. That resulted in the Consent Order, by which in effect Mex Securities submitted to judgment for the full amount of the claim within a few days of it having been made. There is a dispute about what was happening in these negotiations. The claimant says that they were arms' length negotiations resulting in a genuine settlement. The respondents' case is that they were the result of collusion between Mr Naser Taher and Mr Smith; that the settlement terms were in effect dictated by Mr Taher; that there was no loan pursuant to which Mex Securities owed the claimant over €36 million; and that the Consent Order was in effect a fraudulent device to extract funds from Mex Securities to the detriment of other Noteholders.

18. Mex Securities purported to renege on the settlement agreement made in Dubai and the resulting Consent Order on 22nd December 2020. It claimed that it knew nothing

about the matter and that Mr Smith had no authority to act for it. In March 2021 Mex Securities commenced proceedings in Luxembourg in which it alleged that the claimant had unlawfully pressurised Mr Smith into agreeing to the settlement. He was said to have been held in a 'golden prison' in Dubai, a reference to the luxury hotel in which he had stayed during the negotiations in December 2020. However, that action did not proceed as the claimant obtained an anti-suit injunction from Mr Justice Bryan in the English Commercial Court.

19. VdHI then intervened in the original BVI proceedings. It sought to recover the €36 million paid to the claimant and applied without notice for a worldwide freezing order against the claimant and Mex Securities. At an *inter partes* hearing in the BVI, Mr Justice Jack held that a good arguable case of fraud had been made out by VdHI and continued the freezing order previously granted without notice. That finding was upheld by the Eastern Caribbean Court of Appeal (*MultiBank FX International Corporation v Von der Heydt Invest SA* (BVIHCVAP2021/0009, judgment of 21st February 2023).

The Scottish proceedings

20. In October 2023 the claimant commenced proceedings in Scotland. These consisted of (1) a commercial summons in which the claimant made its substantive claim for damages for conspiracy against the defendants and (2) a petition in which the claimant sought a warrant, which is the Scottish equivalent of a search order, against the individual defendants resident in Scotland (Mr Ford and Mr Cormack) and the company defendants with business premises there (the 5th to 7th defendants in the English proceedings) (together, 'the Scottish defendants').

21. The unlawful means on which the claimant relies in the Scottish proceedings consist principally of causing Mex Securities unlawfully to renege on the settlement and Consent Order at the instigation of the defendants, the making of false allegations about the circumstances of the negotiation of the settlement, and the provision of a financial inducement to do so by the Von der Heydt companies. The case advanced is that, as a result of claims made in bad faith in the BVI litigation and the false allegations concerning the circumstances in which the Consent Order was agreed, the claimant has incurred legal costs and, more significantly, has lost substantial profits and business due to the reputational damage which it has suffered, including having to postpone a bond issue which would otherwise have taken place but which did not occur due to the claimant's inability to obtain a satisfactory rating. The damages are alleged to amount to as much as €85 million.

22. At a without notice hearing in the Outer House of the Court of Session on 18th October 2023, Lord Sandison granted applications for two forms of interim relief. The first was an order, known as a 'warrant of diligence', which is broadly equivalent to a domestic freezing order in England and was made in the proceedings commenced by summons. It was made against all the defendants, but applies only to assets located in Scotland. Accordingly, as the respondents have no such assets, they are not directly affected by this order, although it is binding on them. In practice, the only defendants affected are the Scottish defendants.

23. The second was an order made in the proceedings commenced by petition under section 1(1) of the Administration of Justice (Scotland) Act 1972 (as amended) for the

Scottish equivalent of a search order. That order resulted in the seizure by commissioners appointed by the court of some 13,000 documents. These were only provided to the claimant's Scottish solicitors on 6th June 2024. Once they had reviewed those documents, no doubt at some speed and under pressure of time, the claimant's Scottish solicitors sought permission from Lord Sandison to rely on 93 of them for the purposes of this appeal. That permission was granted by order dated 19th June 2024. Only then could the documents be provided to the claimant's English lawyers. On 11th July Lord Sandison gave the claimant permission to share a further 38 documents (as to which there had been a claim to privilege and which were only disclosed to the claimant's Scottish solicitors on 4th July).

24. Meanwhile, the Scottish defendants applied to recall (i.e. set aside) the interim orders granted by Lord Sandison, but those applications were refused after an *inter partes* hearing by judgments handed down on 17th May 2024 (*Mex Group Worldwide Ltd v Ford* [2024] COSH 51 ('the petition recall judgment') and [2024] CSOH 52 ('the diligence recall judgment').

The application to adduce new evidence on appeal

25. On 27th June and 15th July 2024 the claimant applied to adduce new evidence on appeal, which was not available in the court below. Leaving aside documents as to which there is now no dispute, this comprised the judgments of Lord Sandison dated 17th May 2024 on the recall applications and some of the documents obtained as a result of the Scottish search order which are said to be relevant to the issues on this appeal as supporting the claimant's case on good arguable case or risk of dissipation. I shall refer to these as 'the Scottish documents'.

26. The applicable principles were explained by Lord Justice Popplewell in *Al Sadeq v Dechert LLP* [2024] EWCA Civ 28:

> '141. This court has a discretion under CPR 52.21(2)(b) to receive evidence on appeal which was not before the lower court. The well-known test in *Ladd v Marshall* [1954] 1 WLR 1489 continues to provide important guidance as to the exercise of the discretion, although the discretion is not confined by it: evidence may be admitted where the test is not fulfilled, or not admitted where it is, if either is dictated by furtherance of the overriding objective (*Hertfordshire Investments Ltd v Bubb* [2000] EWCA Civ 3013 [2000] 1 WLR 2318, 2325E-H; *Yukong Line Ltd v Rendsburg Investments Corporation* [2000] EWCA Civ 358 [2001] 2 Lloyd's Rep 113 at *125; Hamilton v Al-Fayed (No 2)* [2000] EWCA Civ 3012 [2001] EMLR 15 at [11]; *Terluk v Berezowsky* [2011] EWCA Civ 1534 at [32]).
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> 142. The *Ladd v Marshall* test is that new evidence will be allowed on appeal if three conditions are fulfilled, namely: (1) the evidence could not have been obtained with reasonable diligence for use at first instance; (2) if given, the evidence would probably have an important influence on the result of the case, though it need not be decisive; and (3) the evidence is such as is presumably to be believed.'

The judgments of Lord Sandison

27. The claimant seeks to rely on the judgments of Lord Sandison in the Scottish proceedings, principally because in the diligence recall judgment Lord Sandison held that the claimant has a good arguable case on the merits of its claim, for which purpose he relied on the reasoning set out in the petition recall judgment.

28. Mr Olivier Kalfon for the HK defendants submitted that these judgments of Lord Sandison are inadmissible in accordance with the rule in *Hollington v F Hewthorn & Co Ltd* [1943] 1 KB 587 as re-formulated and explained by the Court of Appeal in *Rogers v Hoyle* [2014] EWCA Civ 257, [2015] QB 265:

> '39. As the judge rightly recognised the foundation on which the rule must now rest is that findings of fact made by another decision-maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it (the trial judge), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard.
>
> 40. In essence, as the judge rightly said, the foundation of the rule must be the preservation of the fairness of a trial in which the decision is entrusted to the trial judge alone.'

29. In my judgment this rule has no bearing on the present issue. It is concerned with the finding of facts at a trial. These English proceedings have not reached the stage of the trial and, because they are ancillary to the substantive proceedings in Scotland, never will. It would be absurd for this court to shut its eyes to developments in the Scottish proceedings to which these English proceedings are ancillary. We are entitled to know what the Scottish court has decided and why, so that we can take this into account, so far as appropriate, in deciding what order should be made in the English proceedings. As the authorities on section 25 of the CJJA show, although ultimately the English court has to form its own view on the issue of good arguable case, the view of the court seised of the substantive proceedings may in some circumstances be of considerable weight in the English court's determination of that issue. For example in *Motorola Credit Corpn v Uzan (No. 2)* [2003] EWCA Civ 752, [2004] 1 WLR 113, Lord Justice Potter (giving the judgment of the court) said that:

> '105. … Where there is available to the judge on an application under section 25 a reasoned judgment of a foreign court at an interlocutory stage upon the merits or arguability of the

> defendant's [sc. claimant's] claim, that judgment will inevitably form the judge's starting-point in relation to the question of "good arguable case" and, depending upon the apparent cogency of the reasoning and the force of any arguments raised by the defendant, is likely to prove conclusive. …'

30. Mr Kalfon submitted that Lord Sandison's view is of no relevance in the present case, and therefore inadmissible, because the HK defendants did not take part in the arguments which led to those judgments and because (despite the similarity of language) Lord Sandison was applying a different test of what amounts to a good arguable case from the test which applies in England and Wales. However, these are not good reasons why we should proceed in ignorance of Lord Sandison's reasoning. The English court is well able to evaluate those submissions in deciding what weight, if any, to give to the view of the Scottish court in the circumstances of this case.

31. In my judgment Mr Kalfon's first objection has little or no weight. Although the HK defendants did not take part in the applications for recall, that was their choice. They are parties to the Scottish litigation and are bound by the orders made in those proceedings. They had notice of the applications. Indeed, we were told that their counsel were present to deal with other procedural matters which arose at the hearing of the recall applications, but chose to leave while the argument on those applications took place. They had the opportunity, however, to make whatever submissions on the issue of good arguable case they saw fit.

32. The second objection is less straightforward. I propose to deal with it under the heading of good arguable case.

The Scottish documents

33. In relation to the Scottish documents, there is no difficulty so far as the first and third *Ladd v Marshall* criteria are concerned. None of the documents on which the claimant seeks to rely was available to it or could have been obtained with reasonable diligence for use in the court below. Although some of the documents in question are susceptible of more than one interpretation, they are apparently credible for what they show.

34. The real issues are whether the documents would probably have an important, but not necessarily decisive, influence on the result of the appeal and whether it would be unfair and oppressive to allow the claimant to rely on them. As to this latter point, Mr Kalfon submitted that the HK defendants had received them very shortly before the hearing of this appeal at a time when this would cause maximum disruption, and that there was a risk that they represented a misleading selection of only those documents which are favourable to the claimant's case. I would reject this submission. The English lawyers on both sides have had the documents for a very short time, but there has been no application for an adjournment of this appeal. Mr Gollits is a party to many of the documents on which the claimant relies, so that he at least is familiar with them. If he has not provided them to his lawyers, that was his choice. While I recognise the possibility that, in the short time available, relevant documents may have been overlooked, in my judgment the balance of justice is strongly in favour of

allowing the claimant to rely upon the documents if and to the extent that they satisfy the second *Ladd v Marshall* criterion.

35. Whether they do satisfy this criterion is best considered when dealing with the substantive issues which arise on this appeal. For that reason we permitted the parties to make submissions about these documents *de bene esse*. Having heard those submissions, for the reasons which I shall explain when addressing the issues of good arguable case and risk of dissipation, I consider that the application to adduce the documents should be allowed.

36. It is, however, regrettable that of the three days allowed for this appeal, the first day and a half were occupied by submissions on whether this evidence should be allowed to be adduced. The consequence was that in an appeal which had much ground to cover, many of the submissions had to be made at considerable speed, with less opportunity to test and reflect on them during the hearing than would preferably have been the case.

Good arguable case

37. Logically the first issue is whether the claimant has established a good arguable case, albeit that this issue arises under the respondent's notice.

The test

38. There has been some debate in a number of first instance cases as to the correct test for a good arguable case for the purpose of a freezing order and whether the test is the same as for establishing jurisdiction under one of the gateways set out in paragraph 3.1 of Practice Direction 6B (see e.g. *Unitel SA v Unitel International Holdings BV* [2023] EWHC 3231 (Comm) at [25] to [43]). I understand that the *Unitel* case has been appealed to this court and that the judgment is likely to resolve this debate. However, the debate is one into which we need not enter. It is common ground in the present case that the test of good arguable case for the purpose of a freezing order remains as explained by Mr Justice Mustill in *The Niedersachsen* [1983] 2 Lloyd's Rep 600, 605, namely 'one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50% chance of success'.

39. As appears from the decision of this court in *Kazakhstan Kagazy Plc v Arip* [2014] EWCA Civ 381, [2014] 1 CLC 451 at [53], this is not a demanding test. Thus a claimant may succeed in establishing a good arguable case despite the existence of 'formidable' arguments to the contrary and despite the existence of 'a very real possibility' that the claim will fail at trial. Consistently with this approach, there is no reason in principle why a court should not conclude that both sides have a good arguable case on the material presently available and that the dispute can only be resolved at trial. However, despite the flexibility of the good arguable case test, the case must be one which has at least a real prospect of success so as to withstand successfully an application for reverse summary judgment. As Mr Justice Picken said in *PJSC Tatneft v Bogolyubov* [2016] EWHC 2816, [2017] 1 All ER (Comm) 833:

> '110. … It is, indeed, Mr McGrath suggested, perfectly possible and logical to conclude that both sides have a good

> arguable case on the material presently available and that their dispute can only be resolved at trial. Mr McGrath also submitted, relying upon the *Kazakhstan Kagazy* case at [23] (as well as *Derby & Co Ltd v Weldon (No. 1)* [1990] Ch 48 at 57-58), that the Court should, at this early stage in the litigation, discourage any attempt to embroil it in a detailed assessment of the facts or legal argument. I accept that Mr McGrath is right about this. In the present case, however, my having decided that there is no "serious issue to be tried", it is impossible to conclude that the "good arguable case" test has been met.'

40. Because the decision whether the claimant has established a good arguable case requires an evaluative assessment by the first instance judge, this court will only interfere with that decision if it is plain that the judge is wrong or has made some error of principle.

Error of principle?

41. Mr Kalfon submitted that the judge made three errors of principle: (1) he wrongly treated the respondents as having the burden of establishing that the claimant did not have a good arguable case; (2) instead of applying the test set out in *The Niedersachsen*, he proceeded erroneously in two stages, by assessing first whether the claimant's case was 'arguable', and then whether it was 'good'; and (3) he wrongly attached weight to the decision of the Scottish court on the without notice application for interim relief that the claimant had a good arguable case.

42. I would reject the first two of these submissions. The judge correctly stated the applicable test, which he took from *The Niedersachsen*, as analysed in the judgment of Mr Justice Butcher in *Magomedov v TPG Holdings (SBS) LP* [2023] EWHC 3134 (Comm):

> '38. Very recently, in *Omni Bridgeway (Fund 5) Cayman Investment Ltd v Bugsby Property LLC* [2023] EWHC 2755 (Comm), Jacobs J said, at [8]:
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> > "The test of 'good arguable case' is well-known in the context, for example, of freezing injunctions. The authorities in this area are summarised in *Gee: Commercial Injunctions* 7th edition, paragraphs 12-032 – 12-033 drawing on classic statements of Mustill J. It is not enough to show an arguable case, namely one which a competent advocate can get on its feet. Something markedly better than that is required, even if it cannot be said with confidence that the plaintiff is more likely to be right than wrong. It is therefore not necessary for the applicant to have a case with a better than 50 per cent chance of success.'
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> 39. I consider that that statement of the position is correct, and summarises the test which I should apply.'

43. On a fair reading of the judge's judgment as a whole, this is the test which he applied. It is true that there are some passages in which he expressed himself loosely, in ways which taken in isolation might suggest that the burden was on the respondents ('In summary, it seems to me that I cannot currently conclude that there is no good arguable case against the fourth and ninth defendants'), but I would not be too critical of an *extempore* judgment in this respect. Further, while it was probably unhelpful to break up the test of good arguable case by asking separately whether the claimant's case was arguable and then whether it was good, it is clear overall that what the judge had in mind, as explained by Mr Justice Mustill in *The Niedersachsen*, was that the case needed to be something more than barely arguable by a competent advocate.

44. However, I would accept Mr Kalfon's third submission. The judge recognised that the assessment whether the claimant had a good arguable case had to be made by the English court, but he appears to have been under the impression that it was common ground that weight should be given to the view of the Scottish court on the without notice application for interim relief that there was a good arguable case. He said that:

> '31. The assessment is one made by this court. It is not a minitrial and it can only be done on the basis of the evidence before me. The proceedings relate to an underlying claim in Scotland. Weight must be given to the decision of the Scottish court that there is a good arguable case. The parties, however, agreed that that decision of the Scottish court is not determinative. …'

45. In fact this was not common ground. Mr Kalfon did not submit that the decision of the Scottish court was not determinative. Rather, he submitted that, because it was a view expressed on a without notice application, the view of the Scottish court should be given no weight at all.

46. It is true that the judge went on to recognise that the hearing in Scotland had been without notice, that the court had made its decision without the benefit of hearing from any of the defendants, and that there was no reasoned judgment from Lord Sandison at that stage to explain why he had reached that view, only evidence from the claimant's Scottish junior advocate that Lord Sandison was ultimately persuaded on this point. As a result, the judge said that 'whilst some weight should be given to the decision in Scotland, the degree of weight is at the lower end of the scale'.

47. In my judgment this was an error of principle. The judge should not have given any weight to a view reached on a without notice application. In the context of purely domestic litigation, the court recognises that it is sometimes necessary in the interests of justice to make an order without giving the defendant an opportunity to be heard, as a necessary derogation from the usual requirements of natural justice. Freezing orders and search orders are obvious examples. But the derogation from natural justice goes no further than is necessary. Thus such orders are only made pending a return date at which the defendant can be heard. On the return date hearing it is for the claimant to establish afresh, at any rate if the point is challenged, that it satisfies the requirements for the order in question (good arguable case, risk of dissipation, etc). The claimant derives no benefit from having previously persuaded a judge of these matters at the without notice stage (cf. the reasoning of Lord Justice Phillips (sitting at first instance)

in *VTB Commodities Trading DAC v JSC Antipinsky Refinery* [2020] EWHC 72 (Comm), [2020] 1 WLR 1227 at [37] and [38]).

48. If that is true in the context of purely domestic litigation, as in my judgment it is, it should apply equally on an application under section 25 of the CJJA to a view expressed at a without notice hearing by the court seised of the substantive merits.

49. This means that the judge's finding must be set aside and that we must determine for ourselves whether the claimant has a good arguable case. For this purpose we have available considerably more evidence than the judge had, namely the judgments of Lord Sandison dated 17th May 2024 and the Scottish documents.

The judgments of Lord Sandison

50. As already noted, Lord Justice Potter said in *Motorola Credit Corpn v Uzan (No. 2)* that a reasoned judgment of a foreign court at an interlocutory stage upon the merits or arguability of the claimant's claim will inevitably form the starting-point in relation to the question of 'good arguable case' and, depending upon the apparent cogency of the reasoning and the force of any arguments raised by the defendant, is likely to prove conclusive. The reasoning in Lord Sandison's judgments is, if I may say so, highly cogent, and entitled to weight, but I am not persuaded that it is conclusive or that it absolves us from considering the issue for ourselves. That is because of the procedural differences between English and Scottish proceedings and because, despite the similarity of the language, I cannot be sure that the term 'good arguable case' has precisely the same meaning in both jurisdictions.

51. It is clear that in the petition recall judgment, under the heading of '*Prima facie* case', the test applied was one of 'intelligibility', and that this represents a low standard. As Lord Sandison explained:

> '47. … The question thus becomes how closely the court should examine the sufficiency of the material already available to the prospective pursuer before determining that an action is, indeed, likely to be brought. That bar has necessarily been set up relatively low; the prospective pursuer need not show a *prima facie* case which could confidently be expected to pass muster against the standards which would be applied at procedure roll, but merely an "intelligible" in such case – *Pearson*, *Ted Jacob* Engineering. To demand a higher standard of the prospective pursuer at the point of application for the section 1 order would risk stultifying the facility which Parliament has determined should be available to persons in that position. …'

52. In order to understand this passage it is necessary to know something about what is meant by 'the standards which would be applied at procedure roll'. Although counsel were not able to explain this during the hearing, Mr James Kinman, junior counsel for the HK defendants, has subsequently drawn our attention to evidence from Harper Macleod LLP, the HK defendants' Scottish solicitors that:

> 'A petitioner requires to plead an "*intelligible*" *prima facie* case, rather than a "*relevant*" case: [2024] CSOH 51 at [47] and [49] *per* Lord Sandison. As the term suggests, the requirement of an "*intelligible*" *prima facie* case is a comparatively low one, which is to say lower than the standard of relevancy. In contrast, "*relevancy*" is (ordinarily) the standard which pleadings in an action must achieve if challenged. The relevancy of the case may be tested at a debate on the procedure roll: whether, taking the averment in the pleadings alone but *pro veritate*, the Pursuer is bound to fail at trial. A case which is bound to fail will be dismissed without a trial.'

53. It appears, therefore, that a case which is good enough to meet the low standard of intelligibility may nevertheless be vulnerable to being dismissed summarily at a 'procedure roll debate'. Accordingly it would not be safe to draw any conclusion from the petition recall judgment.

54. The diligence recall judgment is much shorter. In this judgment Lord Sandison held that the claim met the standard of good arguable case, which he described as a 'substantial hurdle', referring to what he had said in the petition recall judgment:

> '6. I set out the parties' contentions on the existence or otherwise of a *prima facie* case in my opinion in the petition process. For the reasons set out in that opinion, in particular the identification of the salient points of the pursuer's case at [49], and taking fully into account the nature of the defence stated, I conclude that a *prima facie* case of the requisite standard has been stated by the pursuer. It is a good arguable case, notwithstanding that it will face the same challenges and hurdles described in my opinion in the petition procedure. For the reasons there explained, I do not consider it appropriate at this stage to canvass in any further detail at this stage the apparent merits and weaknesses of the case of any party.'

55. Although the test applied here is clearly more demanding than the test of intelligibility, I cannot feel confident that Lord Sandison was using the term 'good arguable case' in the same way as it would be used in English proceedings for a freezing order. That is because the petition recall judgment identifies 'clear difficulties' with the claimant's case, and the 'challenges and hurdles' there described expressly include the possibility (albeit no more than a possibility) that the case may be summarily dismissed at the procedure roll debate stage:

> '49. There does, however, remain the petitioner's allegation that Mex Securities was caused to renege on a binding settlement agreement and to repudiate a relative consent order in furtherance of a scheme to benefit the respondents and harm the interests of the petitioner. That it did renege on what was at least an apparently binding such agreement, and attempt to repudiate the consent order, does not appear to be in real dispute amongst the parties. The suggestion that it did so in furtherance of an alleged conspiracy remains a matter of

> inference (as would be the case in most instances where a conspiracy is alleged). The suggested inference is by no means one which will necessarily be drawn at the end of the day. There are clear difficulties it (at least as matters currently appear), which counsel for the respondents highlighted in the course of his submissions, as already noted. The petitioner's theory of the case may have to surmount the hurdle of a procedure roll debate, up when the test to be applied to its efficiency will not be limited to one of mere intelligibility. …'

56. Thus Lord Sandison deliberately did not decide whether the claimant's case was good enough to go to trial. On the contrary, he was careful not to pre-judge what might happen at future stages of the Scottish proceedings, including at a procedure roll debate.

The Scottish documents

57. For my part, I agree that there are clear difficulties with both sides' case theories. The claimant's case is that it advanced money to Mex Securities by way of loan and that it was entitled to demand repayment when the request was made for withdrawal of funds from the VdHI Notes. That is the premise for the Consent Order in the BVI, which is said to be a genuine settlement. But no loan agreement has been produced, let alone an agreement providing for repayment to be accelerated in these circumstances. Moreover, it is not clear why proceedings in the BVI were necessary at all if Mex Securities was willing to concede the claim within a matter of days as the claimant says that it was. I am therefore sceptical about the claimant's claim. I agree that there are some indications that the Consent Order was not the result of a genuine settlement, but (as the respondents allege) a device to enable the claimant to withdraw funds at the expense of Noteholders after Mr Naser Taher was annoyed to be told that investment in gold and precious metals was no longer allowed and that funds would as a result have to be withdrawn from the Notes.

58. On the other hand, the Scottish documents do provide what appears to be considerable support for the claimant's case:

    (1) They contain some references to loans having been advanced by the claimant.

    (2) They cast doubt on the respondents' case that Mex Securities was controlled by Mr Naser Taher. It appears that Mr Ford, Mr Smith and Mr Gollits were all involved in some way with Mex Securities from as early as November 2019, making decisions without apparent reference to Mr Taher as to who should be on the company's board of directors, and that they continued to have such involvement until at least August 2021.

    (3) They suggest that CSM was established in about July 2020 in order to take over from Mex Securities as the issuer of new Notes to be issued to investors on the recommendation of VdH AG; that Mr Ford, Mr Smith and Mr Gollits were the founder members of and partners in CSM, which was indeed named after them; that Mr Smith was merely the nominal shareholder of the company; and that they sought to conceal their involvement in CSM from the claimant.

(4) They suggest that Mr Smith did not simply do what Mr Naser Taher told him to do, and that Mr Ford, Mr Smith and Mr Gollits were in close communication during the period when Mr Smith was negotiating the settlement agreement and Consent Order with Mr Taher in Dubai during December 2020.

(5) They suggest that the Luxembourg proceedings were viewed by Mr Ford, Mr Smith and Mr Gollits as a means of 'targeting' Mr Naser Taher and MultiBank.

(6) They suggest that by September 2023 Mr Ford and Mr Smith, at least, saw CSM's role as having been to support VdH AG in legal proceedings with the claimant in Luxembourg and the BVI, and that they made this known to Mr Gollits as a line to take with a more junior employee who was questioning the propriety of VdH AG's relationship with CSM. Mr Gollits did not demur. It will be recalled that in the Luxembourg proceedings, VdHI's case was that Mr Smith had been coerced into agreeing the settlement agreement, while in the BVI VdHI's case was that Mr Smith had wrongfully colluded with Mr Naser Taher in making that agreement.

(7) They demonstrate, at the very least, that Mr Gollits on behalf of VdH AG was prepared to do business with CSM, including placing substantial amounts of clients' money with CSM, for a period of several years after the settlement agreement and Consent Order. If Mr Gollits genuinely believed that Mr Smith had colluded with Mr Naser Taher to cheat VdH AG's clients in the December 2020 negotiations, this would seem incomprehensible.

59. All of this casts considerable doubt on the truthfulness of Mr Gollits' evidence, including his evidence that he had no economic interest in or control over CSM, and that he had no knowledge of or involvement in the Dubai negotiations or the Luxembourg proceedings.

Conclusion on good arguable case

60. It would not be right to draw any final conclusions about these matters and I do not do so. However they are sufficient, in my judgment, to demonstrate on the material currently available that the claimant is able to satisfy the requirement of having a good arguable case.

Risk of dissipation

The test

61. In order to obtain a freezing order a claimant must show that there is what is usually labelled a risk of dissipation. What this means was explained by Lord Justice Haddon-Cave in *Lakatamia Shipping Co Ltd v Morimoto* [2019] EWCA Civ 2203, [2020] 2 All ER (Comm) 359:

> '33. The basic legal principles for the grant of a WFO are well-known and uncontroversial and hardly need re-stating. It nevertheless is useful to remind oneself of the succinct summary of the test by Peter Gibson LJ in *Thane Investments Ltd v Tomlinson (No 1)* [2003] EWCA Civ 1272 at [21] where

he stated that, before making a WFO, the court must be satisfied that:

> "… the applicant for the order has a good, arguable case, that there is a real risk that judgment would go unsatisfied by reason of the disposal by the defendant of his assets, unless he is restrained by the court from disposing of them, and that it would be just and convenient in all the circumstances to grant the freezing order."

34. I also gratefully adopt (as the Judge did) the useful summary of some of the key principles applicable to the question of risk of dissipation by Mr Justice Popplewell (as he then was) in *Fundo Soberano de Angola v dos Santos* [2018] EWHC 2199 (Comm) (subject to one correction which I note below):

> (1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.
>
> (2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.
>
> (3) The risk of dissipation must be established separately against each respondent.
>
> (4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets [may be][*] dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.
>
> (5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.
>
> (6) What must be threatened is unjustified dissipation. The purpose of a WFO is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the

> normal course of business in a way which will have the effect of making it judgment proof. A WFO is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the WFO jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.
>
> (7) Each case is fact specific and relevant factors must be looked at cumulatively.
>
> ([*] Note: I have replaced the words "are likely to be" in sub-paragraph (4) with "may be").'

62. Lord Justice Haddon-Cave added that:

> '51. … (1) Where the court accepts that there is a good arguable case that a respondent engaged in wrongdoing against the applicant *relevant to the issue of dissipation*, that holding up will point powerfully in favour of a risk of dissipation.
>
> (2) In such circumstances, it may not be necessary to adduce any significant further evidence in support of a real risk of dissipation; but each case will depend upon its own particular facts and evidence.'

63. Although we were referred to other summaries of the applicable principles, these statements will suffice for the present case.

The matters relied on

64. The judge considered, on the material then available, that the claimant had failed to establish a risk of dissipation. However, it is unnecessary to consider the criticisms of his judgment made by Mr Thomas Grant KC on behalf of the claimant. That is because the way in which Mr Grant now puts the claimant's case relies heavily on the evidence contained in the Scottish documents which were not available to the judge. Mr Grant identified what he described as 'four pillars' of the claimant's case on risk of dissipation. These were:

(1) the lie allegedly told by Mr Gollits that the Luxembourg regulations which made it unlawful for UCITS funds to trade in gold and precious metals had been newly introduced;

(2) the nature of the substantive allegations against the respondents;

(3) the multiple untruths allegedly told by Mr Gollits in his witness statements, as now revealed to be untrue by the Scottish documents; and

(4) the false concealment of Mr Gollits' involvement and interest in CSM, again as shown by the Scottish documents.

65. I have already dealt with many of these matters and can therefore take them shortly.

66. As to the first pillar, Mr Gollits wrote on behalf of VdH AG to Mr Naser Taher on 3rd December 2020 requesting 'a very substantial transfer request'. He explained that:

> 'And then worst comes to worst. I was informed by our fund administrator and the auditor, that there have been recent regulatory changes and that we are not allowed to hold instruments which have gold included and we have to sell the position immediately. There is no choice for me to avoid this. …'

67. As is now accepted, there were no recent regulatory changes. The prohibition in question was of long standing. Mr Grant emphasised that Mr Gollits had identified two sources of this new information, submitting that what was said can only have been a lie. He submitted also that Mr Gollits had in effect doubled down on this lie in his witness statements by repeating that he had been told by someone whom he cannot now identify that the regulatory changes were indeed newly introduced.

68. Despite Mr Kinman's submissions to the contrary to the effect that Mr Gollits would not have told a lie which could so easily have been found out, I would accept that on the material presently available, and without reaching any final conclusion, the claimant has a strong case that this was a deliberate lie by Mr Gollits, intended to deceive an important business partner, and that Mr Gollits has been prepared to lie in his evidence in these proceedings rather than admit this.

69. As to the second pillar, the nature of the conspiracy alleged against the respondents is that they conspired with other unsavoury characters, including Mr Ford (from whom anyone with integrity in the financial services industry would have run a mile) to bring dishonest and abusive legal proceedings in Luxembourg (the 'golden prison' case) and the BVI. I have found that there is a good arguable case to this effect.

70. As to the third pillar, I have already found that the Scottish documents cast considerable doubt on the truthfulness of important parts of Mr Gollits' evidence.

71. Finally as to the fourth pillar, I accept that on the material currently available there is a strong case that Mr Gollits has falsely concealed the true nature of his interest in CSM. There are in addition documents which suggest that Mr Gollits was to receive very substantial personal benefits from Mr Ford as a result of directing investment business on behalf of clients of VdH AG to CSM, albeit Mr Gollits' evidence is that these agreements were never implemented.

Conclusion on risk of dissipation

72. Looking at the matter in the round, I am satisfied that there is a good arguable case that Mr Gollits, and VdH AG as a company of which he is the CEO, have engaged in wrongdoing relevant to the issue of risk of dissipation and that this points powerfully in favour of a risk of dissipation being established.

Inexpedient

73. My conclusions so far mean that, subject to the issue of full and frank disclosure, the claimant has satisfied the first stage of the enquiry. That is to say, the facts here would warrant the grant of a worldwide freezing order if the substantive proceedings had been brought in England. The second stage is to consider whether the fact that the court has no jurisdiction apart from section 25 makes it 'inexpedient' to grant such an order.

The judgment

74. The judge noted that the parties were in dispute as to the degree of connection, if any, with this jurisdiction which is required for an injunction under section 25 of the CJJA. The respondents submitted that in general such an injunction should only be granted if a defendant has a connection with the jurisdiction of England and Wales, as a result of being domiciled or resident here or as a result of having assets here. The claimant submitted that the court has a broad jurisdiction with no such limitation. The judge held that if the test was as proposed by the respondents, no injunction could be granted as they have neither presence nor assets in England and Wales; and that in any event it would be inappropriate to grant an injunction merely because this was a case of alleged international fraud as it is not the role of the English court to act as an 'international policeman', not least as the respondents were parties to the BVI litigation and any injunction should be obtained, if at all, from the court there. He held, therefore, that (in terms of section 25) it was 'inexpedient' to continue the freezing order against the respondents.

The claimant's submissions

75. Mr Grant submitted that the need for a connection with England and Wales, as illustrated by cases such as *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line* (Case C-391/95) [1999] QB 1225, had been swept away by the combined effect of the Privy Council's decision in *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24, [2023] AC 389 and the withdrawal of the United Kingdom from the European Union. The judge should have held that the English court has a broad discretion to grant an injunction under section 25 even in the absence of any such connecting link and that such an injunction ought to be granted in a case where the substantive merits were to be determined by another court within the United Kingdom. He submitted also that the judge was wrong to say that the claimant could or should have sought a freezing order in the BVI proceedings, where it was not even a party.

The case law on section 25

76. When section 25 of the CJJA was first enacted in 1982 it was limited to the grant of interim relief in support of proceedings in a Contracting State party to the Brussels or Lugano Convention. However, by 1997 when *Crédit Suisse Fides Trust SA v Cuoghi*

[1998] QB 818 was decided, this limitation had been removed by the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997 No. 302). In that case the claimant sought a freezing order against a defendant resident and domiciled in England in support of civil proceedings in Switzerland. Lord Justice Millett observed at p.825A-E that, before 1982, the decision of the House of Lords in *The Siskina* [1979] AC 210 forbade the grant of interim relief in support of substantive proceedings abroad; and that section 25 'was enacted in order to prevent the rule established by *The Siskina* from preventing our courts from giving effect to article 24' of the Brussels Convention. Article 24 provided:

> 'Application may be made to the courts of a contracting state for such provisional, including protective measures as may be available under the law of that state, even if, under this Convention, the courts of another contracting state have jurisdiction as to the substance of the matter.'

77. The issue in *Crédit Suisse* was whether the fact that the defendant had no assets in England and Wales made it 'inexpedient' to grant a worldwide freezing order against him. The Court of Appeal held that it did not. Lord Justice Millett said at p.829D-E that:

> 'It is in my judgment regrettable that a gloss has been placed on the words of section 25(2). The question for consideration is not whether the circumstances are exceptional or very exceptional, but whether it would be inexpedient to make the order. Where an application is made for *in personam* relief in ancillary proceedings, two considerations which are highly material are the place where the person sought to be enjoined is domiciled and the likely reaction of the court which is seized of the substantive dispute. Where a similar order has been applied for and has been refused by that court, it would generally be wrong for us to interfere. But where the other court lacks jurisdiction to make an effective order against a defendant because he is resident in England, it does not at all follow that it would find our order objectionable.'

78. These comments must be seen in the context that the defendant, Mr Cuoghi, was resident and domiciled in England, a point also emphasised by Lord Bingham CJ at p.832D. Indeed, Lord Justice Millett said at p.829H that 'it would be a very different matter' if the court were being asked to make a worldwide freezing order against a Mr Voellmin, another individual implicated in the alleged conspiracy who was resident and domiciled in Switzerland.

79. *Crédit Suisse v Cuoghi* therefore represents an early decision by the Court of Appeal emphasising the importance of a relevant connection to the United Kingdom in order for a freezing order having extraterritorial effect to be granted in support of substantive proceedings abroad. The decision did not in any way depend on principles of EU law. Indeed the decision in *Van Uden*, holding that the granting of provisional or protective measures under Article 24 of the Brussels Convention was conditional on the existence of a 'real connecting link' between the relief sought and the territorial jurisdiction of the forum state did not come until more than a year later, in November

1998. Moreover, although the substantive proceedings in *Crédit Suisse v Cuoghi* were taking place in a Lugano Convention state, this was not critical (or even relevant) to the decision in circumstances where the initial limitation of section 25 to substantive proceedings in Brussels/Lugano contracting states had already been removed. To the same effect, Mrs Justice Gloster confirmed in *Royal Bank of Scotland Plc v Fal Oil Co Ltd* [2013] 1 Lloyd's Rep 327 at [37(v)] that the need for a connecting link between the subject matter of the interim measures sought and the territorial jurisdiction of the English court applies equally when the order is sought in aid of substantive proceedings which are not within the Brussels/Lugano regime.

80. In *Motorola Credit Corpn v Uzan (No. 2)* a freezing order was sought pursuant to section 25 in aid of substantive proceedings in New York against four defendants who were Turkish citizens. There was no suggestion in the case that a different approach was required on the ground that the substantive proceedings were not within the Brussels/Lugano regime. Of the defendants, only the first was resident in the United Kingdom and only the first and fourth owned assets here. The Court of Appeal continued the worldwide freezing order granted at first instance against the first and fourth defendants, but discharged the order against the second and third defendants on the ground that it was inexpedient to grant it. Lord Justice Potter identified the point of principle in the case in the following terms:

> '2. … The point of principle which lies at the heart of the appeals is whether a worldwide freezing order should be made under section 25 of the 1982 Act in support of an action in another jurisdiction in circumstances where the defendant in question is neither domiciled nor resident within the jurisdiction and there is no substantial connection between the relief sought and the territorial jurisdiction of the English court.'

81. He identified five considerations which the court should bear in mind:

> '115. As the authorities show, there are five particular considerations which the court should bear in mind, when considering the question whether it is inexpedient to make an order. First, whether the making of the order will interfere with the management of the case in the primary court e.g. where the order is inconsistent with an order in the primary court or overlaps with it. That consideration does not arise in the present case. Second, whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders. Third, whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located. If so, then respect for the territorial jurisdiction of that state should discourage the English court from using its unusually wide powers against a foreign defendant. Fourth, whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide

> order. Fifth, whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce.'

82. Lord Justice Potter made it clear at [116] that the position of each defendant must be considered separately. In the case of the second and third defendants, who (unlike the first and fourth defendants) were not resident here and had no assets in the United Kingdom, Lord Justice Potter considered at [125] that it was inexpedient to make a worldwide freezing order which the court would be unable to enforce. Thus the court's implicit answer to the point of principle identified at [2] was that it would be inexpedient to grant a worldwide freezing order in circumstances where the defendant in question is neither domiciled nor resident within the jurisdiction and there is no substantial connection between the relief sought and the territorial jurisdiction of the English court.

83. In this regard Lord Justice Potter's discussion of *Republic of Haiti v Duvalier* [1990] 1 QB 202 is instructive. That was a case where interim relief was sought against the former President of the Republic of Haiti in support of substantive proceedings in France in which he and his family were accused of embezzlement of state assets which had been concealed in unknown jurisdictions. The relief sought was information as to where the assets were and a temporary worldwide restraint on dealing with them until applications could be made in the countries where they were located. In his discussion of expediency under section 25, Lord Justice Staughton said at p.216 that there was considerable force in the submission that it was for the court where the assets were located to decide on any interim measures, but the problem was that the location of the assets was unknown:

> 'But the Republic, when it launched the English proceedings, did not know where the assets were located. One of its objects was to find out. The proceedings were started here because it was here the information was available.'

84. The information was available in this jurisdiction because the defendant had used a firm of English solicitors as his agents in a scheme to conceal the assets which he had stolen, and those solicitors could be ordered to give information about what had happened to them. In *Motorola* Lord Justice Potter identified this as one of three key points:

> '66. … it is clear that the principal basis of the decision was the fact that England was the only place which at any known connection with the asset concealment scheme and was therefore the place where information was most likely to be obtainable, the court having earlier ordered the solicitors to provide information, an application to set aside which had failed.'

85. He noted that this feature of the case had been highlighted by distinguished commentators:

> '68. In an article written in *Essays on International Litigation and the Conflict of Laws* in 1994, referred to by Millett LJ in *Cuoghi*, Lawrence Collins commented as follows:
>
> > "For an English court to enjoin a person properly subject to its jurisdiction from disposing of assets abroad cannot in this sense be regarded as exorbitant. Perhaps *Republic of Haiti v Duvalier* goes to the very edge of what is permissible. For the sole connection of England with that case was the presence in England of solicitors with access to the foreign assets. The exercise of jurisdiction can be justified on the basis that the solicitors could be treated as agents of the defendants and the relevant information was located in England."
>
> 69. The same view of the ratio of *Republic of Haiti v Duvalier* is expressed in *Dicey and Morris*: *The Conflict of Laws* (13th ed, 2000) vol 1 at 192-3 where it is stated that "the relief was effective because the defendants had solicitors in England who held assets for them abroad and … therefore the fact that the court had no jurisdiction apart from section 25 … did not make it "inexpedient for the courts to grant" the relief within the meaning of section 25(2).'

86. Thus *Republic of Duvalier v Haiti* was not a case where there was no connection with this jurisdiction. On the contrary, although it was a case which went 'to the very edge of what is permissible', there was a sufficient connection in the exceptional circumstances of that case because the information about the location of the assets was available here. The case therefore confirms the need for such a connection as a condition of the grant of relief under section 25, albeit that in some circumstances the connection may be weaker than the usual cases of the residence or domicile of the defendant or the presence of assets here.

87. It is notable also that Lord Justice Potter at [67] described the order made in the circumstances of *Republic of Duvalier v Haiti* as 'a most unusual measure, such as should very rarely be granted'.

88. The need for a connecting link with the territorial jurisdiction of the English court was further confirmed in *Banco Nacional de Comercio Exterior SNC v Empresa de Telecommunicaciones de Cuba SA* [2007] EWCA Civ 662, [2008] 1 WLR 1936, where a domestic freezing order was granted in aid of the enforcement of an Italian judgment, but this court held that it would be inexpedient to grant a worldwide order when the defendant was not resident here; and in *Belletti v Morici* [2009] EWHC 2316, [2010] 1 All ER (Comm) 412, where a freezing order against the 5th and 6th defendants (the parents of the 1st defendant) was held to be inexpedient as they were resident in Italy and there was no evidence that they had any connection with England.

89. *ICICI Bank UK Plc v Diminico NV* [2014] 3124, [2014] CLC 647 was a claim for a freezing order in support of substantive proceedings in Belgium. After a review of the case law, Mr Justice Popplewell summarised the position as follows:

’27. Drawing the strands together, I derive the following principles as applicable when the court is asked to grant a freezing order in support of foreign proceedings under section 25.

(1) It will rarely be appropriate to exercise jurisdiction to grant a freezing order where a defendant has no assets here and owes no allegiance to the English court by the existence of *in personam* jurisdiction over him, whether by way of domicile or residence or for some other reason. Protective measures should normally be left to the courts where the assets are to be found or where the defendant resides or is for some other reason subject to *in personam* jurisdiction.

(2) Where there is reason to believe that the defendant has assets within the jurisdiction, the English court will often be the appropriate court to grant protective measures by way of a domestic freezing order over such assets, and that is so whether or not the defendant is resident within the jurisdiction or for some other reason is someone over whom the English court would assume *in personam* jurisdiction.

(3) Where the defendant is resident within the jurisdiction, or is someone over whom the court has *in personam* jurisdiction for some other reason, a worldwide freezing order may be granted applying the discretionary considerations which were explained in the *Cuoghi*, *Motorola* and *Banque Nationale* cases.

(4) Where the defendant is neither resident within the jurisdiction nor someone over whom the court has or would assume *in personam* jurisdiction for some other reason, the court will only grant a freezing order extending to foreign assets in exceptional circumstances. It is likely to be necessary for the applicant to establish at least three things:

> (a) that there is a real connecting link between the subject matter of the measure sought and the territorial jurisdiction of the English court in the sense referred to in *Van Uden*;
>
> (b) that the case is one where it is appropriate within the limits of comity for the English court to act as an international policeman in relation to assets abroad; and that will not be appropriate unless it is practical for an order to be made and unless the order can be enforced in practice if it is disobeyed; the court will not make an order even within the limits of comity if there is no effective sanction which it could apply if the order were disobeyed, as will often be the case if the defendant has no presence within the jurisdiction

> and is not subject to the *in personam* of the English court;
>
> (c) it is just and expedient to grant worldwide relief, taking into account the discretionary factors identified at paragraph 115 of the *Motorola* case. They are (i) whether the making of the order will interfere with the management of the case in the primary court, e.g. where the order is inconsistent with an order in the primary court or overlaps with it; (ii) whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders; (iii) whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting, inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located; (iv) whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order; and (v) whether in a case where jurisdiction is resisted and disobedience may be expected the court will be making an order which it cannot enforce.'

90. Mr Grant did not challenge this as an accurate summary of the position as it stood before the two developments on which he relied, namely the decision of the Privy Council in *Convoy Collateral Ltd v Broad Idea International Ltd* and the withdrawal of the United Kingdom from the European Union. I would respectfully endorse it as a statement of the principles which should in general be applied. It is relevant to note, however, with the qualification perhaps that one should never say 'never', that this summary does not envisage the English court taking upon itself the role of 'international policeman' in a case which has no connection at all with the territorial jurisdiction of the English court.

Convoy Collateral

91. It is important to see what *Convoy Collateral* actually decided. The issues are identified by Lord Leggatt at the outset of his judgment, which contains the decision of the majority. The first issue was whether the High Court of the British Virgin Islands had power under its procedural rules to authorise service on a defendant outside the jurisdiction of a claim form in which a freezing order was the only relief sought. Previously *The Siskina* would have required a negative answer to that question. The Privy Council held that this remained the law:

> '2. … In the Board's view, those decisions should not now be disturbed. The EC CPR must be interpreted by reference to them and, if a wrong turning has been taken, the appropriate means of getting the law of the BVI back on track is by amending the EC CPR.'

92. As a result the order for service of the claim form on an individual defendant, Dr Cho, who was resident in Hong Kong, was set aside.

93. The second issue was whether, where the BVI court had personal jurisdiction over a defendant, the court had power to grant a freezing order against that defendant to assist enforcement of a prospective or existing foreign judgment. The issue here was whether a freezing order could be granted against Broad Idea, a BVI company, when that was the only relief sought against it and the substantive proceedings were elsewhere. The Eastern Caribbean Court of Appeal had held that *The Siskina* prevented the grant of such an injunction. After an extensive review of authority, the majority of the Privy Council held that this was a misunderstanding of what *The Siskina* had decided. Lord Leggatt summarised the correct position as follows:

> '101. In summary, a court with equitable and/or statutory jurisdiction to grant injunctions where it is just and convenient to do so has power - and it accords with principle and good practice - to grant a freezing injunction against a party (the respondent) over whom the court has personal jurisdiction provided that:
>
> i) the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;
>
> ii) the respondent holds assets (or, as discussed below, is liable to take steps other than in the ordinary course of business which will reduce the value of assets) against which such a judgment could be enforced; and
>
> iii) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied.
>
> 102. Although other factors are potentially relevant to the exercise of the discretion whether to grant a freezing injunction, there are no other relevant restrictions on the availability in principle of the remedy. In particular:
>
> i) There is no requirement that the judgment should be a judgment of the domestic court - the principle applies equally to a foreign judgment or other award capable of enforcement in the same way as a judgment of the domestic court using the court's enforcement powers.
>
> ii) Although it is the usual situation, there is no requirement that the judgment should be a judgment against the respondent.

> iii) There is no requirement that proceedings in which the judgment is sought should yet have been commenced nor that a right to bring such proceedings should yet have arisen: it is enough that the court can be satisfied with a sufficient degree of certainty that a right to bring proceedings will arise and that proceedings will be brought (whether in the domestic court or before another court or tribunal).'

94. In *Wolverhampton City Council v London Gypsies & Travellers* [2023] UKSC 47, [2024] 2 WLR 45, the Supreme Court confirmed that this decision also represents English law:

> '17. The injunction is equitable in origin, and remains so despite its statutory confirmation. The power of courts with equitable jurisdiction to grant injunctions is, subject to any relevant statutory restrictions, unlimited: *Spry, Equitable Remedies*, 9th ed (2014) ("*Spry*"), p 333, cited with approval in, among other authorities, *Broadmoor Special Hospital Authority v Robinson* [2000] QB 775, paras 20-21 and *Cartier International AG v British Sky Broadcasting Ltd* [2016] EWCA Civ 658; [2017] Bus LR 1, para 47 (both citing the equivalent passage in the 5th ed (1997)), and *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24; [2023] AC 389 ("*Broad Idea*"), para 57. The breadth of the court's power is reflected in the terms of section 37(1) of the 1981 Act, which states that: "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."
>
> …
>
> 43. An injunction against newcomers purports to restrain the conduct of persons against whom there is no existing cause of action at the time when the order is granted: it is addressed to persons who may not at that time have formed any intention to act in the manner prohibited, let alone threatened to take or taken any steps towards doing so. That might be thought to conflict with the principle that an injunction must be founded on an existing cause of action against the person enjoined, as stated, for example, by Lord Diplock in *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210 ("*The Siskina*"), 256. There has been a gradual but growing reaction against that reasoning (which Lord Diplock himself recognised was too narrowly stated: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 81) over the past 40 years, culminating in the recent decision in *Broad Idea*, cited in para 17 above, where the Judicial Committee of the Privy Council rejected such a rigid doctrine and asserted the court's governance of its own practice. It is now well established that the grant of injunctive relief is not always conditional on the

> existence of a cause of action. Again, it is relevant to consider some established categories of injunction against "no cause of action defendants" (as they are sometimes described) in order to see whether newcomer injunctions fall into an existing legitimate class, or, if not, whether they display analogous features.'

95. It is apparent from these citations that there is nothing in *Convoy Collateral* which eliminates the need for a court to consider whether the grant of a freezing order under section 25 of the CJJA is inexpedient on the ground that the court has no jurisdiction apart from that section in relation to the subject-matter of the proceedings in question. Nor is there anything which would justify jettisoning the well-established principle that such an order will not be made (save possibly in very exceptional cases) where there is no connection with the jurisdiction of the English court.

96. First, in *Convoy Collateral* the defendant, Broad Idea, was a BVI company. That was itself an obvious connection with the BVI, giving the court personal jurisdiction over that defendant. The question whether such a connection was necessary therefore did not arise and was not considered.

97. Second, the decision was limited to cases where the court has personal jurisdiction over the defendant against which the order is to be made. In the present case, the only basis for establishing jurisdiction over the respondents is section 25 itself, that being a ground of jurisdiction under paragraph 3.1(5) of Practice Direction 6B. Accordingly the court was required to consider the issue of expediency under section 25(2), including the matters identified as relevant in the case law.

98. Third, although the Privy Council had section 25 of the CJJA well in mind, the case law which I have discussed above was not referred to in the judgment and does not appear to have been cited. It is inconceivable that the Privy Council intended to overrule this consistent line of authority without saying so. On the contrary, as the Supreme Court indicated in the *Wolverhampton* case, the otherwise unlimited power of courts with equitable jurisdiction to grant injunctions where it is just and convenient to do so is subject to any relevant statutory restriction. In the case of an order for interim relief under section 25, the issue of expediency under section 25(2), as interpreted in the case law, is a relevant statutory restriction.

99. Thus, while *Convoy Collateral* has eliminated the need for a freezing order applicant to have a cause of action which can be pursued in the forum state, it has not eliminated the need for a connecting link with the territorial jurisdiction of the English court.

Brexit

100. The second matter on which Mr Grant relied was the withdrawal of the United Kingdom from the European Union. He submitted that the need for a connecting link with the territorial jurisdiction of the English court was an EU principle, derived from *Van Uden*, which has now ceased to be part of English law as a result of section 5 of the European Union Withdrawal Act 2018 ('the Withdrawal Act') and sections 3 to 6 of the Retained EU Law (Revocation and Reform) Act 2023 ('the Retained EU Law

Act'); and that recent case law under section 37 of the Senior Courts Act 1981 shows that all that matters is whether the grant of a freezing order is just and convenient.

101. I do not accept the premises for this argument. First, as I have sought to show, the need for a connection with the territorial jurisdiction of the English court is not a principle of EU law derived from *Van Uden*, but a basic principle of English law. The English court will not grant an injunction against a defendant over which it does not have jurisdiction in the absence of any connection with this jurisdiction. Accordingly I accept the submission of Mr Kalfon that, once it is understood that the requirement for a connecting link applies to cases under section 25 of the CJJA, both within and without the Brussels/Lugano regime, any significance of Brexit falls away.

102. Second, the recent case law on which Mr Grant relied consists of *Convoy Collateral*. But for the reasons already explained, this case has not eliminated the need for a connecting link with the territorial jurisdiction of the English court.

103. It is therefore unnecessary to wrestle with the intricacies of the Brexit legislation and I shall not lengthen this judgment by doing so. I need only say that I found persuasive Mr Kalfon's submission that the case law on section 25 of the CJJA which I have summarised above constitutes 'retained domestic case law' as defined in section 6(7) of the Withdrawal Act and (after 31st December 2023) 'assimilated domestic case law' as defined in section 6(7) of the Retained EU Law Act which continues to form part of English law.

Another part of the United Kingdom

104. Finally, Mr Grant submitted that the English court should adopt a different approach to the grant of injunctions under section 25 in support of substantive proceedings in another part of the United Kingdom such as Scotland. I would reject that submission. There is no basis for it in the terms of section 25 which draw no distinction between proceedings in 'a 2005 Hague Convention State' and proceedings in 'a part of the United Kingdom other than that in which the High Court in question exercises jurisdiction'. Nor do previous versions of section 25, going back to its original enactment in 1982.

105. Mr Grant pointed out that Lord Sandison's grant of permission to the claimant to use the Scottish documents for the purpose of this application must at least imply that the grant of a worldwide freezing order against the respondents would not interfere with the management of the case in Scotland, the primary jurisdiction. He submitted further that the fact that the Scottish court does not make such orders is a factor in support of the grant of a freezing order by the English court.

106. I would accept that the grant of a worldwide freezing order by the English court would not interfere with the proceedings in Scotland or be viewed unfavourably by the Scottish court. However, that cannot justify the grant of such an order in a case where there is no connecting link with the territorial jurisdiction of the English court.

107. Moreover, I would not accept that the policy of the Scottish courts not to make worldwide orders is a factor in the claimant's favour. As already noted, one of the matters identified in *Motorola* as relevant to the exercise of discretion under section 25 is whether it is the policy in the primary jurisdiction not itself to make worldwide

freezing/disclosure orders. A distinction was drawn at [119] between cases where the foreign court seised of the substantive claim has no power to grant the interim relief in question and cases where it is the policy of that court not to grant such relief. In the latter case, this will generally be a factor telling against the grant of a freezing order under section 25.

108. In the present case it appears to be common ground that the Scottish court would have the power to grant a worldwide freezing order, but that it would decline to exercise that power as a matter of policy. This is explained in an Opinion dated 18th October 2023 of the claimant's junior advocate in Scotland, Mr Jonathan Brown, as follows:

> '16. This brings me to the second question, which is whether it is the policy of the Scottish court not to make worldwide freezing or disclosure orders. The primary answer to this is that the Scottish courts are generally reluctant to make orders of any kind having extra territorial effect on third parties. …
>
> 17. … It may be that the English willingness to make extra-territorial freezing orders is bound up with significant hurdles that have to be overcome to be able to serve out of the jurisdiction. By contrast the Scottish reluctance to make such orders may reflect the fact that although Scots law is liberal in allowing foreign defenders to be convened there is no way of enforcing orders against those who do not appear. The traditional approach has been to suggest that the aggrieved party should seek relief in the courts where the wrongdoer is domiciled or where the apprehended wrong is likely to be committed: see, for example, *Burn-Murdoch, Interdict in the Law of Scotland* (1933) at p14-15 and the older cases there cited. A more recent example of the general reluctance to extra-territoriality in a different but related context is *Clark v Trip Advisor LLC* 2015 SC 368.

109. In circumstances where the Scottish court has the power to make a worldwide freezing order but chooses as a matter of policy not to do so, leaving the matter to the court of the defendant's domicile, I see no reason why the English court should intervene. It is neither the court of the defendant's domicile nor the court where the defendant has assets.

Conclusion on expediency

110. As the judge correctly found at [67], none of the respondents has any significant or meaningful current connection to the UK or to England, notwithstanding that Mr Gollits has occasionally visited. The judge was therefore right to conclude that it was inexpedient to grant a worldwide freezing order against them pursuant to section 25.

Full and frank disclosure

111. For the reasons given in the judgment of Lord Justice Coulson, I agree that there were serious failures of full and frank disclosure on the without notice application to Mr Justice Lavender which themselves justify the setting aside of the freezing order and

declining to regrant it. I should add, however, that the claimant was then represented by different counsel and solicitors.

112. I agree in particular with what Lord Justice Coulson has said at [126] to [128] below about the way the failure to disclose issue was presented by the respondents, both in the court below and in this court. I sought in *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [14] and [15] to encourage a degree of restraint and a sense of proportion on the part of those seeking to set aside without notice orders on this ground, but it appears that the message has not got through. In this case we have been prepared to separate the wheat from the chaff, but I would suggest a different approach for the future. In future, if the court is presented with a long shopping list of alleged failures of disclosure, with no attempt made to identify the relatively few points which really matter, it should simply decline to consider the issue at all.

The position of VdHI

113. Although VdHI served a respondent's notice, on 22nd April 2024 a Luxembourg 'insolvency administrator', Mr Rukavina, was appointed over it by the Luxembourg court. From then on, he has been the only individual or entity legally entitled to represent VdHI, but has played no further part in these proceedings. It appears that VdHI's English solicitors could not obtain instructions and have since come off the record, while VdHI's solicitors in the BVI also appear to be without instructions to take any substantive steps in the proceedings there.

114. In these circumstances Mr Grant submitted that, although there is no suggestion that Mr Rukavina, a Luxembourg lawyer operating under the supervision of the Luxembourg court, would take steps to dissipate assets, the freezing order against VdHI ought to be continued at least until there is clarity as to whether Mr Rukavina has control of VdHI's assets and as to the steps which he will now propose to take. As I have concluded that the freezing order should be set aside in any event, it is unnecessary to consider this submission further.

Disposal

115. I would dismiss the appeal.

LORD JUSTICE COULSON:

116. I agree that, for the reasons given by my Lord, Lord Justice Males, this appeal should be dismissed. I also consider that the judge was right to discharge the order, and not to renew it, because of the claimant's material failure to give full and frank disclosure of all relevant matters at the *ex parte* hearing before Lavender J on 20th October 2023. I set out below my reasons for that separate conclusion.

Introduction

117. Before the judge, the HK defendants complained that there had been a failure on the part of the appellant to make full and frank disclosure to Lavender J. Regrettably, as has become far too common in this situation, their complaints were numerous (18 in total), and extended over 67 paragraphs of their skeleton argument. It was by far the longest section of that document. Although the claimant responded at similar length,

their skeleton accepted that "certain aspects of its presentation of this large-scale and complex multi-jurisdictional dispute were inadvertently inaccurate, should have been put differently, and/or should have been expanded upon." In my view, that was a wide-ranging acceptance of the claimant's failure to give full and frank disclosure.

118. Unsurprisingly perhaps, in the light of that statement of the claimant's position, the judge acceded to some of the HK defendants' complaints, finding that there had been a material failure to provide full and frank disclosure and concluding, in consequence, that the order should be discharged and not renewed. On appeal, the claimant contends that the judge misapplied the relevant principles and gave far too much significance to immaterial slips and errors. The HK defendants not only maintain that the judge was right for the reasons that he set out in his judgment but, by way of their Respondent's Notice, they also seek to rely on another 14 allegations of failure to provide full and frank disclosure which are not identified in the judgment. The consequence of all this was, I regret to say, trench warfare of the most attritional kind.

The Applicable Principles

119. It is unnecessary to set out the law in relation to full and frank disclosure in any great detail. The relevant principles were summarised by Carr J (as she then was) in *Tugushev v Orlov & Ors* [2019] EWHC 2031 (Comm) at [7]. She said:

> "The law is non-contentious. The following general principles can be distilled from the relevant authorities by way of summary as follows:
>
> i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;
>
> ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make;
>
> iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;
>
> iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no

amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;

v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;

vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;

vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits;

viii) In general terms it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself;

ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived; x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged; xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;

xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank

> disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;
>
> xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure.
>
> (See in particular *Memory Corporation plc and another v Sidhu and another (No 2)* [2000] 1 WLR 1443 at 1454 and 1459; *Behbehani v Salem* [1989] 1 WLR 723 at 735 and 730; *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* [2008] EWHC 1615 (Comm); [2009] 1 All ER (Comm) 479 at [62]; *Bank Mellat v Nikpour* [1985] FSR 87 at 89 and 90; *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381; [2014] 1 CLC 451 at [36] and [42] to [46]; *Todaysure Matthews Ltd v Marketing Ways Services Ltd* [2015] EWHC 64 (Comm) at [20] and [25]; *JSC BTA Bank v Khrapunov* [2018] UKSC 19; [2018] 2 WLR 1125 at [71] and [73]; *Banca Turco Romana SA v Cortuk* [2018] EWHC 662 (Comm) at [45]; *PJSC Commercial Bank PrivatBank v Kolomoisky and others* [2018] EWHC 3308 (Ch) at [72] and [73] to [75]; *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [18] to [21]); *Microsoft Mobile Oy v Sony Europe Ltd* [2017] EWHC 374 (Ch) at [203].)"

120. More recently, in *Derma Med Limited & Anr v Dr Zack Ally & Ors* [2024] EWCA Civ 175, this court added these other considerations to Carr J's list:

> "30. Although this was said in the context of an application for a freezing order, the principles are of general application. I would draw particular attention, as relevant in the present case, to the fact that the overriding consideration when deciding whether to continue an injunction or grant a fresh injunction despite a failure of disclosure is the interests of justice; and to the need to maintain a due sense of proportion in complex cases. This latter point was made by Mr Justice Toulson in *Crown Resources AG v Vinogradsky* (15 June 2001) and was adopted by the Court of Appeal in *Kazakhstan Kagazy Plc v Arip* [2014] EWCA Civ 381, [2014] 1 CLC 451 at [36]:
>
> '… where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion. …
>
> I would add that the more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is, in my view, that the judge should not lose sight of the wood for the trees. …
>
> In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of prejudice which could be advanced under the guise of discretion.'

> 31. A further point which merits emphasis is that even when there has been a failure of full and frank disclosure, the interests of justice may sometimes require that a without notice order be continued and that a failure of disclosure be marked in some other way, for example by a suitable costs order. A court needs to consider the range of options available to it in such an event."

121. In essence, if a subsequent court considers that an *ex parte* order has or may have been obtained in circumstances where important information should have been but was not disclosed to the judge, it may well set that order aside, but the failures must be material and any assessment of the alleged failures must be proportionate. Ultimately, in considering whether to discharge the order and/or to renew it, the court will always be guided by the interests of justice.

The Judgment

122. The judge dealt with full and frank disclosure between [72] and [120] of his judgment. He expressly referred to *Tugushev* at [72] and said that he had considered all Carr J's points in reaching his decision. At [73], the judge referred to materiality, saying:

> "The point was made that I should consider materiality when assessing information put forward to Lavender J. That is, of course, correct. This involves an assessment of the degrees of relevance of the evidence and a due sense of proportion. There need to be sensible limits on what is presented; this was not a matter where evidence was presented to Lavender J over a four week hearing where every stone could be unturned. The obligation was, however on the claimant, to fairly present the situation. It filed a bundle of some 1,322 pages which Lavender J could not possibly have been expected to read in full. It was for the claimant to highlight all the material matters. As the claimant had been heavily involved in this dispute involving some 30 court hearings in the BVI, Luxembourg and Scotland it should have been intimately engaged with all the evidence; it had no excuse for any failure to identify critical issues or present them fairly"

123. Thereafter, the judge went through first the transcript of the hearing before Lavender J, then the claimant's skeleton argument for that *ex parte* hearing, then the affidavit of Yahya Taher sworn on 19 October which was relied on for that hearing. He identified what he considered to be errors in each of those documents. He made plain at [74] these were "not…just the places in which Lavender J was misled. They are in essence all the key points made to Lavender J". I shall refer below to the relevant passages of the judgment when considering the detailed allegations of failure to give full and frank disclosure. Because of the way in which the judge was invited to approach this part of the case, there is a good deal of repetition in the judgment.

124. At [118], the judge summarised the areas of the case in which he considered there had been a failure to give Lavender J full and frank disclosure:

> "In summary:

> 1. The situation regarding the timing and urgency was absolutely not as presented.
>
> 2. The position of the tenth defendant and its role and connections to furth and ninth defendants were not presented in a full and frank way;
>
> 3. The different actions taken by the different defendants throughout the litigation were not identified to the court;
>
> 4. The situation regarding the €7,000,000 that was held in the company was not presented in a fair manner and, indeed, the references to €7,000,000 either accidentally or otherwise, were allowed to be confused in front of Lavender J such that the source of the investment of the €7,000,000 into CSM could easily be construed as having come from the money that actually was subject to the freezing order;
>
> 5. Lavender J was not given the full facts about the regulatory history of the fourth, ninth, or tenth defendants and, indeed, was given a version that was significantly different from the truth. It is not as if the situation was not mentioned. It was positively mentioned in an adverse manner;
>
> 6. Material facts were omitted regarding Mr Taher and MultiBank and their regulatory history and non-compliance with court orders; and
>
> 7. The status and parties to the BVI proceedings were not fairly presented at all.
>
> I have referenced other matters that were not entirely accurately presented and Mr McGrath addressed me, as did Miss Hutton, in relation to a number of those. They are, in my judgment, by definition less material but, nevertheless, add to the overall picture."

125. At [120] the judge's conclusions were as follows:

> "120. It seems plain to me that the information put forward before Lavender J was not full and frank. It was, in my judgment, partial and partisan. It was, in relation to these defendants, substantially misleading both in itself and by omission. It seems to me that the inevitable consequence is that this freezing order should not be renewed. The misstatements fall easily into the category of substantial. I do not need to decide whether they were deliberate but there must be serious questions on that given the length of time the claimant was in possession of the information before putting their case forward and the degree to which the way it was put forward did not correspond to the full and frank facts. I repeat my previous observation that the solicitors and counsel appearing before me were not the ones who appeared in the *ex parte* hearing."

The Presentation on Appeal

126. I have criticised the way in which these issues were presented to the judge. Unhappily, that process has been replicated in the appeal documents. In this way, paragraphs 79 to 130 of the HK defendants' appeal skeleton argument dealt with full and frank disclosure. That section both responded to paragraphs 91 to 120 of the

claimant's skeleton argument, and also went on to make further points about full and frank disclosure which the judge had not addressed in his judgment. In consequence, just as had happened below, the allegations in respect of full and frank disclosure on this appeal took as much, if not more, time as the substantive issues.

127. That is not a sensible or proportionate way in which to address this sort of allegation. It is almost always the position that, no matter how big the case or how complex the underlying issues, a defendant's case that the claimant failed to make full and frank disclosure at the *ex parte* hearing will stand or fall on no more than a handful of alleged failures. That is because, if the 'big ticket' allegations of failure are not established, or are established but found to be immaterial, then the less significant failures will not bridge the gap. It is the law of diminishing returns. In our view, this case is no different to the norm.

128. Accordingly, those preparing this sort of attack in the future should ensure that they concentrate their efforts on alleged failures of disclosure which are clear-cut and obviously important. Quality not quantity should be the watchword. The failure to follow that course, as happened both before the judge and again on appeal, means that there is a real risk that the best points become buried in an avalanche of trivia. I do not believe that the judge was best served by the presentation of the points in this way; indeed, I consider that proper assistance to this court only arrived on the third day of the appeal hearing, when Mr Kalfon put his submissions on full and frank disclosure into some semblance of order and importance.

Errors of Principle?

129. Mr Grant, on behalf of the appellant, submitted that the judge made a number of errors of principle. He said that the judge failed to have regard to the interests of justice; failed to have regard to whether the court had been materially misled by the non-disclosures that he had found; and compounded that erroneous approach by failing properly to consider whether or not the injunction should be regranted or to consider whether, even if there had been errors, some other form of sanction or response by the court was appropriate, as opposed to discharging the order. His underlying complaint was that the judge adopted a process akin to marking the appellant's exam paper, seeming to alight on any slip, no matter how trivial.

130. I do not accept these criticisms. The judge was properly concerned with the many non-disclosures that had been revealed, some of which were admitted by the claimant. He plainly had regard to the materiality of those non-disclosures generally: see paragraph 7 above, and his reference to these errors being "key points" at [74]. Furthermore, he expressly referred to the potential causative effect of some of the failures: see for example [81] (in respect of the BVI litigation), and [102] (in respect of the delay/timing point). Having found that there had been material non-disclosures, he considered whether or not the order should be renewed. At [120] he expressly stated that it should not. For these reasons, I consider that the judge had regard to the applicable principles.

131. I take the point that there are times when this part of the judgment reads like the rigorous marking of a poor examination paper. But that was, at least in part, a function of the unsatisfactory way in which the matter had been presented to him. He was faced with a blizzard of allegations of non-disclosure, and he did his best to consider

those which he thought were the most significant. Moreover, the judge gave an *ex tempore* judgment on 15 December 2023, so that, even with a certain amount of 'tidying up' afterwards, it was never going to be as fluent as a reserved judgment. Given the perceived urgency, the judge is to be commended for dealing with the matter there and then.

132. In my view, the only remaining question is whether the judge was entitled to find that particular non-disclosures were material and justified the discharge of the order. Since he made no error of principle, the only issue can be whether, in reaching his conclusions, the judge took into account matters he should not have taken into account; or failed to take into account matters he should have taken into account; or whether the ultimate result was outside the wide ambit of his evaluative exercise. In my view, this issue should be addressed by reference to the most significant of the non-disclosures.

The Matters Relied on by the Judge

a) The Presentation of the Position in the BVI

133. The judge criticised the appellant for the way in which the position in the BVI litigation was explained to Lavender J. The relevant paragraphs of the judgment are [80]-[81], [115] and [118(7)]. In particular, the judge was critical of the way in which it was said that, although some adverse findings were made against the appellant at an interim stage in the BVI, they were "in effect" reversed by the Court of Appeal. The judge said that that was not the case and that this was "absolutely central to the explanation of what was going on in the overall picture, and the Scottish litigation".

134. I agree with the judge: indeed, for the reasons set out below, I consider that he would have been entitled to go further than he did, and discharge (and not renew) the order on this basis alone. In order to explain that conclusion, it is necessary to set out the position in some detail.

135. In the BVI, VdHI had sought a freezing order against the appellant. They had to demonstrate a good arguable case that the settlement in the BVI was a sham, procured by fraud on the part of the claimant. That issue was considered by Jack J in a judgment dated 4 October, and corrected under the slip rule on 19 October 2021. Jack J concluded that there was a clear case of fraud. Amongst other paragraphs of his judgment on this topic were these particular references:

(a) [24] where the judge said that it could be seen from the transcripts of the meetings in Dubai which led to the settlement that they "were not in truth any arm's length negotiation….";

(b) [29] where the judge said that at those meetings, "far from seeking, on behalf of Mex Securities, to contest or reduce the claim which had been filed against it, Mr Smith was instead seeking to justify a pre-conceived figure to be paid to Mex Clearing…";

(c) [33] where the judge said of the claimant's desire for anonymity in the BVI that their explanation "of the need for secrecy cannot sensibly be accepted";

(d) [36] where the judge described the claimant's indemnity to Mr Smith, promising to indemnify him against any claims arising out of his approving the Tomlin order as "an extraordinary document…if the compromise about to be embodied in the Tomlin order was a *bona fide* settlement";

(e) [66] where the judge said of the claimant's lengthy justification of the Dubai settlement recorded in the BVI Tomlin order that "none of this stands much analysis";

(f) [71] where the judge analysed the list of claims which constituted the settlement sum and pointed out that "the argument based on unjust enrichment falls away"; and

(g) [75] where he described the original BVI proceedings which led to the disputed settlement as "clearly collusive. The sole purpose of commencing the action was so that it could be settled on terms already agreed".

136. Subsequently, the claimant sought to persuade Jack J to recuse himself on the grounds of apparent bias. He refused, and the matter went to the Eastern Caribbean Court of Appeal. In a judgment dated 21 February 2023, the Court of Appeal allowed that appeal. The appeal related to a number of judgments by Jack J: the only specific element of the decision in respect of the freezing order that was the subject of the Court of Appeal's decision was his description of the claimant's fraud as "clearly collusive". The Court of Appeal said at [50] that this wording suggested "even in the slightest, a hint of partiality".

137. However the Court of Appeal also considered, in a separate judgment dated the same day whether, as a matter of substance, Jack J had been wrong to reach the conclusion that he did. At [83] they concluded that he had been right to find a good arguable case:

> "Pulling the strands together, I am satisfied on the facts in this case and the current state of the law that the Noteholders had a good arguable case when VDHI applied for the WFO based on evidence before Jack J at the Stage 1 hearing and the undertakings offered by VDHI. Further, that VDHI had standing to bring these claims in its own right and on behalf of the Noteholders, a situation that was reinforced by the grant of the representation order on 21st July 2021. Finally, at least some of the claims asserted by VDHI in the claim form and statement of claim can result in a judgment for the payment of specific sums of money and therefore qualify as money claims for the purpose of applying for a freezing injunction. There is no basis to interfere with Jack J's finding that VDHI has shown a good arguable case of fraud. This takes me to the risk of dissipation."

138. That remains the position in the BVI. In my view, that was possibly the most important background fact in this case. In Scotland, the claimant is alleging an unlawful means conspiracy to undo/undermine a settlement in the BVI which, in the view of the Eastern Caribbean Court of Appeal, was arguably itself a fraud. That fact should plainly have been disclosed to Lavender J. It was not. On one view, as explored below, it was deliberately concealed from him by the claimant in its evidence.

139. The only reference to this important part of the background is in the affidavit of Mr Yahya Taher at paragraph 90:

> "90. During the BVI Litigation, Jack J made adverse findings against MBFX and Naser in a judgement dated 4 October 2011 (p.p 727 to 789 of MEXl). However, MBFX made a successful application, supported by an affidavit of Naser (p.p 790 to 815 of MEXl), to the Court of Appeal in the BVI to recuse Jack J, on the basis of apparent bias by Jack J against MBFX and Naser Taher. The recusal Judgment of the Court of Appeal can be seen at (p.p 870 to 891 of MEXl)."

140. The emphasis was therefore wholly on the recusal of Jack J, and Mr Taher went so far as to exhibit the Court of Appeal judgment which recused him. No mention was made of the Court of Appeal judgment, handed down the very same day, which upheld Jack J's substantive finding that there was a good arguable case that the settlement was a fraud. That judgment was not referred to, let alone exhibited. No explanation has been given for why the Court of Appeal judgment recusing Jack J was exhibited, but the judgment which upheld his conclusions was not. In my view, there must be a strong inference that that was a particular and therefore deliberate omission.

141. Paragraph 16 of the skeleton argument relied on by the claimant before Lavender J was properly based on the evidence of Mr Yahya Taher:

> "16. Full and frank disclosure: adverse findings against MGWL and Mr Naser Taher were made, at an interim stage, in a judgment of Jack J in the BVI **(p.727 of MEX1)**. However, that judgment itself led to Jack J being recused by the Eastern Caribbean Court of Appeal, on the basis of apparent bias against MGWL and Mr Naser Taser. While MGWL will prepare to address the Court further on this topic if required, its primary submission is that these interlocutory adverse comments do not have any material impact on the question of whether MGWL would comply with its cross undertaking in damages if required to do so in future."

In this way, doubtless unwittingly, the claimant's skeleton argument did not set out the true position.

142. When the matter arose during the hearing before Lavender J, leading counsel referred to the judgment recusing Jack J, and went on to say that the "adverse findings were reversed" by the Court of Appeal. That may well have been counsel's instructions, and it is in many ways the obvious inference to be drawn from the limited material that had been presented in evidence. But, unknown to leading counsel and the judge, that statement was entirely wrong. The adverse findings were not reversed; in fact, they were upheld.

143. Allied to this omission were the transcripts of some of the critical meetings in Dubai. It was these transcripts which were the principal reason for Jack J's trenchant views as to the *bona fide* nature of the settlement. So they were disclosed in the BVI proceedings. In addition, these transcripts were disclosed by the claimant in earlier proceedings before Bryan J in 2021, to injunct a claim brought against the claimant in Luxembourg. The claimant relied on these transcripts for a specific purpose: see [55] and [69] of the judgment at [2021] EWHC 1038 (Comm). It is therefore very odd (to

say the least of it) that the claimant chose not to disclose the transcripts to Lavender J. Mr Kalfon may have put it too high when he said that the claimant disclosed documents when it suited their case, and not when it did not, but I am again struck by the absence of any explanation for this omission.

144. Indeed, no excuse has been offered for any of these failures. The closest that Mr Grant came was to say that, since Lavender J knew that there was a freezing order in place in the BVI against the claimant, he would have known that VdHI had established a good arguable case. But without a proper explanation to Lavender J, that conclusion simply does not follow. Mr Grant's suggestion that Lavender J should have worked it all out for himself only serves to highlight the central importance of a party seeking *ex parte* relief to explain matters to the judge, not leave it to him or her to draw any inferences. It is an inadequate answer to the consequences of the claimant's evasions and, in one instance at least, a wholly incorrect statement of the true position.

145. In my view, the true position in the BVI litigation was of central importance to the hearing before Lavender J and the judge. First, many of the issues subsequently debated before the judge, and before the Scottish Court (and before this court), have been and continue to be the subject of lengthy hearings and debate in the BVI. It would be absurd if the results of all that costly litigation were ignored or glossed over simply because one party or the other does not like the result. That is redolent of forum-shopping.

146. Secondly, the claim in Scotland is based upon an allegation that there was an unlawful means conspiracy to set aside the BVI settlement, which settlement (unbeknownst to Lavender J) had been found arguably to be a collusive sham. I agree with Mr Kalfon that it is a necessary part of the Scottish proceedings that the settlement was entered into in good faith. Lavender J should have been told that there was a judgment which said it arguably was not: in my view, that information may well have led him to refuse to make the order. At the very least, he may have concluded that both sides were as bad as each other and that it was not in the interests of justice to make an *ex parte* order in favour of one over the other.

147. In consequence, I consider that the judge was entitled to conclude that there was a serious failure to provide full and frank disclosure in respect of the true position in the BVI and that, moreover, it was so important that the freezing order should be discharged and should not be renewed.

b) Timing/Delay

148. The second point of substance raised by the HK defendants and upheld by the judge was the misrepresentation about the timing/urgency of the application: see in particular [99]–[100] and [118(1)]. Indeed, this topic appeared to be something that the claimant properly recognised as a potential issue from the outset, because the skeleton argument before Lavender J said at [88] that the respondent "may wish to submit that an injunction should not be granted because MGWL could have sought relief sooner." It then sought to deflect any criticism by referring to the contents of Mr Yahya Taher's affidavit and the later "reassessment" of the events of December 2020 (particularly sections I, K, P and R of that affidavit).

149. On analysis, those sections of the affidavit were not a clear explanation for the timing of the application. Even if Lavender J had looked at the affidavit in detail (and it is 60 pages long), he would not have found any explanation for why the application had not been made over a year before. On the contrary, those sections of Mr Taher's affidavit to which reference was made indicate that, by the middle of 2022, the claimant – on its own case – had more than enough information to bring the proceedings in Scotland and therefore, by extension, to make the application to Lavender J.

150. As is always the case with any judge being asked to grant an *ex parte* order, Lavender J was properly concerned about the timing and urgency of the application. At the hearing before him, leading counsel had said on behalf of the claimant that "we say we have done what we can as quickly as we can". In this context, Lavender J properly asked about the K2 report (which had investigated the dealings of the respondents and the other defendants in the Scottish proceedings), and upon which Mr Taher had relied in his affidavit. Lavender J expressly assumed that that report "was fairly important in getting us to today". Looking at the K2 report which had been disclosed to him, he noted that "K2 was retained in August [2023]. The report is dated this week. No doubt there were drafts." In other words, he was exploring whether there had been a delay between August 2023 and October 2023. In answer to the point about drafts, leading counsel agreed and said "they may have been engaged earlier".

151. As the claimant anticipated, the HK defendants took the point before the return day that there had been a failure to disclose the proper sequence of events to Lavender J, and that he had been wholly misled about the timing of the application. Ms Wright, the claimant's general counsel, produced a lengthy affidavit for the hearing before the judge, dated 4 December 2023. She dealt with the delay at [47]-[52]. She suggested that the question of dates was resolved at the hearing before Lavender J and said, at [50], that the key point about timing was that the risk of dissipation was created by the orders of the Scottish Courts.

152. In his judgment, the judge was troubled by the fact that Lavender J may have been misled as to the timing/urgency of the *ex parte* application. In particular, he noted that the appellant was relying on the K2 report, but that Lavender J had been misled as to when K2 were retained and what information they produced and when. His various criticisms of the K2 report are at [95], [100], [102], [105], and [109]. His concerns are best encapsulated at [100]:

> "100. The K2 report and its timing are therefore critical. Lavender J was told that the instruction to K2 was effectively in August 2023. That was fundamentally untrue and completely misleading. The K2 report was prepared originally, and in substantially the same form as the final version, in March 2022, if not earlier. In other words, over 18 months before the *ex parte* hearing. The draft K2 reports were included in the *ex parte* hearing bundle, but without the cover pages that showed the dates on which they were produced. The defendants say that was deliberate and intended to hide the true date. I do not need to make a decision on that and in the interest of time do not do so."

153. In my view, the judge was entitled to conclude that there had been material non-disclosure of the sequence of events behind, and the timing of, the *ex parte* application, specifically by reference to the critical K2 report. There are a number of reasons for that.

154. First, the judge was told at the hearing that K2 was retained in August 2023. That was simply incorrect. In fact, K2 had been engaged at least 18 months earlier.

155. Secondly, the judge was not told that there were numerous reports from K2 dealing with different aspects of the make-up and conduct of the HK and other defendants, dating back to March 2022. I counted five between March and 5th August 2022. By the time of the August 2022 report, Mr Kalfon demonstrated that most of the information later set out in the October 2023 K2 report had already been obtained and reported on by K2. That was not disputed at the appeal hearing.

156. Thirdly, the earlier reports from K2 refer to their other reports: they were not drafts, but different reports dealing with particular topics (although there was clearly some overlap). They always referred to their earlier reports on the first inside page of any subsequent report. But the K2 report of October 2023 that was relied on before Lavender J was the first which made no reference at all to any of the earlier reports. No explanation for that has been provided.

157. Finally, instead of referring to other reports, K2 themselves said, bafflingly, that they had been retained in August 2023. That plainly misled Lavender J, as the transcript demonstrates.

158. The non-disclosure of what K2 had told the appellant, and when, was critical to the timing/delay point. This was because the vast bulk of the relevant points in the K2 report before Lavender J can be found in the earlier draft reports. I therefore conclude that, by no later than early August 2022, the appellant was in possession of the vast majority of the significant pieces of information which underpin their claims in the Scottish proceedings. That means that this was a case where, on the face of it, the appellant had sat on its hands for well over a year, before commencing the Scottish proceedings and therefore launching the application for an *ex parte* freezing order.

159. That delay was material. Judges dealing with *ex parte* orders always want to know why the application is being made when it is and, if there has been delay, how and why that delay occurred. That is because, if X says that there is a risk of dissipation on the part of Y, the fact that X has spent 18 months doing nothing about Y, even when X was in possession of all the relevant information, may well lead the judge to refuse to make the order.

160. The answer to all this, Mr Grant said, was that the timing of the application was simply a function of the Scottish proceedings. In saying that, he echoed paragraph 50 of Ms Wright's statement. Indeed, in his oral submissions in reply, Mr Grant went so far as to say that, because the English proceedings were ancillary to the Scottish proceedings, it was not for the English court even to question the timing of the application, or the timing of the commencement of the Scottish proceedings.

161. I disagree with that. If, as Mr Grant continually argued, the English courts' jurisdiction to order a worldwide freezing order was somehow ancillary to the

Scottish courts, then the delay in commencing the primary proceedings in Scotland was plainly a matter for the English courts to consider. Judging from the questions and answers, that was plainly the view of Lavender J and leading counsel at the hearing in October 2023. But, as Mr Kalfon pointed out, there was and remains no explanation for why the proceedings in Scotland were not issued until 15 months or so after the claimant was in possession of all, or almost all, the relevant information. Neither Mr Yahya Taher's affidavit, nor Ms Wright's, come close to explaining how and why, although the claimant was in possession of all the relevant facts from K2 no later than early August 2022, they delayed in commencing the Scottish proceedings until October 2023.

162. Accordingly, for these reasons, I consider that the judge was entitled to conclude that there had been a failure to give full and frank disclosure of the claimant's delay in utilising the information in the K2 reports. Again I consider that that was a highly material omission which threw into grave doubt whether such an order should be made at all. The non-disclosure again justified the judge's decision to refuse to renew the order.

163. For completeness, I should also deal with another point about the K2 report. The judge was critical of the presentation of this report to Lavender J, saying at [95] that:

> "The K2 report was prepared to discover things that the parties it was investigating may have done improperly. It was not created for the purpose of creating an objective assessment of the situation of the defendants. That, however, is precisely what the advisors in this litigation to the claimant should have presented to Lavender J."

164. I respectfully disagree with that observation. It was plain that the K2 report had been obtained by the claimant. It was therefore an expert's report commissioned for and on behalf of the claimant. It was not a report ordered by a court or some third party tribunal. Lavender J plainly knew that, and there was never any suggestion to the contrary. The judge's criticisms therefore of that aspect of the K2 report were therefore misplaced.

c) Parties to and Multiplicity of Proceedings

165. At [114] of his judgment, the judge noted that Mr Yahya Taher's affidavit said expressly that the HK defendants were not parties to the BVI litigation. He pointed out that, as Mr Taher well knew, that was wrong and that they were parties in the BVI. Although the judge does not draw it out, I consider that this was important for a number of reasons, and it draws together the two failures I have already discussed, namely the misrepresentations and omissions in respect of the position in the BVI litigation, and the delay in making the application. The analysis is set out below.

166. Because the HK defendants were parties to the counterclaim in the BVI, the claimant could have sought a freezing order against them in those proceedings. There is no dispute that the BVI regularly exercises that jurisdiction. But no such order was sought, despite the fact that the claimant had made them parties 18 months ago. There are two inferences to be drawn from that.

167. First, if the claimant had been concerned about the dissipation of assets by the HK defendants, it could and would have sought a freezing injunction in the BVI 18 months ago. That suggests that the risk was not as great as was claimed. Secondly, the decision not to seek such an order, and to do so in England instead, means that Mr Gollits and VdH AG are being required to deal with these claims in three separate jurisdictions: the BVI, Scotland and now England. That is a relevant consideration under paragraph 7(v) of *Tugushev*. It gives rise to a real risk of oppression.

168. Accordingly, I consider that there was more to Mr Taher's erroneous statement than simply a failure to recall that the HK defendants were parties to the BVI litigation. If the full information had been provided to Lavender J, he would have asked (as any judge would have asked): why not seek a freezing order in the BVI? I am not persuaded that Mr Grant's answer, namely that there were different causes of action there is, on analysis, a proper answer at all. Whatever the causes of action, both sides' claims come back to the settlement agreement and whether or not it was made in good faith. That is the issue before the courts in the BVI. It strongly suggests that – if appropriate at all - a freezing order should have been sought there.

169. Just pausing there, I consider that these three findings by the judge as to the claimant's failure to give full and frank disclosure – in respect of the BVI litigation, the parties to it, and the timing/delay point - were the most material failures. The judge did not omit to take into account any relevant material and did not take into account anything that was irrelevant when he listed them as the first and last points in his summary at [118] (paragraph 124 above). His conclusion was not so unreasonable or perverse that it should not be upheld: on the contrary, I consider that many judges would have reached precisely the same conclusion.

170. Accordingly, although I go on to consider briefly the other findings of non-disclosure, I should make plain that they are not material to my decision. The only other point I consider material is raised in the Respondent's Notice, and is addressed at paragraphs 184-188 below.

d) The €7m Inducement

171. The judge was plainly concerned that Lavender J had been confused about the two sums of around €7m that were in play in the evidence: see [85] – [89] of his judgment. He made two points: that there were two different sums of €7 million and that the inducement paid to CSM had been invested in assets.

> "89 In summary, at no point is Lavender J told that there are two sums of €7,000,000. He is not told that one such sum is frozen under a BVI court order. He is not clearly told that the other € 7,000,000 has been invested in genuine assets."

172. In my view, if there was any confusion, then respectfully I think it was in the mind of the judge. These two figures had always been different sums: the circa €7m left in the account of Mex Securities, and the circa €7m paid to CSM which the appellant says was an inducement. These two figures were separately explained in the affidavit of Yahya Taher at paragraphs 45.13 and 130 respectively. Although at one point in the hearing before Lavender J, leading counsel appeared to confuse them, the matter was clarified immediately after the short adjournment. Counsel also explained how the

€7m paid to CSM was broken down, saying, by reference to paragraph 130 of Mr Taher's affidavit:

> "And you see their reference to 22 April 2021, where there are calls and discussions taking place, and then: "Moreover, in this email VDH attached a portfolio summary showing that ..." 3.6 and then 3.4 million in an 18-month period or in a 18-month bond were invested. That is the money which we say by inference gives rise to the suggestion of bribe. The reference there within the affidavit to pages 519-524 in fact is probably better to be amended to 526…That's where the figure of $7 million comes from, my Lord, and it's that money which, by inference had no good reason to be going to CSM."

173. For those reasons, therefore, I consider that paragraphs [85]-[89] of the judgment were erroneous. The two figures were always different sums. What mattered most for the purposes of the freezing order was the circa €7m paid to CSM and a full explanation of that was given in the affidavit and orally by leading counsel to Lavender J. There can have been no confusion. There was certainly no material non-disclosure.

e) Conflation

174. One of the repeated criticisms that the judge makes is the appellant's conflation of the HK defendants (together or separately), and VdHI: see [75], [82]-[84], [90]-[91], [108], [111], and [116]. The judge referred to "the continual and systematic conflating of, in particular, the fourth, ninth and tenth defendants".

175. In my view, there are two difficulties with this. The first is that there was (as there often is in these sorts of cases) a genuine uncertainty about where the boundaries precisely lay between Mr Gollits, as an individual, and as a director or shareholder of VDHI and VDH AG. The appellant was not going to know precisely where those boundaries were and it was therefore unfair to criticise it if errors were made. Secondly, and in any event, the precise location of those boundaries is a matter of dispute in this litigation. The interconnections between these parties (and others such as the Scottish defendants) lie at the heart of the disputes. In accordance with [7(viii)] of *Tugushev*, the judge should not have ventured into disputed matters in finding a failure to give full and frank disclosure.

f) The Presentation of The Appellant

176. At paragraphs [76]-[79], and again at [94], the judge was critical of the failure to explain to Lavender J that MultiBank were on the FCA watch list and that Mr Naser Taher had been the subject of a committal order for contempt of court. He said at [79] that, in consequence, Lavender J should not have been told that MultiBank has "a blameless reputation in the industry".

177. I agree that, in the circumstances, it was probably an error to describe MultiBank as "blameless". But the true position is not so very different. MultiBank do not trade in the UK so are not subject to the FCA regime. There is an explanation for its appearance on the watch list in Ms Wright's Affidavit, previously noted above, at [175]. The claimant may very well not have known in October 2023 that it was even on the watchlist. More importantly, whilst it is right that Mr Naser Taher was found to

be in contempt of court, that was 20 years ago. Moreover, he appealed and his appeal was allowed by consent. Accordingly, it seems to me that it would be most unlikely that, if Lavender J had been given this slightly fuller information, it would have made any difference at all to the order that he made.

g) Miscellaneous

178. I deal here with some of the paragraphs in the judge's judgment on disclosure that I have not expressly addressed. At [92]-[93], and again at [112], there is criticism that Lavender J was told that VdHI had been "let go". The judge said that this somehow implied that it was wrongfully "let go" and there was no evidence that the transfer had been at an under-value. I do not agree with the judge's criticism of the phrase "let go", and doubt that the point was of any materiality anyway. In any event, the proof of this pudding might be said to be in the eating: VdHI are now the subject of a form of administration in Luxembourg.

179. At [98] the judge said that it was misleading to say that VdH AG were likely to hold English assets, without going on to say that those assets were held in its capacity as custodian for the underlying investors. Given that VdH AG were expressly an investment manager, I have no doubt that this point was not lost on Lavender J. Thus the presentation was not erroneous, and even if it was, it was not material.

180. At [110] the judge criticises the description of the losses alleged to have been suffered by the claimant in the skeleton argument. He criticised the claimant because the legal challenges that arise in respect of the claims were not set out more fully. I reject that. These are the losses which the claimant claims in these proceedings. Lavender J would have known enough about the history of this matter to know that every item of claim was going to be contested tooth and nail.

181. At [113], the judge criticised the skeleton argument for not setting out the counter arguments as to expediency. Again I disagree. The appellant was obliged to set out the detail of its claims and explain how and why those met the hurdles set out in s.25. It was not obliged to second-guess every detailed point of defence that might be advanced on the return day in relation to those points.

The Matters Raised in the Respondents' Notice

182. As I have indicated, the HK defendants take a further 14 points on full and frank disclosure in its Respondent's Notice. The first point to make, of course, is that, because I have upheld the judge's decision in respect of three important points (as to the current position in the BVI litigation, the parties to that litigation and the possible making of a WFO there, and the timing/delay issue), it is unnecessary to consider these matters at all. Furthermore I consider that the vast bulk of them, namely the points under Ground 4 at (1), (6)-(10) and (12) are immaterial, such that even if they were established as non-disclosures, they had no causative effect. The points at (3)-(5) go to a good arguable case and, for the reasons set out by my Lord, Lord Justice Males, I consider that – primarily because of the *Ladd v Marshall* material - there is a good arguable case, notwithstanding these points. Insofar as the points stress the failure to properly present the position in the BVI litigation, I have already accepted that and found that to be a material non-disclosure.

183. The point at (11), namely whether this was part of a campaign of oppression, is relevant, but only on the limited basis that I have explained at paragraphs 165-168 above. Beyond that, it is best regarded as a contested matter and therefore, in accordance with the principles in *Tugushev*, not a matter that could amount to a failure to make material non-disclosure. The point at (13) about alternative service is a point of peripheral relevance (and some complexity), and did not require to be pointed out to Lavender J. The same is also true of the point at (14): in any event, I consider that, with one exception, the claimant properly explained the main legal issues to Lavender J at the *ex parte* hearing.

184. That leaves the exception, which is the point at (2) of Ground 4 of the Respondent's Notice, namely the claimant's failure to refer Lavender J to the assignment of these claims on 24 June 2022 from the claimant to Multibank (MBFX). This was a point that was raised before the judge but not addressed in his judgment. For the reasons set out below, I consider that this was a material non-disclosure.

185. The deed of assignment, which was signed by both parties and witnessed in Dubai, plainly raised a serious question as to whether, on the day of the *ex parte* hearing before Lavender J, the claimant had a cause of action against the respondents. If the deed was effective, they did not, yet no mention was made at that hearing of the deed or its implications for the claimant's ongoing right to continue litigation against the respondents. I also consider that, in the skeleton argument provided to the judge to explain this omission at paragraphs 80-81, the claimant takes a surprisingly cavalier attitude to this revelation, saying:

> "Whilst the question of locus standi is obviously important, the practical reality is that the claims on which the WFO is based would, on any view, be controlled and funded by MGWL as the ultimate holding company in the MultiBank group."

That may be right, but it ignores the fundamental importance of companies being separate legal entities, and does not address the underlying point that, at the time the order was obtained, the claimant was not entitled to it because it had no cause of action.

186. An equally cavalier line has been taken subsequently. Mr McConnell's affidavit of 1 December 2023 suggested at [14] that, to avoid further difficulties, MultiBank will re-assign the claims back to the claimant. There is no evidence about why the assignment took place in the first place, and no evidence that there has been a re-assignment, despite the passage of time since the point was first raised.

187. I consider that this omission constitutes a failure to comply with the duty of full and frank disclosure. The contents of the deed were clearly material to Lavender J's consideration of the *ex parte* application as per the principles in *Tugushev*. There, Carr J spoke of the importance of making the court "*aware of the issues likely to arise and the possible difficulties in the claim*" - [7(v)]. It is hard to conceive of a more archetypal 'difficulty' for a claimant than whether or not they have a cause of action at all. For that reason, I consider that the deed of assignment and its importance to the *ex parte* application means that it falls well within the "*sensible limits*" which the High Court places on claimants complying with the duty.

188. I accept that this non-disclosure was inadvertent, but as per *Tugushev* at [7(iv)], the duty "*extends to matters of which the applicant would have been aware had reasonable inquiries been made*". It is plain that the deed of assignment was either known to some at the claimant at the time of the hearing, or would at least have been easily identified through minimal inquiry. As such, it would have been neither onerous nor impractical for the claimant to disclose and refer to Lavender J the deed of assignment with MultiBank. For the reasons I have given, their failure to do so constitutes another material non-disclosure which weighs in the balance against them on the present appeal, although it is not as significant as the three that I have already identified from the judge's judgment.

The Further Documentation

189. Finally, I should address the issue of the further documentation allowed in on the basis of the rule in *Ladd v Marshall*. Its primary relevance was as to the issues of good arguable case and risk of dissipation, as explained in the judgment of Lord Justice Males. Indeed, those were the matters identified by Mr Grant in his oral submissions as being affected by that new material, although he did at one point suggest – without elaboration - that they were also relevant to full and frank disclosure. In my view, they were not. They made no difference to the particular points to which I have attached importance above.

190. Mr Grant also suggested that, because Lord Sandison had rejected similar points about non-disclosure in his judgment at [2024] CSOH 51, that should be of significance to this application. I fundamentally disagree with that proposition. First, the non-disclosure points taken in front of Lord Sandison were not the same. Secondly, those were not the points taken by the respondents in these proceedings. Thirdly, the views of another judge in such circumstances can be neither determinative nor persuasive. As Lord Sandison himself said at [45(5)] of his judgment, "decisions made by judges in other jurisdictions in litigation between different parties and dealing with different material can have but very limited weight in forming the decisions of this court, especially in procedural matters…". I respectfully agree. Fourthly, it might be thought that these parties had done sufficient damage to the idea that an *ex parte* freezing order can be obtained swiftly and efficiently, without requiring this court to undertake a laborious textual analysis of another judgment, in another case, in a different jurisdiction, based on different documents and different arguments, advanced by different parties.

191. Moreover, that analysis yields the following points, none of them helpful to the claimant:

(a) Lord Sandison at [44] expressly declined to follow *Tugushev*. It appears from his judgment that, in Scots law, what matters is whether the non-disclosure is "deliberate or reckless" which is, at least potentially, a much higher test than in England.

(b) Lord Sandison addresses some issues as to the BVI litigation at [45(5)]. But he does not address the matters that I have covered in paragraphs 133-147 above, presumably because they were not raised before him.

(c) As to the issue of the K2 reports, at [45(6)], Lord Sandison could not recall the K2 report and therefore ascribed no significance to it at all. By contrast, Lavender J himself referred to it and the judge thought it of particular importance.

192. Accordingly, whether approached as a generality or as a matter of specifics, I do not consider that the judgment of Lord Sandison makes any difference to the conclusions that I have reached as to material non-disclosure.

193. Finally, I have considered whether it is inconsistent to conclude that, on the one hand, the new documentation which we have allowed in under the rule in *Ladd v Marshall*, and which is of significance in respect of the issues as to both good arguable case and risk of dissipation, is inconsistent with the conclusion that the *ex parte* order should not be renewed. I do not think that it is. There are three reasons for that.

194. First, it is important to consider the issue of full and frank disclosure by reference to what was before Lavender J and whether or not, on the return day, the judge was entitled to conclude that there had been a material failure to give full and frank disclosure. I have upheld the judge on three important points and identified a fourth. In those circumstances, as of 15 December 2023, the order was properly discharged and not renewed. The new documentation does not ameliorate the claimant's failure to give proper disclosure 9 months ago.

195. Secondly, it would be wrong, and contrary to public policy, for this court to encourage parties to make repeated attempts to obtain and hang on to orders of this kind in circumstances where the party seeking the *ex parte* order has materially failed to give full and frank disclosure. Such a party should not be encouraged to pursue claims to the Court of Appeal (or even beyond) on the basis that something might turn up in the interim which may improve their case on the merits, and therefore somehow obscure or reduce the significance of their original failure to give full and frank disclosure. Speaking for myself, I would deprecate any such result.

196. Thirdly, the decision to grant a WFO is ultimately a matter of discretion. The matters that I have identified in this judgment justify the conclusion that, as a matter of discretion, the order should not be renewed.

Summary

197. For the reasons that I have given, I consider that the judge was entitled to find three material failures to give full and frank disclosure (the adverse findings in the BVI, the parties to the BVI litigation and the potential WFO that might have been obtained there, and the timing/delay point), and that there was also a fourth, possibly of less weight but still material (the failure to disclose the assignment). These were sufficient to justify the judge's decision to discharge the order (and not to renew it) on 15 December 2023. The further documentation does not alter that conclusion.

SIR JULIAN FLAUX C:

198. I agree with the judgments of both Lord Justice Males and Lord Justice Coulson.