

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2023/0013

BETWEEN:

[1] JULIAN SVIRSKY
[2] DENIS DONIN

Appellants

and

ARMAN OYEKENOV

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Robert Levy
The Hon. Mr. Dexter Theodore

Chief Justice [Ag.]
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Robert Nader and Mr. Ben Giblin for the Appellants
Ms. Lisa Walmisley, Mr. Tim Wright and Ms. Sara Malik for the Respondent

2024: May 21;
July 26.

Interlocutory appeal – Freezing order - Insufficiency of the evidence – Cryptocurrency - Striking out - Overriding objective - Whether the judge erred by rejecting the appellants' explanation in the absence of expert evidence adduced by the respondent as to the appellants' ability to provide the information sought in the context of what is a highly technical area – Whether the judge's order was not an appropriate order given the procedural history and pending appeals – Whether there was a more appropriate relief available to the Court - Whether the sanction of striking out without any form of judicial determination was inconsistent with the overriding objective

On 17th October 2023, the appellants, Messrs. Svirsky and Donin, filed a notice of interlocutory appeal against the Order of the judge in the court below dated 11th July 2023 (the "July 2023 Order"). The appellants were previously granted leave to appeal the July 2023 Order by Ellis JA by an Order dated 26th September 2023.

Paragraph 1 of the July 2023 Order provided that:

“The second and third defendants shall comply with paragraph 21 of the Freezing Injunction, and within 48 hours of service of this order provide and confirm to the Claimant’s solicitors

- a. 1.1 the name of the exchange (or exchanges if more than one) at which the Bitcoin is held;
- b. the name of the exchange (or exchanges if more than one) at which the Ethereum is held;
- c. The number and current value of rewards that have accrued to the staked Ethereum;
- d. the name of the exchange (or exchanges if more than one) at which any Ethereum rewards are held;
- e. the blockchain address (or addresses if more than one) of the Etheruem (the 42-character hexadecimal address).”

Paragraph 21 of the Freezing Order made on 23rd April 2021, more than two years earlier (the “2021 Freezing Order”) provided that unless the appellants relied upon the privilege against self-incrimination then they:

“...must within 48 hours of receiving notice of this Order, and to the best of their ability, inform the Applicant’s solicitors of the current location of the transferred Bitcoin and Ethereum, whether in their own name or not and whether solely or jointly held, giving the value, location, and names and physical addresses of any natural person or company holding the aforementioned Bitcoin and Ethereum.”

The July 2023 Order provided, in paragraph 2, that unless the appellants comply with paragraph 1, (which compliance had to be within 48 hours of service on them), then their amended defence would be struck out and judgment would be entered for the respondent, Mr. Oyekenov, who would be awarded the relief set out in para 2.1 of the July 2023 Order, which would have amounted to the substantive relief sought in the proceedings.

The appellants submitted three grounds of appeal challenging the learned judge’s order. The first ground of appeal was headed ‘Insufficiency of the evidence/Insufficiency of any breach made out on the evidence’. Under this ground, the appellants asserted that in seeking to meet the respondent’s application, the appellants had presented the court with evidence as to the limitations on their ability to give information in respect of cryptocurrency that they averred they no longer had control of. They also emphasised that it was clearly wrong for the court to conclude as to the veracity of the explanation provided by the appellants, on the basis of legal practitioners’ affidavits and the views of the receiver, but in the absence of expert evidence adduced by the respondent as to the appellants’ ability to provide the information sought in the context of what is a highly technical area. The appellants stated that they themselves are well versed in the workings of cryptocurrencies and gave detailed explanations as to the limits of what they could supply, which evidence was not properly rebutted by the respondent’s evidence. The appellants further argued that even if the court considered that there had been a breach of the disclosure obligation in the original order, such breach was a single breach as to the level of effort made in supplying information and was insufficiently serious to require the court to make the July 2023 Order, in particular, given the sanction provided

in the same, and given that any breach did not have the effect of impeding the merits-based determination of the claim. Therefore, they submitted that the judge erred in making the July 2023 Order, in the exercise of her discretion, even if a breach were made out.

The second ground of appeal was that the July 2023 Order was not an appropriate order given the procedural history and pending appeals. The appellants argued that the court could not properly have made the July 2023 Order, based only on what is described as relatively short and conjectural written evidence, in a context in which the appellants' disclosure obligation, together with such findings as had been made in respect of alleged asset dissipation, were open questions and, in particular, where the Receivership Order was at that time subject to an appeal. The appellants stated that the continuation of the 2021 Freezing Order was, at the time the grounds were drafted, subject to several undetermined appeals. Lastly, under ground 2, the appellants stated that the July 2023 Order was inappropriately made in circumstances where the respondent had not moved to progress the case beyond case management over the course of some two years, in particular, given the object that the Civil Procedure Rules 2000 ("CPR") 26.4 serves.

The third ground of appeal was that more appropriate relief was available to the court and that the sanction of striking out (and the grant of the substantive relief in the claim, without any form of judicial determination, let alone consideration of its underlying merits) were inconsistent with the overriding objective.

Held: allowing the appeal under ground 1, dismissing grounds 2 and 3 of the appeal. and ordering that the respondent should pay the appellants one third of their costs of the appeal, such costs to be assessed by the court below, if not agreed within 21 days, that:

1. Where matters of a highly technical nature are set out in evidence, rebutting such evidence requires equally technical evidence. When faced with difficult (or potentially difficult) technical issues, a party should present the court with material from an appropriately experienced/knowledgeable person to explain why the evidence to which it replies is, on balance, incorrect or incredible. What may seem highly unlikely in relation to matters that are commonplace and within a judge's usual experience may easily be dealt with as a matter of judicial common sense; the more extraordinary an explanation for a given state of affairs, the less likely that may be. However, where a court is facing highly technical issues with which it is not familiar. then there is a greater need for compelling evidence from a person appropriately experienced or qualified to explain why a given explanation does not hold water.
2. The world of cryptocurrency is somewhat novel; some judges may have a better understanding of it than others; and there cannot be a bright-line rule that in all cases concerning it there needs to be expert evidence. The need for such evidence will be case specific. Such evidence may be admissible on technical issues which are outside the court's knowledge or experience. It is not for this Court to second guess whether or not the learned judge had sufficient knowledge of relevant matters such that it was inappropriate for him to proceed in the absence of expert evidence. However, having read all the materials the Court was invited to read, it cannot be said that there was any compelling evidence from a person who has established sufficient technical experience

such that the learned judge could have been satisfied that the explanations proffered by the appellants were, on balance, to be rejected. Consequently, there was not sufficient material before this Court to enable any reasonable tribunal to conclude that the appellants had not complied with their disclosure obligation to the best of their ability.

3. Disclosure provisions are crucial aspects of orders which are to be complied with to the letter, and serious consequences can be expected for a failure to comply. However, where a freezing order contains a disclosure provision that relates to a relatively novel type of property or asset, the means of compliance has to be crystal clear and, if a technical argument is asserted by way of explanation as to why compliance is not possible, then such explanation has to be discounted by appropriate evidence. There was nothing in the materials that discounts that evidence.

JUDGMENT

- [1] **LEVY JA [AG.]:** By their notice of interlocutory appeal filed on 17th October 2023, the appellants, Messrs. Svirsky and Donin (who are two of the three defendants in these proceedings), appealed the Order of the learned judge dated 11th July 2023 (the “July 2023 Order”). Paragraph 1 of that Order provided:

“The second and third defendants shall comply with paragraph 21 of the Freezing Injunction, and within 48 hours of service of this order provide and confirm to the Claimant’s solicitors

- (a) 1.1 the name of the exchange (or exchanges if more than one) at which the Bitcoin is held;
- (b) the name of the exchange (or exchanges if more than one) at which the Ethereum is held;
- (c) The number and current value of rewards that have accrued to the staked Ethereum;
- (d) the name of the exchange (or exchanges if more than one) at which any Ethereum rewards are held;
- (e) the blockchain address (or addresses if more than one) of the Etheruem (the 42-character hexadecimal address).”

- [2] The July 2023 Order provided, in paragraph 2, that unless the appellants comply with paragraph 1, (and I emphasise that compliance had to be within 48 hours of service on them), then their amended defence would be struck out and judgment would be entered for the claimant, Mr. Oyekenov, who would be

awarded the relief set out in para 2.1 of the July 2023 Order which, we were told, amounted to the substantive relief sought in the proceedings.

- [3] The Freezing Order referred to in the extract at paragraph 1 above was an order made on 23rd April 2021, more than two years earlier (the “2021 Freezing Order”). Paragraph 21 of that Order provided that unless the appellants relied upon the privilege against self-incrimination then they:

“...must within 48 hours of receiving notice of this Order and to the best of their ability inform the Applicant's solicitors of the current location of the transferred Bitcoin and Ethereum, whether in their own name or not and whether solely or jointly held, giving the value, location, and names and physical addresses of any natural person or company holding the aforementioned Bitcoin and Ethereum.”

- [4] The appellants were granted leave to appeal the July 2023 Order by Ellis JA by an order dated 26th September 2023.

- [5] Pausing here, I note that in paragraphs 54 to 56 of the judgment¹ of Ventose JA [Ag.] (with which Ellis JA and Farara JA [Ag.] agreed), in these very proceedings, the Court, with reference to paragraph 16 of the Receivership Order in these proceedings (as to which, see below) that contained a similar information provision obligation as the one set out in paragraph 1 above, observed:

“(i) Paragraph 16 of the Receivership Order does not contain on its face a specified date by which the breach by the appellants of paragraph 21 of the Freezing Order is to be remedied. Paragraph 21 of the Freezing Order states that the respondent must within 48 hours of receiving notice of the Freezing Order and to the best of their ability provide the requested information to the respondent's solicitors. Paragraph 21 of the Freezing Order, however, has a specified date by which compliance was required of the appellants. A literal interpretation of paragraph 16 of the Receivership Order suggests that the appellants were required to provide the information within a timeframe that was impossible because 48 hours of receiving notice of the Freezing Order had long since expired. I agree with the appellants that while the court has a discretion as to whether to make an unless order, the procedural requirements for making an unless order, for example, the requirement to specify the time for compliance, is one of those requirements that is not part of the discretion that the court may exercise.

¹ BVIHCMAP2022/0064 (delivered 12th February 2024, unreported).

- (ii) I do not agree with the respondent's submission that a combined reading of paragraph 16 of the Receivership Order and paragraph 21 of the Freezing Order by implication provides 48 hours from service of the Receivership Order for the appellants to remedy the breach by providing the information identified at paragraphs 16.1 to 16.5 of the Receivership Order. Paragraph 16 of the Receivership Order requires compliance with paragraph 21 of the Freezing Order, which itself contains a requirement for the appellants first to provide certain information within a specific period. Paragraph 16 of the Receivership Order also contains another requirement for the appellants also to provide the information identified at paragraphs 16.1 to 16.5 of the Receivership Order. I do not see how the reference to paragraph 21 of the Freezing Order in paragraph 16 of the Receivership Order by implication requires the provision of the information identified at paragraphs 16.1 to 16.5 of the Receivership Order within 48 hours of service of the Receivership Order. That implication requires the reader to suspend logic and make an assumption that paragraph 16 of the Receivership Order could not have meant a time period that had already expired. The actual wording of paragraph 21 of the Freezing Order to which reference is made in paragraph 16 of the Receivership Order does not provide that clarity that is necessary when the specified date is ascertained by reference to some other document or order.
- (iii) In my view, the Unless Order fails to comply with the CPR 26.4(5) in that it does not contain a requirement that the appellants remedy their noncompliance with paragraph 21 of the Freezing Order by a specified date. The Unless Order seemingly requires the appellants to perform an act that was impossible because the time specified in paragraph 21 of the Freezing Order had already lapsed. Even if one can read into paragraph 16 of the Receivership Order a requirement to comply with the 48-hour period as stated in paragraph 21 of the Freezing Order from receiving notice of the Receivership Order, this would not cure the failure to adhere to the requirement in CPR 26.4(5) for the "unless order" to require the party in default to remedy the default by a specified date. In my view, the reference in paragraph 16 of the Receivership Order to paragraph 21 of the Freezing Order would not also satisfy the requirement that any such specified date should be reasonably ascertainable if contained in any other document or order."

In the premises, it occurs to me that the Order set out in paragraph 1 above suffers from the same vice as the provision that was considered by the Court of Appeal in the aforementioned appeal. This point was not urged upon us at the appeal, and I say no more about it.

- [6] Before dealing with the grounds of appeal, having just touched upon the 2021 Freezing Order I should say that I find the language of that Order odd in so far as it required the appellants to give details of 'the current location of the transferred' cryptocurrency. For my part, I do not fully understand what was meant by the 'location' of those assets. The word 'location' tends to suggest a physical place, yet it is unclear to me whether cryptocurrency, which is a digital currency whereby transactions are verified, and records maintained by a decentralised system using codes and keys, may be amenable to being kept in a 'location' as that word is commonly understood.
- [7] The confusion is compounded by the second use of the word 'location' in the extract above, viz. 'the value, location, and names and physical addresses of any natural person or company holding the aforementioned Bitcoin and Ethereum'. If compliance with this limb of the provision required giving a 'physical address' of any person holding the cryptocurrency, then the word 'location' is, presumably, superfluous.
- [8] In answer to questioning by the Court, Ms. Lisa Walmisley for the respondent suggested that the term 'location' as used in the phrase 'current location of the transferred Bitcoin...' was actually some form of shorthand which, for all intents and purposes meant 'all the information capable of identifying the cryptocurrency in question'; (I am paraphrasing Ms. Walmisley's submission). However, with the greatest respect to Ms. Walmisley, that does not seem to me to be a credible response. If that is what the court was ordering in the 2021 Freezing Order then other words would have been very obviously more apt to explain that.
- [9] It is trite, as canvassed at the hearing, that freezing injunctions, which, like the 2021 Freezing Order, contain penal notices with potentially very serious consequences for non-compliance, must be absolutely clear so that the person served with it knows, in precise detail, exactly what must be done in order to comply. Using shorthand expressions, whether or not the person served with it may understand those expressions one way or another, is not good practice, and could result in protracted arguments about the extent of the obligation

thereby imposed when no such argument would be possible if the language had been clear and precise.

- [10] This is not to say that I accept that the 2021 Freezing Injunction was using the term 'location' as a form of shorthand. It is, however, to say that I find that term confusing in the context of a freezing order of this nature.
- [11] I also note that the 2021 Freezing Order required compliance by the appellants 'to the best of their ability'. That expression is commonly used in a variety of court orders, including in standard forms of information provision in injunctions in the UK. However, it occurs to me that a 'best ability' obligation, when scrutinised in the context of compliance, necessarily involves a degree of ambiguity, and that an argument concerning breach of such a provision will entail a consideration of the obligor's means and ability to comply.
- [12] The return date of the 2021 Freezing Order was 10th November 2021. Without delving into the details of various events between its original grant and the anticipated return date, the injunction was extended to 10th December 2021. On 9th December 2021, the injunction was varied (in a manner not relevant for present purposes), and on 24th December 2021, it was extended until the final determination of another application to be made by the respondent (which, despite the passage of time, has not yet been heard).
- [13] For the sake of completeness, I need to mention the Receivership Order made by the learned judge on 6th October 2022 (the "Receivership Order"). That order was made in view of alleged dissipation by the appellants of the assets of the corporate defendant to these proceedings. In making that order, the judge noted that 'the terms of an injunction appear not to have been complied with, both in terms of actual dissipation and also disclosure of assets or persistent non-disclosure of assets...'.
- [14] The recitals to the Receivership Order refer to the 2021 Freezing Order, and specifically the provision of information requirement in paragraph 21 thereof. It recites the appellants' failure to provide that information. Thus, it appears that

the Receivership Order was made as a result of non-compliance with paragraph 21 of the 2021 Freezing Injunction – a provision that troubled me and my brethren as we explained in the course of oral submissions.

[15] Paragraph 16 of the Receivership Order contained a disclosure obligation in substantially the same terms as the provision in the July 2023 Order. The Receivership Order also contained an unless order in substantially the same terms as the July 2023 Order.

[16] By a judgment of this Court handed down on 12th February 2024, the Receivership Order (and an ‘unless’ provision therein) was set aside because the appellants had not received seven days’ notice of the application for the appointment of the Receiver as required by the **Civil Procedure Rules 2000 (“CPR”)**² and that the proceeding thereby resulted in a serious injustice to the appellants. It appears from this Court’s judgment that there was no debate at the appeal as to whether the appellants were given seven days’ notice; rather, it appears from the judgment, that the issue was whether the lack of notice was the respondent’s fault or the court’s. I note that at the hearing in July 2023, whilst the appeal of the Receivership Order was pending (that appeal having apparently been filed on 28th October 2022), counsel for the respondent explained to the judge that ‘this application, without any prejudice to any of the arguments in the appeal, seeks to regularise that position by applying for a new unless order giving the adequate amount of notice’. In other words, that application was made because of apparent procedural defects in the previous unless order. Paragraph 4.7 of Ms. Malik’s affidavit in support of the July 2023 Order made precisely the same point.

[17] In relation to this I should emphasise that it is incumbent on litigants to comply with the CPR. A failure to do so is wasteful of litigants’ time and money; it is also wasteful of the court’s time and resources and can result in unnecessary appeals. The making of applications to ‘regularise’ any perceived failing in

² The Civil Procedure Rules 2000 has now been amended by the Revised Civil Procedure Rules (Revised Edition 2023).

previous applications/orders that are currently under appeal, and which might not survive appeal, is far from good practice (particularly where the original applicant opposes the appeal). For completeness, I should add that my decision on the merits of this appeal is not influenced at all by the fact that the July 2023 Order was essentially a belt and braces exercise in case the Receivership appeal succeeded.

The Notice of Appeal

- [18] Turning to the Notice of Appeal, in paragraph 2 it challenges the learned judge's findings, to the extent that he made any (which, I interject he obviously did as otherwise he would not have made the July 2023 Order), that the appellants had not complied with their disclosure obligation in the 2021 Freezing Order. It asserts that to the extent that such findings were made, then the making of the Order was inconsistent with the overriding objective.
- [19] There are three grounds of appeal. The first is headed 'Insufficiency of the evidence/Insufficiency of any breach made out on the evidence'. This is pithily explained in the notice by asserting that this was not a case in which the appellants had, outright, not complied with the disclosure obligation in the Original Order (and the Receivership Order); rather, the respondent, by his lawyers and by the receiver, suggested that insufficient particularity had been supplied and/or that the account given by the appellants as to their limited ability to provide information was untrue (in a context in which the appellants were required to comply with their disclosure obligation 'to the best of their ability'). The appellants go on to say that in seeking to meet the respondent's application, the appellants had presented the court with evidence as to the limitations on their ability to give information in respect of cryptocurrency that they averred they no longer had control of.
- [20] From this, the appellants assert that it was clearly wrong for the court to reach a conclusion as to the veracity of the explanation provided by the appellants, on the basis of legal practitioners' affidavits, and the views of the receiver, but in the absence of expert evidence adduced by the respondent as to the appellants' ability to provide the information sought in the context of what is a highly

technical area. The appellants say that they themselves are well versed in the workings of cryptocurrencies and gave detailed explanations as to the limits of what they could supply, which evidence was not properly rebutted by the respondent's evidence.

[21] The appellants say that to the extent that the July 2023 Order was grounded in part on an averment that assets had been dissipated by the appellants, there was no coherent evidence to demonstrate the same, in particular in the context of the explanations given by the appellants (and notwithstanding the making of the Receivership Order), and in any event any such alleged dissipation was unconnected to the provision of information that is the subject of the Order.

[22] This Court is therefore invited to find that it was obviously wrong for the judge to make an order in the form of the July 2023 Order against that background and to the extent that he did so, he was clearly wrong in finding that the appellants had not complied with their disclosure obligation to the best of their ability.

[23] The concluding argument under Ground 1 is that even if the court considered that there had been a breach of the disclosure obligation in the original Order, such breach was a single breach as to the level of effort made in supplying information and was insufficiently serious to require the court to make the Order, in particular given the sanction provided in the same and given that any breach did not have the effect of impeding the merits-based determination of the claim (being the situation that CPR 26.4 is designed to address). The court therefore erred in making the Order, in the exercise of its discretion, even if a breach were made out.

[24] The second ground of appeal is that the July 2023 Order was not an appropriate order given the procedural history and pending appeals. That is explained by saying that the Court could not properly have made the Order, based only on what is described as relatively short and conjectural written evidence, in a context in which the appellants' disclosure obligation, together with such findings as had been made in respect of alleged asset dissipation, were open questions and, in particular, where the Receivership Order was at that time, subject to an

appeal. I note the Receivership Order was extant when the July 2023 Order was made and therefore required compliance. The fact that subsequently, this Court held that it should not have been made in the manner that it was did not obviate the need for compliance with it.

[25] But returning to ground 2 of the appeal, the appellants say that the continuation of the 2021 Freezing Order was, at the time the grounds were drafted, subject to several undetermined appeals; they add that the judge's refusal to recuse himself below was also the subject of an appeal (which has been considered but not yet determined). This is not a compelling ground of appeal. The fact that an order may be subject to appeal is not a basis for non-compliance, and neither is an outstanding recusal appeal. If that were not the case then litigation could be stalled by reason of such applications.

[26] Lastly under ground 2, the appellants say that the July 2023 Order was inappropriately made in circumstances where the respondent had not moved to progress the case beyond case management over the course of some two years, in particular given the object that CPR 26.4 serves. This was the subject of debate at the hearing of the appeal. I noted during the hearing of the appeal with some surprise that despite these proceedings having been commenced in April 2021, with the respondent having obtained a freezing order in April 2021, which order has been continued/varied on a number of occasions, there has still not been a case management conference and no trial date has yet been set. Whilst I appreciate that justice can grind slowly in a very busy jurisdiction and where the court's resources are thinly spread, I am concerned at the apparent, and I put it no higher than that, lack of progress. That is all the more concerning given that the first stage in these proceedings appears to have been the obtaining of the ex parte 2021 Freezing Order. Given that substantive relief was sought in the proceedings beyond the obtaining of a freezing order it is incumbent on the respondent to progress his proceedings – he started them. The interlocutory wranglings over freezing orders and receivership orders would not, ordinarily at least, mean that the progress of the substantive proceedings should be delayed.

[27] In her written submissions, Ms. Walmisley says that the:

“suggestion that the Respondent has not progressed the case expeditiously is, unsurprisingly, not particularised or rooted in reality. The Respondent wants these proceedings to be concluded as swiftly as possible, in line with the overriding objective, so that he can recover the assets he is entitled to without further dissipation.”³

It is not necessary for me to delve into the history of these proceedings or reach any findings on the whys and wherefores of the delay, but I should say that I find that submission surprising in view of the relative antiquity of these proceedings and, apparent lack of procedural progress.

[28] The final ground of appeal was that more appropriate relief was available to the court and that the sanction of striking out (and the grant of the substantive relief in the claim, without any form of judicial determination, let alone consideration of its underlying merits) was inconsistent with the overriding objective.

Discussion

[29] In his oral submissions, Mr. Robert Nader for the appellants, referred to the July 2023 Order as a ‘swingeing order’. Without prejudice to whether or not it should have been made, I was concerned at the very short time for the provision of the information that was a feature of not only this order, but also the 2021 Freezing Order and the Receivership Order. Whether or not that time limit was properly imposed back in 2021, so far as we are aware, there had been no attempts by way of application to the court to enforce compliance between then and the Receivership Order, some 18 or so months later, but yet again that order appears to have imposed, by implication, the 48-hour deadline. It is not expressly stated, but is apparent by reference back to paragraph 21 of the 2021 Freezing order. The July 2023 Order also contained a 48-hour deadline. But, so far as I am aware, there had been no attempt to enforce the information provision in the Receivership Order or its ‘unless’ provision (other than for the respondent to make the application to ‘regularise’ the position).

³ Respondent’s submissions filed 30th November 2023 at para 70.

[30] So, in the round, it seems to me that given the apparent lack of progress in the proceedings, commenced by the respondent more than three years ago, there have been three occasions on which information was sought in an extremely short period of time, and two unless orders, which would result in judgment for the respondent in the event of failure to comply with that provision, whilst all the while the proceedings have matured, but not apparently made the substantive procedural progress that one would reasonably expect. That said, I do not take this into account when considering the merits of the appeal.

[31] We were not told precisely why, given the terms of the provision of information requirements in the Receivership Order, the appellant did not seek a declaration that the proceedings stood struck out by reason of non-compliance therewith. The fact that the parties recognised that there may have been problems with the Receivership Order, whether in terms of the notice given for the hearing of the application or otherwise, did not render that order ineffective. Thus, no valid explanation was given for why an essentially duplicative application was made, apparently leisurely, some nine or so months later. It was not submitted to us that the July 2023 Order was ‘swingeing’ due to the essentially duplicative relief it granted, and I say no more about that.

[32] Returning to Mr. Nader’s submissions, he relied upon the well-known decision in **Novel Blaze Limited (in liquidation) v Chance Talent Management Limited**⁴ concerning the exercise of judicial discretion. He also referred us to the judgment of Ellis J (as she then was) in **Gladys Scatliffe (Widow and intended personal Representative of the Estate of Jacinto Scatliffe) v The BVI Health Services Authority**,⁵ where, with reference to the overriding objective, she observed, at paragraph 30, that:

“Shutting out through a technical breach of the rules will not often be consistent with this because the civil courts are established primarily for deciding cases on their merits, not in rejecting them through procedural default.”

⁴ BVIHMAP2020/0006 (delivered 9th July 2020, unreported).

⁵ BVIHCV2011/0087 (delivered 1st July 2015, unreported).

[33] Ellis J also noted, at paragraph 31, ‘the general reluctance on the part of the courts to impose the draconian sanction of striking out a claim’. She continued:

“It is now established that striking out the whole of a party’s statement of case is to be reserved for the most serious or repeated breaches or defaults. While it is not appropriate to order the striking out of a matter where the court has available alternative and more proportionate sanctions, there are cases where there has been serious default and immediate striking out is appropriate.”

[34] Mr. Nader submitted that the learned judge should have asked himself whether the appellants had failed to give disclosure ‘to the best of their ability’ and also whether the evidence they gave to explain the limitations on their ability to give the information was so obviously untrue that it could, and should, be rejected out of hand based only on affidavit evidence. He also urged on us that the court below should have asked whether, against the background of the overriding objective, if breach was made out, it was nonetheless appropriate to make an unless order whose sanction was striking out the defence, and also whether the breach adversely affected the determination of the claim.

[35] Under ground 1 of the appeal, it was submitted that this was not a case in which the appellants had unambiguously failed to comply; after all, says Mr. Nader, the obligation was only a ‘best ability’ obligation and the appellants had explained their position.

[36] Ms Malik’s evidence in support of the application for the July 2023 Order complains that the previous answer given by Mr. Svirsky, as long ago as 28th April 2021, failed to provide the information required. She said, by reference to a table he had provided, that he had not given evidence of, and I quote ‘assets, balance, value, location and names and physical addresses of any natural person or company holding the currency’. Ms. Malik asserted that Mr. Svirsky’s email of 12th October 2022 also failed to provide the information. In that email he said:

“As we have no control over said assets or know their whereabouts, it is impossible for us to answer question 16 deterministically, outside of the information we provided in JS-2/10.
Currently the following is true:

16.1 We do not know which exchange (or exchanges) the Bitcoin is at and if it is indeed at an exchange.

16.2 We do not know which exchange (or exchanges) the Ethereum is at and if it is indeed at an exchange.

16.3 We do not know the current value of rewards, that have occurred in staked Ethereum.

16.4 We do not know exchange (or exchanges) at which any Ethereum rewards are held if indeed they are at an exchange.

16.5 We believe that you state the Ethereum 42-character hexadecimal blockchain address in your own question 5.3.”

The bundles provided to the Court also contained the fifth witness statement of Mr. Svirsky from 3rd November 2022 which we have read and it deals, amongst other things, with the appellants’ ability to provide information.

- [37] We were referred to the affidavit of Julian Svirsky and Denis Donin in response to Sara Malik’s seventh affidavit of 27th June 2023 which we have read. Paragraph 17 thereof states:

“We repeat, as stated in the Fifth Witness Statement of Julian Svirsky that we are simply unaware of how the cryptocurrencies in question are held at present. This has been responded to repeatedly and was stated to the Receiver in our email to her of 12th October 2022.”

They continue, at paragraph 18:

“As stated in detail in Julian Svirsky’s Fifth Witness Statement and also to the Court in prior proceedings, we have lost access to Ledger devices which are able to enact transactions or lookup the addresses of ETH and BTC. Due to prolonged lack of use of our Ledger devices in keeping with the Court’s Order, they have reset to their initial state. We lost access to backup codes to these wallets which were held in Kyiv, a city which has become a warzone since the commencement of these proceedings.”

- [38] By way of response to this, Mr. Tim Wright (of the respondent’s BVI attorneys) filed an affidavit on 4th July 2023. In that, he said that the appellants’ assertions regarding compliance were disputed, and he referred back to Ms. Malik’s affidavit in support of the application. As to paragraph 18 of the appellants’ statement of 27th June 2023, Mr. Wright said:

“ [18] At paragraph 18, the Second and Third Defendants claim to have lost access to the Ledger devices which are required to enact transactions of the Ethereum and Bitcoin cryptocurrency. It is further asserted that as a result of this prolonged non-use of the Ledger devices, the Second and Third Defendants are

no longer able to enact transactions of the Ethereum and Bitcoin cryptocurrency. It is also said that access to the backup codes to the crypto currency wallets is impossible because they are stored in Kiev, which is now a warzone.

[19] It is Mr. Oyekenov's position that the Second and Third Defendants' explanation for the dissipation of Tensigma's cryptocurrency is all too convenient and is advanced in an attempt to obstruct and obfuscate the truth from the court. Mr. Oyekenov believes that the Second and Third Defendants have dissipated the Ethereum and Bitcoin in breach of the Freezing Injunction. The plausibility of the explanation given at paragraph 18 of the Defendants' Affidavit was considered by Justice Wallbank at the 3 November hearing (emphasis added):

"Now both sides in this dispute accept that these two latest transfers have occurred, although there are different perspectives on it. The perspective of Mr. Oyekenov is that it was Mr. Svirsky and Mr. Donin who are behind these transfers. Their version of events is that, why it's [sic] somebody else have been doing this. They suppose it might be another investor in Tensigma and the business venture who is the beneficial holder of an arbitration award. They suppose that it might be him but they don't know and they venture a narrative which would have somebody going into a property in Kiev, in the Ukraine. And then happening or knowing how to locate somehow or other, a password or passcode would then somehow we'll also be able to access the computer system there, we'll also somehow know how to get into the part of that computer system which dealt with the transfers in question, or **which would all require, presumably, either an enormous amount of luck, intuition, skill or familiarity with how to get into these particular safe spaces where this cryptocurrency was located.** So that's the version of events in relation to the dissipation that is being put forward.

For the record I would state, that I am not entirely satisfied, far from satisfied, in fact, that the Second and Third Defendants' explanation for the missing cryptocurrency is indeed somebody got into an apartment in Kiev and somehow insinuated themselves into a computer system and somehow found the right place in that computer system and somehow then able to take over that system to transfer the assets. That's highly unlikely. It is far more likely that the Second and Third Defendants themselves are the parties who dissipated, but I am making no findings in that regard now."

[39] In that extract from the learned judge's *ex tempore* judgment on 3rd November 2022 (when he dismissed the respondent's application to strike out the Defence and for judgment for the Claimant), the learned judge expressed himself as far from satisfied of certain matters (that related to dissipation, but by necessary implication to other relevant issues, such as knowledge of the exchanges/accounts etc), noting that the appellants' explanations were highly unlikely. However, in the closing words of the extract, he expressly made no findings in that regard. I can understand the learned judge not making findings at that stage; the respondents' fifth witness statement dealt with an array of technical matters that, other things being equal, are outside the knowledge of those not familiar with the workings (if that is the correct word) of cryptocurrency, and the manner in which the currencies in question were held/stored (I apologise for any infelicity in my terminology). I do not know whether any of that is correct in a technical sense. Having read the relevant documents to which our attention was invited, I am far from clear that there was evidence from any person sufficiently experienced to satisfy a court that the evidence was, on balance, untrue, highly implausible, incredible etc.

[40] That is not to say that judges do not routinely reach findings based on written evidence; obviously they do. However, where matters of a highly technical nature are set out in evidence then it seems to me that rebutting such evidence requires equally technical evidence. When faced with difficult (or potentially difficult) technical issues it seems to me that a party should present the court with material from an appropriately experienced/knowledgeable person to explain why the evidence to which it replies is, on balance, incorrect or incredible. What may seem highly unlikely in relation to matters that are commonplace and within a judge's usual experience may easily be dealt with as a matter of judicial common sense; the more extraordinary an explanation for a given state of affairs, the less likely that may be. However, where a court is facing highly technical issues with which it is not familiar then there is a greater need for compelling evidence from a person appropriately experienced or qualified to explain why a given explanation does not hold water.

- [41] At the hearing of the application for the July 2023 Order, the respondent's counsel made four main points. Firstly, that the unless order in the Receivership Order demonstrated that there had been non-compliance. Despite the uncertainties surrounding the Receivership Order, it was an extant order that required compliance. However, in my view, whether the appellants had complied with the Receivership Order was not the correct question. The correct question was whether the appellants had complied with the 2021 Order. That demanded separate and direct consideration.
- [42] Secondly, it was submitted that the court had previously expressed serious reservations about the appellant's explanations in a previous (dismissed) application for a strike out of the defence. That is true. I of course accept that the court does not have to rehear all the historic evidence that has previously been before it on each new application; it can bear in mind findings that it has previously made. But being dissatisfied with evidence is not the appropriate test. The appropriate test is whether there has been a failure to comply. As noted in the extract cited in paragraph 39 above, the court did not make any findings of non-compliance. The learned judge expressly said 'I am making no findings in that regard now'.
- [43] Thirdly, it was submitted that the Receiver's two reports demonstrated insufficient engagement by the appellants with the Receiver, leading the latter to conclude that they had failed to cooperate and failed to provide the information. That is important. A Receiver is an officer of the court and will not lightly make allegations of non-compliance with Court orders. However, as I have said, in my view the appropriate course in such a situation would have been for the Receiver to have applied for appropriate relief for any alleged failure to comply with the order the Receiver obtained.
- [44] Fourthly it was submitted that attempts to preserve assets had failed and the receiver was hamstrung. I repeat my observations in the preceding paragraph.
- [45] On behalf of the respondent, reference was made to the overriding objective. Complaint was made that 'the appellants have however failed to grasp the

substance of the overriding objective, especially in the present case which has involved elongated proceedings and delays'. This is not a terribly compelling point in view of the apparent lack of progress in the proceedings themselves and various complications attendant upon the Receivership Order (as noted above, that Order has been discharged and directions given for it to be determined afresh by a different judge at first instance).

[46] Under the first ground of appeal, insufficiency of evidence, it was submitted that the learned judge was entitled to find that the appellants had not provided, or used their best efforts to provide, the information to which they had access. Reference was made to **Ng Min Hong v Soemarli Lie and Success Overseas Finance Limited**.⁶ I note the observations of Ellis JA in that decision; however, I also note that in paragraphs 127 and 128 she noted that in that case (which concerned post trial relief) the judge had previously conducted a three-week trial and that his conclusions in the post-trial judgment would have been, in part, informed by that experience. The same cannot be said to apply here.

[47] Further, the respondent submits that when making the July 2023 Order the judge explicitly set out the precise steps the appellants were required to take. I find that a difficult submission, particularly so given that the obligation was couched in terms of the 'best of the [Appellants'] ability' (by reference to the 2021 Freezing Order). In addition, I repeat my concerns about the language of the 2021 Freezing Order, which was not, in my view, a model of clarity and which left clear scope for argument. In Ms. Walmisley's written submissions she spoke about the appellants' 'failure to provide basic information such as the location of the crypto exchanges in which the assets were held'. Given my real doubts as to the meaning of the word 'location', that submission strikes me as wrong as a matter of principle. I should note that having read the judgment, the learned judge did not condescend to detail his reasons for finding there had been non-compliance with the order. To the extent that the appellants' responses on location are relevant, one is unable to discern the judge's precise findings on that. The judge's judgment is commendably brief, and the passage in which he

⁶ BVIHMAP2022/0068 (delivered 28th July 2023, unreported) at paras 126 to-128.

found breach of the 2021 Freezing Order occupies a very small part thereof. He explained that he had been taken through the various responses to the earlier Order, and said:

“I am satisfied that they have not complied with the information requirement, disclosure requirements in circumstances where I’m also satisfied that it was within their purview, that is their knowledge or power, to disclose the information. I am not satisfied that they have disclosed information to the best of their ability.”

He continued by noting, in general ‘the inconsistencies in their evidence’, and commenting (again in general, outline, terms) apparent non-cooperation with the Receiver.

[48] Ms. Walmisley’s submissions focused at some length on the appellants’ failure to cooperate with, and challenges to, the Receiver. It seems to me that such issues are peripheral and should have been peripheral in context. The July 2023 Order referenced back to the 2021 Freezing Order; it required compliance with that earlier order. As Mr. Nader submitted, the enquiry was not focused on the question of failure to comply with that earlier order to the best of their abilities. The transcript below suggests that the burden of the application related to the appellants’ dealings with the Receiver, and in his judgment, the learned judge repeatedly refers to non-cooperation with the Receiver.

[49] Then the respondent submitted that the assessment of proper disclosure did not require expert evidence. I find this a difficult issue. The world of cryptocurrency is somewhat novel; some judges may have a better understanding of it than others, and there cannot be a bright-line rule that in all cases concerning it, there needs to be expert evidence. The need for such evidence will be case specific. Such evidence may be admissible on technical issues which are outside the court’s knowledge or experience. It is not for this Court to second guess whether or not the learned judge had sufficient knowledge of relevant matters such that it was inappropriate for him to proceed in the absence of expert evidence. However, having read all the materials the Court was invited to read, I am unable to see any compelling evidence from a person who has established sufficient technical experience such that the learned judge could have been satisfied that the explanations proffered by the appellants were, on balance, to be rejected.

[50] Mr. Nader submitted, by reference to the **Scatliffe** decision, that the striking out provision is appropriate where (and presumably, per Mr. Nader, only where) there are repeated breaches of court orders and rules in circumstances ‘that impede the Court from determining the matter on the merits’. I would not circumscribe the circumstances in which it might be appropriate to make such an order, but I do accept, as Ellis J did in that case, that the ‘shutting out through a technical breach of the rules will not often be consistent with [the overriding objective] because the civil courts are established for deciding cases on their merits...’. However, as Ellis J also noted (at paragraph 31) there is a reluctance to strike cases out and it is to be reserved for the most serious or repeated of breaches and where the Court has alternative and more proportionate sanctions.

[51] Under the second ground of appeal, Mr. Nader urged that due to the various appeals of earlier orders, the July 2023 Order should not have been made. Like Ms. Walmisley, I am not persuaded by that argument. An order requires strict compliance. Even if there are doubts about an earlier order, it remains in place and effective unless stayed or successfully appealed. This applies not only to earlier injunctive provisions, but also to an application that was on foot when the July 2023 Order was made, for the judge’s recusal. In short, applications for interlocutory relief could very easily be scuppered or, at the very least rendered far more time consuming, if, as would often be the case, the impact of actual or proposed appeals or recusal applications fell to be considered before the substantive relief.

[52] As to the final ground of appeal, I am not impressed by Mr. Nader’s argument that it would have been more appropriate to make ‘a form of debarring order requiring the respondent to make out a *prima facie* case on the evidence before judgment was entered in the event of non-compliance’. There has to be finality in litigation, and the authority he relied upon, **Oscar Trustee Limited (as trustee of the Chloe Trust) v MBS Software Solutions Limited**⁷ is factually

⁷ BVIHCMAP2021/0024 (delivered 8th February 2023, unreported).

very far removed from the instant case. That case concerned the stay of a motion for conditional leave to appeal to His Majesty in Council for failure to comply with costs orders. By contrast, other things being equal, this is a case where an extremely serious order was made, the breach whereof would normally require condign consequences. Ordering a further hearing at which the respondent would have to make out a *prima facie* case strikes me as costly and an inappropriate use of the court's resources.

- [53] I agree with Ms. Walmisley, who submits, by reference to **Zuckerman on Civil Procedure: Principles of Practice**⁸ at paragraph 11.15 that:

“Today the court must not sit back and observe repeated defaults before responding. To have to wait until the reasonable period for performance has elapsed and then give the litigant a further period to comply on pain of a sanction would effectively compel the court to allow litigants substantially more than reasonable time for compliance.”

Disposition

- [54] For the reasons set out above, I would allow the appeal under ground 1. In my view, there was not sufficient material before the Court to enable any reasonable tribunal to conclude that the appellants had not complied with their disclosure to the best of their ability. I fully appreciate that disclosure provisions are crucial aspects of orders and that they are to be complied with to the letter. I fully acknowledge that serious consequences can be expected for a failure to comply. However, where a freezing order contains a disclosure provision that relates to a relatively novel type of property or asset, the means of compliance has to be crystal clear, and, if a technical argument is asserted by way of explanation as to why compliance is not possible, then such explanation has to be discounted by appropriate evidence. There is nothing in the materials that I have seen that discounts that evidence.

- [55] I would dismiss grounds 2 and 3 of the appeal.

- [56] I would also order that the respondent should pay the appellants one third of their costs of the appeal, such costs to be assessed by the court below, if not

⁸Chap.11, 4th edn, Sweet & Maxwell, 2021.

agreed within 21 days. I propose this order because the appellants have only succeeded on one of their three grounds of appeal; I did not find any real merit in the two grounds which failed, and it was reasonable for the respondent to oppose the ground upon which the appellants have ultimately succeeded.

I concur.
Mario Michel
Chief Justice [Ag.]

I concur.
Dexter Theodore
Justice of Appeal [Ag.]

By the Court

Chief Registrar