

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHC(COM) 2020/0135

BETWEEN:

CURI INVESTMENTS LTD.

Respondent/Claimant

and

**MR. FARID CURI (by his Litigation Friend Ms.
NADIA INTAKLI GIFFONI)**

Respondent/First Defendant

FCURI HOLDINGS LTD.

Applicant/Second Defendant

Appearances:

Mr. Paul Dennis K.C. and Mrs. Asha Johnson Willins for the Applicant/ Second Defendant.

Mr. Faisal Saifee, Mr. André McKenzie, Mr. Christopher Pease and Ms. Aurelia Matonis for the Respondent/ Claimant.

2025: November 12;
2026: February 9.

JUDGMENT

[1] Mangatal J (Ag.): This is my ruling on the Variation Application filed by the Second Defendant FCuri Holdings Limited (“FHL”) on 5th June 2025 which came on for hearing on 12th November 2025.

- [2] By this Variation Application FHL seeks to vary an *ex parte* injunction granted on 2nd September 2020.
- [3] On 7th November 2025, just a few days before this hearing, and 6 months after FHL had filed its Variation Application, Curi Investments Limited the Claimant (“**CIL**”) filed what it has referred to as its Adjournment/Expanded Relief Application. For ease of reference, I will refer to this application as “CIL’s Application”. CIL’s Application sought, amongst other matters, an adjournment of the Variation Application, amendments to the claim, and an application to appoint a receiver over FHL pending trial or further order. CIL’s Application was vehemently opposed by FHL.
- [4] I considered it appropriate to hear the adjournment aspect of CIL’s Application as the first order of business. After hearing both sides, I refused the adjournment, indicating that the other aspects of CIL’s Application, which seeks to launch extensive amendments, would have to be dealt with at another time. This was partially because the time fixed for hearing on 12th November was 3 hours, and that was set in respect of the Variation Application only. Further, as FHL’s leading Counsel Mr. Dennis pointed out, FHL had not come prepared to deal with, and had very little advance notice of CIL’s Application. I gave my reasons for refusing the adjournment in an oral ruling and I then proceeded to deal with FHL’s Variation Application.

The Injunction

- [5] On 2nd September 2020, on the *ex parte* application of CIL, Jack J (Ag.) granted a proprietary and freezing injunction (“**the Injunction**”) against the First Defendant Farid Curi (who subsequently passed away) (“**Mr. Curi /the Deceased**” as required by the context) and FHL (“together “**the Respondents**”).

[6] The Injunction restrained Mr. Curi from (sub-paragraph 4 (a) of the Order), amongst other matters:

- (i) in any way disposing of, dealing with or diminishing the value of his shares in FHL (“**the FCuri Shares**”) up to the value of US\$26,086,577;
- (ii) registering or causing to be registered any change in the legal or beneficial ownership of the FCuri Shares in any way, including but not limited to any disposal, transfer, sale, exchange, charge, pledge, contribution, or other encumbrance (collectively any *Dealing*);
- (iii) declaring any dividend or distribution on behalf of FHL or causing any dividend payments or distribution to be made;
- (iv) causing the appointment of any receiver, liquidator or engaging in any merger, consolidation, arrangement or similar in respect of FHL;
- (v) exercising any voting rights in respect of the FCuri Shares;
- ..”

[7] By sub-paragraphs 5(a) and (b) of the Order, FHL was, amongst other matters, restrained as follows:

- (a) from disposing of, dealing with or diminishing the value of the following assets (whether inside or outside the Virgin Islands) up to the value of US \$26,086,577;
 - (i) the investments in stocks and bonds set out at Schedule A of the Order; and
 - (ii) any money in any account in the name of the First (sic) FHL up to the sum of US \$5,826,919.
- (b) Acting by and/or on the instructions of its directors, including Mr. Curi, his officers and or agents *mutatis mutandis* from:
 - (i) in any way dealing with the FCuri Shares or any Relevant Assets of FHL up to the value of US\$26,086,577;
 - (ii) cancelling, repurchasing, forfeiting, redeeming, and/or reissue of the FCuri Shares, and/or instructing the same or similar to be done;
 - (iii) registering or causing to be registered any change in the legal or beneficial ownership of Mr. Curi’s shares in FHL in any way, including

but not limited to any disposal, transfer, sale, exchange, charge, pledge, contribution, or other encumbrance;

(iv) issuing any new shares or entering into any oral or written agreements, commitments or the like for the issue of new shares in addition to those shares already in issue or which are recorded on FHL's register of members (the **Register**) as at the date of this Order; and

(v) in any way recognizing or causing to be recognized in the Register any purported Dealing in respect of any part of the legal or beneficial ownership of the Shares.

[8] The Variation Application seeks that the Injunction be varied to:

- (a) permit FHL to comply with its contractual obligations by allowing it to redeem its Class A Shares and update its Register of Members accordingly;
- (b) remove the cap placed on the company for spending money in relation to legal advice and representation.
- (c) permit FHL to make payments in the ordinary and regular course of its business, including to (i) permit FHL to discharge all outstanding property taxes and maintenance fees which are due and payable by Curi Holdings LLC and (ii) permit FHL to repay Suse Maria Gomes Camacho ("**Ms. Camacho**") the sum of US \$106,382.64 in respect of debts of Curi Holdings LLC which she discharged on its behalf, pending the making of the Variation Application;
- (d) permit FHL to (1) transfer funds between its accounts, and (2) reinvest the funds maintained within its account with Julius Baer with another financial institution, provided that once transferred it deals with those assets in accordance with the terms of the Injunction.

Background

- [9] This matter has a long history which it would not be practical to detail here in its entirety. However, some background relevant to the Variation Application is set out below.
- [10] CIL is a company incorporated on 24th July 2007 in the British Virgin Islands (“**the BVI**”) with company number 1420892. Its registered office and registered agent was at the material times, Amicorp BVI Limited, Marcy Building, 2nd Floor, P.O. Box 2416, Road Town, Tortola.
- [11] Mr. Curi was, prior to his death, and at all material times, the holder of 49,000 Class A shares in CIL. Mr. Curi had 5 children from his first marriage: Beatrice Pontes Savioli, Alfredo Pontes Curi, Rodrigo Pontes Curi, Muriel Amaral Curi, and Marjorie Curi (collectively “**the Children**”).
- [12] FHL is a company incorporated in the BVI on 21st May 2014 with company number 1824910. Its registered office and registered agent is Proservices Limited, Marcy Building, 2nd Floor, P.O. Box 3820, Road Town, Tortola.
- [13] Mr. Curi was at all material times a director and a holder of 1000 Class A Shares in FHL.
- [14] On 26th June 2013 Mr. Curi married Ms. Camacho.
- [15] Both CIL and FHL were incorporated by Mr. Curi as part of his intended estate and inheritance planning. Both companies had similar Memoranda and Articles of Association.
- [16] Clauses 7.1 and 7.2 of the Memorandum of FHL and CIL respectively provided as follows:
- “7.1 Each Class A Share in the company confers upon each Class A Shareholder:*

- (a) The right to one vote at a meeting of the shareholders of the company, or on any resolution of the Shareholders;*
- (b) The right to a pro-rated share in any dividends paid by the company;*
- (c) The right to a pro-rated share in the distribution of the surplus assets of the company in its liquidation.*

7.2 Each Class B Share in the Company confers upon each Class B Shareholder:

- (a) The Class B Shares shall not carry with them the right to vote or receive any dividends declared or distributions paid by the Company and shall not carry the right to participate in a pro-rated share in the distribution of the surplus assets of the company on its liquidation or otherwise, except upon the death or the incapacitation of the sole remaining Class A shareholder. For the purposes of this Memorandum of Association "incapacitation" shall mean that the person is unable to perform the duties of a director of the Company as a result of physical or mental incapacitation as certified by a competent doctor.*
- (b) Upon the death or incapacitation of any Class A Shareholder the Class A Shares held by the said Class A Shareholder shall be immediately redeemed by the Company for the consideration of US\$1.00 without the consent of the deceased shareholder or their personal representative.*
- (c) Upon the death or the incapacitation of the sole remaining Class A Shareholder the rights attaching to Class A Shares shall terminate and the Company shall immediately have the right to compulsory redeem without shareholder consent all of the issued Class A Shares from the sole remaining holder for a total*

consideration of US\$1.00 which will be deemed to be cancelled immediately on redemption and with effect from such date, the Class B Shareholders shall be entitled to one vote per Class B Share and pro-rated rights to dividends and distributions of the Company and the right to a pro-rated share in the distribution of the surplus assets of the Company on its liquidation or otherwise.”

[17] It is CIL's case that Mr. Curi was in ill health from March 2019. This is denied by Ms. Camacho. By August 2020 a dispute arose between the Children and Ms. Camacho as to whether Mr. Curi lacked mental capacity. CIL avers that on 11th April 2022, the Court of Justice of the State of Sao Paulo ratified the expert medical report dated 4th February 2022 that opined that Mr. Curi had been mentally incapacitated since 1st December 2019.

[18] On 2nd September 2020 CIL commenced proceedings by way of claim form against Mr. Curi and FHL in the BVI. The statement of claim was amended in May 2022. CIL is claiming against Mr. Curi for breach of fiduciary duty and unlawful and invalid transfers totaling U.S.\$26,086,557 and against FHL for knowing receipt and dishonest assistance. It seeks relief, including declarations against FHL that it holds investments in stocks and bonds valued at US\$20,241,638, and the sum of US\$5,826,919 in trust for CIL.

[19] It is to be noted that no claim has to date been brought against Ms. Camacho. It is only in its very recently filed application for the adjournment and expanded relief that CIL is seeking to add Ms. Camacho as a Defendant. By CIL's Application it is seeking for the first time, over five years after the original claim was filed, to make a claim against Ms. Camacho.

Procedural Background

[20] On 2nd September 2020 when the *ex parte* application for the Injunction was granted, a return date for hearing the Injunction application had been fixed for 30th

September 2020. On 30th September 2020, the Court ordered that the return date hearing and the application for continuation of the Injunction ("**The Continuation Application**") be adjourned to 9th December 2020.

- [21] On 9th December 2020, the firm of Conyers Dill and Pearman ("**Conyers**") had only recently been instructed to represent Ms. Nadia Giffoni ("**Ms. Giffoni**"), (who was Mr. Curi's Court appointed representative in Brazil). Conyers was instructed to represent Ms. Giffoni who was in turn seeking to represent Mr. Curi's interests in the instant proceedings. As a result, the return date and Continuation Application were further adjourned, with the Injunction being continued.
- [22] By order dated 17th March 2021, Ms. Giffoni was appointed to be Mr. Curi's Litigation Friend in these proceedings ("**the First Representative Order**").
- [23] On 9th April 2021, Conyers, acting on behalf of FHL and Ms. Giffoni (as Mr. Curi's Litigation Friend), and Harneys, acting on behalf of CIL, agreed to a variation of the Injunction such that the amount that could be spent on legal advice for each of FHL and Ms. Giffoni (as Mr. Curi's Litigation Friend) was now increased from US\$25,000 to US\$200,000, and FHL and Ms. Giffoni (as Mr. Curi's Litigation Friend) gave certain undertakings at Schedule D to the Order. Paragraphs 13-16, under the heading "**Exceptions to this Order**", and Schedule D provided as follows:

"Exceptions to this Order

13. This Order does not prohibit:

(a) the First Respondent spending US\$200,000.00; and

(b) the Second Respondent from spending US\$200,000;

on legal advice and representation in relation to these proceedings.

14. Before spending any money, the Respondents must tell the Applicant's legal representatives where the money is to come from including the bank

account number, location of the account, name of the bank, and the source of the funding.

15. The Respondents may agree with the Applicant's legal representative that the above spending limits be varied in any other respect, but any agreement must be in writing.
16. If the Applicant refuses to agree an increase to spending limits, the Respondents may apply to the Court ex parte in order to seek approval for an increase in spending limits.

.....

SCHEDULE D

Undertakings given to the Court by the Respondents

- (1) The Respondents will notify the legal representatives for the Applicant within 48 hours of Ms. Nadia Giffoni learning that: i) the balance in any of the bank accounts held by FCuri increases by US\$200,000.00 or more; or ii) the existing overdraft increases or reduces by US\$200,000.00 or more.

....”

- [24] From 29th July 2021 until 28th February 2022, the claim was consensually stayed, whilst CIL was to effect service on Mr. Curi through Conyers.
- [25] An acknowledgement of service was filed by Conyers on behalf of both Mr. Curi and FHL on 10th March 2022. On 26th May 2022, CIL filed an amended claim form and statement of claim, including a new claim for US\$8.4 m which was allegedly held on constructive trust by FHL and which CIL claimed arose from a transfer from CIL to FHL on 12th August 2020. This amended claim also made no claim/did not seek to make any claim against Ms. Camacho.

- [26] On 24th June 2022, Conyers filed an application to strike out the claim on the basis that Beatriz Savioli did not have authority to commence and continue the proceedings.
- [27] On 21st September 2022 Mr. Curi died.
- [28] Following Mr. Curi's death, by letter dated 6th October 2022 the firm of O'Neal Webster ("**O'Neal Webster**") on behalf of Ms. Camacho wrote to Harneys requesting confirmation that CIL, "*accepts that the injunction should be varied, to delete paragraph 5(b) [that restrains FHL from inter alia 'in any way dealing with the FCuri Shares or any Relevant Assets of the Second Respondent up to the value of US\$26,086,577'], failing which we anticipate that we will be instructed to seek appropriate relief from the Court. When doing so, we note that your client appears to have failed to disclose to the Court that our client would be (i) affected by that relief, (ii) the Statement of Claim did not support the grant of such relief and (iii) that the effect of the injunction was to prevent our client from exercising the self-same contractual right which the Class B Shareholders behind your client had themselves exercised, based upon Mr. Curi's incapacity which long preceded his death.*"
- [29] The hearing of the strike out application was vacated.
- [30] On 10th January 2023 Ms. Camacho filed an application to be joined as a party to these proceedings ("**the Joinder and Variation Application**"). Her application had also sought a variation of the Injunction. Included in the relief sought in the Joinder application was an application that, without prejudice to Ms. Camacho's right to make an application to discharge the Injunction, that the Injunction be varied to permit FHL to redeem the Class A Shares of Mr. Curi and to permit FHL to update the Register of Members accordingly. The application had also sought, that as an alternative to Ms. Camacho being added as a Third Defendant, these proceedings be stayed until such time as the Court has heard an application in

separate proceedings (i) to appoint a receiver over the power to redeem the Class A Shares of Mr. Curi in FHL and (ii) the Applicant has been appointed as a director of FHL.

[31] The Joinder and Variation Application further stated, at paragraphs 14 and 15 of the grounds, as follows:

“14. In her own right, the Applicant is a person affected by the Injunction which interferes with the contractual right of the Applicant to require the Second Defendant to redeem the Class A Shares. That injunction supports no cause of action against the Applicant, and is not justified by any claim which the Claimant makes against either of the Defendants.

15. Furthermore, the fact that the Injunction had the effect of inappropriately preventing the Applicant from exercising a right which the Directors of the Claimant had exercised themselves was not drawn to the attention of the Court, in an apparent breach of the Claimant’s duty of full and frank disclosure.”

[32] The hearing of the Joinder and Variation Application came up before me on 9th March 2023. However, by that time Mr. Curi had died and there was not yet any representative of Mr. Curi’s estate. CIL’s Counsel opposed the Joinder and Variation Application and indicated that no order had yet been applied for or made to appoint a representative of Mr. Curi’s estate for the purpose of the proceedings. Having listened to arguments on both sides, I ordered that the Joinder and Variation Application be adjourned, essentially pending an application being made under Rule 21.7(4) of the CPR 2000 (“**the Second Representation Application**”), the Rules then applicable, the CPR 2000 (“**the CPR**”). I ordered that the Second Representation Application was to be filed by 27th April 2023. Orders were also made that any party wishing to file evidence in response to the Joinder and Variation Application was required to do so within 14 days of determination of the

Second Representation Application, with Ms. Camacho to file any evidence within 7 days thereafter.

- [33] CIL filed the Second Representation Application on 27th April 2023.
- [34] On 10th May 2023, on Conyers' application, I granted an order removing Conyers from the record as appearing for Mr. Curi and FHL.
- [35] The Second Representation Application came before me on 26th July 2023 and, as sought by CIL, I appointed Ms. Giffoni to represent Mr. Curi's estate for the purpose of these proceedings ("**the Second Representative Order**"). On 24th August 2023, an extension of time was agreed between Harneys and O'Neal Webster for CIL to file and serve its evidence in response to the Joinder and Variation Application, by 15th September 2023. On 13th October 2023, Ms. Camacho filed evidence in reply in respect of the Joinder and Variation Application.
- [36] However, Ms. Camacho did not pursue the Joinder and Variation Application. It is fair to say that, as argued by CIL, the affidavit of Ms. Camacho, filed in support of the Variation Application, does not address this issue.
- [37] Without notice to CIL (albeit foreshadowed to some extent in the body of the Joinder and Variation Application), Ms. Camacho filed separate proceedings. In these proceedings, filed on 12th November 2023, Ms. Camacho sought an order for the appointment of receivers over the powers in the memorandum and articles of association of FHL to redeem the Class A Shares in Mr. Curi's name. This application came before Wallbank J (Ag) on 30th November 2023. An order was made as sought (**the Receivership Order**"). However, it was expressly acknowledged and recorded in the Receivership Order that FHL remained enjoined by the Injunction from redeeming the Class A Shares.

- [38] Acting pursuant to their (express) powers under the Receivership Order, the Receivers appointed Ms. Camacho as a director of the Applicant on 9th February, 2024.
- [39] On 25th June 2024, O’Neal Webster filed a notice of acting for FHL.
- [40] The Variation Application was filed on 5th June 2025 and fixed for hearing on 12th November 2025.
- [41] On Wednesday 5th November 2025, CIL filed a further affidavit in response to the Variation Application.
- [42] On Friday 7th November 2025, CIL filed its Adjournment and Expanded Relief Application.
- [43] The Court notes, as it did at the hearing, that no Defence has to date been filed on behalf of FHL to the existing claim by CIL.

Grounds of the application and the supporting affidavit

- [44] The Variation Application is supported by the Affidavit of Ms. Camacho filed 5th June 2025.
- [45] Part of the grounds set out in the Variation Application consist of background information. Otherwise, having referred to the Receivership Order at sub-paragraph 11(c) the grounds are essentially set out in sub-paragraph 11(d) and (e), and paragraphs 12-21 as follows:
- “11.....
- (d) Acting pursuant to their (express) powers under the Receivership Order, the Receivers then acted to appoint Mrs. Curi [Ms. Camacho] as a director of the Applicant and did so on 9th February, 2024.

- (e) The Applicant is the sole shareholder of Curi Holdings LLC (“**Curi LLC**”) and the Injunction has prevented the Applicant from making payments in the ordinary course of its business such as servicing the debts of Curi LLC. Such debts include annual property taxes and maintenance fees which are due and payable in respect of property owned by Curi LLC in Miami, Florida in the current sum of \$152,648.36, and the further sum of \$106,383.64, to repay a liability of Curi LLC which was discharged by ...[Mrs. Camacho] on its behalf.
12. Accordingly, until at least 9th February, 2024, the person properly entitled to control the affairs of the Applicant were [sic] unable to do so and have been disabled from doing so as a result of, inter alia, the very injunction which the Claimant obtained.

The Legal Fees Cap

13. The Injunction prohibits the Company from spending more than \$25,000 on legal fees and requires the Company to provide extensive (and intrusive and unnecessary) disclosure of the source of any such payments. That cap (and the disclosure order) were unprincipled and wrong: the cap had (and has) the effect of effectively preventing the Applicant from taking any steps to apply to discharge the injunction and the disclosure was unnecessarily intrusive.

The Power to Redeem

14. The restriction on the Company's ability to redeem its shares in compliance with its contractual obligations was always inappropriate: (1) the Claimant's claim disclosed no cause of action upon which the relief was parasitic,(2) the directors of the Claimant itself had taken advantage of similar provisions within the Articles of Association,(3) it involved a restriction on the Company from complying with its contractual obligations and (4) the Claimant failed, in breach of its

duties of full and frank disclosure, to draw any of that to the attention of the Court.

Julius Baer & Co

15. One further issue arises and likely as a direct consequence of the Court's order, Julius Baer & Co notified the Applicant of the closure of its account and the liquidation of its investments. There is consequently a need to reinvest those funds and transfer the same.

Mr. Curi's Death

16. On 21st September 2022, Mr. Curi died. Consequently, pursuant to Regulation 7.2 of the Company's Memorandum of Association, the Company became obligated to compulsorily redeem Mr. Curi's Class A Shares for US\$1, with the consequence that [Ms. Camacho] would thereupon become the sole shareholder of the Company entitled to vote.
17. Since Mr. Curi was the Company's sole director, the effect of his death and the provisions in the Company's Articles referred to above, was that:
 - (a) There was nobody able to effect the redemption of his Class A Shares.
 - (b) The injunction had the effect of preventing the redemption of his Class A Shares in breach of the contractual bargain within the Articles of Association.
18. Ms. Giffoni no longer had the power to represent the company on behalf of Mr. Curi with the result that the Company, being a defendant in these proceedings, could take no steps to defend itself or to otherwise protect its interest.
19. Moreover, the company is unable to service its debts, or those of its wholly owned subsidiary, Curi LLC, as they fall due because the

injunction restricts it from using its funds. Unless paid, the Applicant risks losing its interest in Curi LLC, or of that interest being devalued.

20. Despite having been appointed with the express power to redeem the Class A Shares of Mr. Curi, the Receivers have been unable to do so as a result of the injunction. They have consented to and support Mrs. Curi's pursuit of this application in the name of the Company.

21. On 6th October, 2022, the Claimant was invited to consent to varying or deleting paragraph (b) of the injunction but they refused to do so. This was a wholly untenable and unreasonable position for them to have taken."

FHL's Arguments

[46] Mr. Dennis K.C. who appeared for FHL submitted that, pursuant to Section 11 of the **BVI Business Companies Act 2004** ("the **BVI BC Act**"), the provisions of section 7.1 and 7.2 of the Memorandum of FHL take effect as a statutory contract between the Company and its Members.

[47] Learned Counsel submitted that it is well settled that the purpose of a freezing injunction is not to prevent a defendant from meeting its ordinary business expenditure. It is intended only to restrain the defendant from engaging in the "improper" dissipation of its assets. For that reason, continues the argument, the practice has developed of including a so-called **Angel Bell** proviso, permitting the defendant to deal with its assets in the ordinary course of its business and to pay its creditors, even if that would render the injunction of no practical value. Reference was here made to **Halifax v Chandler**¹ [at 19]. The Claimant is not, argued learned Counsel, at least not in a non-proprietary case, entitled to obtain an order which forces the Defendant to change its established pattern of commercial dealings: **Avant Petroleum v Gatoil Overseas Inc.**², or in the case of an individual, one's ordinary living expenditure.

¹ [2001] EWCA Civ 1750.

² [1986] 2 Lloyd's Rep.236.

Redemption of the Class A Shares

[48] FHL advances the argument that therefore, where a defendant is subject to a pre-existing obligation, he is obliged to comply with it, and it can be enforced against him, particularly where (as here) it does not affect the value of his assets. Accordingly, the Court will always be astute to protect third parties from the invasion of their legal rights, and it will not usually grant relief where it would have that effect. Reference was made to the decision in **Galaxia Maritime v Mineral Import Export**³. Mr. Dennis seeks to persuade the Court that where an injunction restrains an asset in respect of which a third party has a pre-existing right, then the injunction should usually be varied.

[49] Mr. Dennis went on to point out that there is no claim, and can be no proprietary claim, over Ms. Camacho's entitlement to a redemption of the Class A Shares, triggering her rights in the Class B Shares. The first part of FHL's application is characterized by FHL as therefore being straightforward. Ms. Camacho has a right, and FHL an obligation, to comply with the statutory promise in FHL's Articles. It was further urged that the fact that doing so does not reduce the value of FHL's assets only serves to illustrate that CIL's stance is unreasonable, and that CIL has been attempting to weaponize the injunction to prevent FHL from defending itself in these proceedings.

[50] It is FHL's position that the Injunction cannot even arguably be justified for a number of reasons, including the following:

- (i) As regards the Class A Shares, there can be no risk of dissipation of assets if the Deceased has no continuing interest in the shares; and there can be no improper dissipation if a third party in the position of Ms. Camacho has a legal right to them;
- (ii) The cause of action asserted by CIL also did not support there being any restraint over the right of redemption- still less over Ms. Camacho's right

³ [1982] 1 WLR 539.

to enforce that contract. No claim was (or could be) made to the shares. The only claim was to the assets of FHL, and against the deceased.

(iii) Mr. Dennis points out that the most recent claim by CIL in its arguments is the suggestion that if the Class A Shares were redeemed, Ms. Camacho might deal with them. It was learned Counsel's submission that this is an extraordinary suggestion because:

- (a) Firstly, she would be entitled to since it is her asset and no claim is (yet) made against her;
- (b) Secondly, this amounts to a suggestion that CIL should be allowed to use the injunction improperly: in effect, to prevent her from taking control of her own asset, without an injunction, and without her being protected by any (or any meaningful) cross-undertaking in damages;
- (c) Thirdly, if a claim were made against her then dissipation of the shares could be restrained by injunction. There can be no suggestion that if a Registered Agent was given notice of that injunction, it could be breached because there would be no changes to FHL's share register;
- (d) Fourthly, the suggestion that Ms. Camacho may deal with her assets was not the basis upon which the injunction was obtained, and is in any event a completely improbable suggestion since (1) she has an interest in defending FHL from the claims which CIL makes; (2) it is a family company and there is no proper basis to suggest that she may wish to deal with the shares and (3) her dealings with the shares would in any event be prevented by service of the injunction on the Registered Agent.

[51] FHL argues that the presentation at the *ex parte* hearing was entirely misleading, and inadequate; and proffers the view that had it been pointed out to the Judge that the effect of the order would be to prevent FHL from complying with a

pre-existing legal obligation and, worse, in effect to prevent FHL from defending the litigation at all, it is unthinkable that the Judge would have made it.

[52] Another submission that flowed from FHL's attack on the Injunction (paragraph 66 of the Applicant's skeleton argument "**SKA**") is the way that it claims CIL subsequently took advantage of it, to prevent FHL from mounting an effective defence of these proceedings, which can be seen from the following:

- (i) At the point when the Injunction was obtained, CIL's own case was that the Deceased was incapacitated, which triggered the immediate obligation of FHL to redeem the Class A Share. Yet the Injunction specifically prohibits that.
- (ii) The Order also contained a restriction limiting the amount that FHL could spend on its defence to the sum of U.S.\$25,000.00, which was then increased to \$200,000.00.
- (iii) FHL's ability to direct the litigation was then further curtailed by an Order dated 17th March 2021, when Ms. Giffoni was appointed as Mr. Curi's Litigation Friend in these proceedings by the First Representative Order. The First Representative Order empowered her to: (a) have conduct of the proceedings in Mr. Curi's name and on his behalf and (b) to exercise any power vested in Mr. Curi as director of FHL. Ms. Giffoni then instructed Conyers to act on her behalf, with the power to represent FHL, but it seems that Ms. Giffoni was not provided with the funding necessary to do so, and she had no real interest in doing so in circumstances in which the incapacity of the Deceased terminated his economic interest in FHL.
- (iv) In an exchange of correspondence in October 2022, initiated by O'Neal Webster on behalf of Ms. Camacho, CIL through Harneys refused to consent to Ms. Camacho's joinder to the proceedings, so that she could defend them, and refused to vary the Injunction to facilitate the redemption of the Class A Shares.
- (v) On 10th January 2023 CIL opposed the Joinder and Variation Application.
- (vi) CIL has also opposed FHL's application to lift the legal fees cap.

(vii) Even in response to the Variation Application, CIL has foreshadowed an intention to seek the appointment of Receivers, a transparent device to interfere with Ms. Camacho's ability to defend these proceedings.

The Legal Fees and Angel Bell Proviso

[53] Mr. Dennis suggested that the starting point for the Court is that the standard form of order contains both an Angel Bell proviso, and a provision which permits the payment of reasonable legal fees and expenses. The submission was that where a departure from the standard form is made, it is Counsel's duty to draw the Court's attention to it and explain it. Reference was made to the well-known case on this subject area, **Memory Corporation v Sidhu (No. 1)**⁴.

[54] Mr. Dennis argued that in this case there was no Angel Bell proviso and there should have been. He urged that such a proviso should now be inserted.

Legal Fees

[55] The position that FHL took in relation to legal expenses was that the usual form of order is that the order should permit the payment of "reasonable" fees and expenses. Where, then, exceptionally, a cap in relation to that expenditure is given, that cap must be justified and it must be set by reference to the anticipated costs of the litigation. Learned Counsel referred to the decision in **CRO v REC**⁵ for that proposition and also to support the point that the Claimant is not entitled to disclosure of the amount of the legal expenses. Further, that the Court is not entitled to review the reasonableness of those expenses.

[56] Reference was made to the observations of Ferris J in **Cala Critical SA v Al Borno**, cited at paragraph [12] in **CRO v REC** as follows:

"Prima facie, the defendant ought to be allowed to choose the legal representatives he thinks best qualified to present his case and to pay those legal representatives such charges as may properly be payable as a

⁴ [2000] 1 WLR 1443.

⁵ [2023] Bus LR 868.

matter of contract....It does not, it seems to me, lie in the mouth of a plaintiff to say that the defendant ought to have gone to a cheaper firm of solicitors, or one that would have spent fewer hours on his case, or to have conducted his case in some other way....”

[57] FHL itself put forward the proposition that where a defendant applies to vary a proprietary injunction order which has otherwise properly been made, whether to increase spending restrictions or to permit certain payments, the Court will approach the matter with heightened caution. This is because, unlike in the case of general freezing orders, in the case of a proprietary injunction, the payments may end up being paid out of what are the Claimant’s assets. The Defendant will therefore have to establish, with cogent evidence, that there are no other assets available for that purpose, because if there are such funds, the defendant ought to use those first.

[58] Reference was made to the decision in **Angel Group v Davey**⁶ [at 35], (which was also cited by CIL in its SKA) where, quoting with approval from the English Court of Appeal’s decision in **Frederic Marino v FM Capital Partners Ltd.**,⁷ at para 23, it was held that the following four questions arise:

- (1) Does the claimant have an arguable proprietary claim to the funds in issue?
- (2) If yes, does the defendant have arguable grounds for denying that claim?
- (3) If yes, has the defendant demonstrated that, without release of the funds in issue, he cannot effectively defend the proceedings (or, it may be added, meet his legitimate living expenses)?
- (4) If yes, where does the balance of justice lie as between, on the one hand, refusing to allow the defendant to expend funds which might belong to the Claimant and, on the other hand, refusing to allow the defendant to expend funds which might belong to it?

⁶ [2018] 2 WLUK 47.

⁷ [2016] EWCA Civ 1301.

- [59] Whilst accepting that the above principles apply to applications to vary proprietary freezing injunctions, it was Mr. Dennis' submission that at the same time, what the Claimant cannot do is to mislead the Court at the *ex parte* hearing, obtain an inappropriate order, and then seek to push the evidential burden onto the Defendant by dint of having obtained an inappropriate order in the first place. In those circumstances, the Order should simply be set aside or varied.
- [60] Mr. Dennis claims that CIL has sought to make much of the fact that the Injunction was subsequently varied, to increase the cap to US\$200,000. However, it is asserted that Ms. Camacho does not have visibility over the actions taken by Conyers on behalf of Dr. Giffoni, and the evidence is that the total fees which Conyers incurred are said to have exceeded US\$200,000. Therefore, says Mr. Dennis, there is a pressing need for the cap to be removed or increased.
- [61] FHL also refers to the suggestion by CIL that Ms. Camacho is a wealthy woman who could fund FHL's fees. Learned Counsel gives that suggestion short shrift; saying that they are not her fees to pay, and that she is not liable to pay them. Further, CIL has made reference to an injunction granted in Brazil, which freezes Ms. Camacho's assets. Consequently, asserts learned Counsel, in circumstances where Ms. Camacho is restrained by an injunction in Brazil, there is clearly no route to FHL vindicating its defence of this claim without being able to pay its lawyers to do so. FHL raises the further concern that this position will worsen in the event that the further receivership application is brought by CIL. That application, it was submitted, will need to be defended; and if it succeeded, there would be a need to find assets to pay the costs of the receiver.
- [62] Mr. Dennis rounded out this aspect of his submissions by contending that, although the Variation Application concerns a proprietary injunction, the balance of justice in this case lies in favour of allowing FHL to defend the claim because it is clear that it has no other assets from which it can do so - **Independent Trustee**

Services GP Noble Trustees⁸. Further, that even in a proprietary case, the right to access to justice should prevail and a variation be granted in the event that refusing the variation gives rise to a real risk that the defendant would be left without effective legal representation – **Stanway v Andrews**⁹ [at 16-18].

Ordinary Course of Business Exception

[63] It was submitted that there can be no proper justification for the omission of the standard form of order permitting the defendant to make payments in the ordinary and regular course of its business. It was FHL's position that it is not sufficient to say that FHL is a holding company which does not have an ordinary course of business since this ignores the fact that it will, for example, inherently have fees to pay to its registered agent and to the BVI Financial Services Commission.

[64] It was Mr. Dennis' stance that in fact, the evidential picture goes beyond that as:

- (i) Curi Holdings LLC owns condominium Unit #2701 in the Santa Maria Brickell building in Miami Florida.
- (ii) Since her appointment as a director, Ms. Camacho has received correspondence from the real estate agents threatening to file proceedings against Curi Holdings LLC for payment of the maintenance fees which stood at \$106,382.64 as at 6th August, 2024.
- (iii) Ms. Camacho says that her payment of these fees has avoided the cost of litigation, and the risk of forfeiture of the lease.
- (iv) Additionally, Ms. Camacho's evidence is that Curi Holdings LLC owes the sum of \$152,648.36 in taxes to the State of Florida, U.S.A. If unpaid, Curi LLC is at risk of litigation and FHL is at risk that its assets will ultimately be sold on a distressed basis. In this instance also Ms. Camacho's position is that she should be entitled to cause FHL to make that payment.

⁸ [2009] EWHC 161.

⁹ [2017] EWCH 3734.

- [65] Mr. Dennis argued that CIL's response that these are not payments to meet debts of FHL, but rather those of its subsidiaries, and that Ms. Camacho could make the payment directly, is opportunistic. This he asserts is particularly so when CIL's own case is that Ms. Camacho's assets are the subject of a freezing order in Brazil.
- [66] FHL's position on this issue is that the Injunction should be varied so as to include the standard ordinary and regular course of business exception which should never have been omitted in the first place. Further, that the Injunction should additionally provide that FHL is at liberty to repay to Ms. Camacho the sums she paid to protect Curi Holdings LLC's investments as a result of the Injunction, and to make similar payments in respect of the lease, tax and other such liabilities which are either of Curi Holdings LLC or which FHL might incur in the future.

Julius Baer

- [67] In relation to these funds, Mr. Dennis submitted that the court will not usually regard as a breach of an injunction a transfer from one account of the defendant to another. Reference was made to the classic work of **Gee, on Commercial Injunctions** 7th Edition, at paragraphs 3-013 and 3-014 where the learned authors state as follows:

"3-013. What the injunction means is a matter of interpretation of the order. It appears that although a Mareva Injunction is expressed as restraining 'any dealing with' an asset, the Court will not necessarily interpret this as preventing any conduct of the Defendant which merely results in the same asset, or in the case of a debt the financial proceeds of the debt, being held by the Defendant himself.

3-014. The Defendant is at liberty to pay money into a bank account which is in credit because this is not a disposal or dissipation of the money, but merely the equivalent of the deposit of an asset for safe-keeping.....

....Movement of an asset whilst it remains intact and unaltered and which does not result in the value of the asset being reduced, would not be a breach of the standard form of injunction.”

[68] FHL points out that Julius Baer & Co have closed FHL’s account and liquidated its assets. The consequence is that FHL’s investments are now in cash, and are not the subject of any form of investment. FHL points out that it merely seeks an order permitting it to transfer the funds between its accounts, and reinvest the proceeds from Julius Baer.

[69] During the course of the hearing, Mr. Saifee, who appeared for CIL, indicated that his client was prepared to agree to the funds being paid into a specific named agreed account. Thus, this is a matter that it appears the Court can order by way of variation, with the parties fleshing out the terms in appropriate language in the formal order.

Full and Frank Disclosure

[70] Mr. Dennis referred to a number of cases, and he submitted that not only were CIL guilty of a breach of the duty of full and frank disclosure, but that the breach was deliberate. Learned Counsel referred to the decision of the Eastern Caribbean Supreme Court of Appeal in **Wang v. XYZ**¹⁰ as authority for the proposition that where a breach of the duty of full and frank disclosure is unexplained, then the Court can treat the breach as being deliberate. Further, that CIL has not explained or offered any apology and has “double-downed” on this position.

[71] Reference was made to the SKA presented by CIL ‘s Counsel at the *ex parte* hearing for the Injunction where (at paragraph 38) it was asserted that: “*there is a real likelihood that he [Mr. Curi] could die, or be certified as incapacitated at any*

¹⁰ BVIHMAP 2022/0055.

moment.” FHL argues that this was an odd assertion to make since on CIL’s own case, that event (of incapacitation) had already occurred in 2019.

[72] Learned Counsel argues that there was an almost complete failure to address the consequences of such an occurrence and that what was said to the Court was highly misleading. Reference was made to paragraph 40 of CIL’s SKA where it was asserted that the consequence of a redemption was that one of the Deceased’s main assets would no longer be available. However, Mr. Dennis criticized that assertion as “nonsense” because the Deceased’s main asset (his shares in FHL), had no value upon his incapacity or death, given the terms of the statutory contract within the Articles which required the Company to redeem the share.

[73] Reference was also made to paragraph 89 (k) of the First Affidavit of Ms. Savioli, where she stated that there may be difficulties for Mr Curi and FHL opposing the Proceedings but the only scenario placed before the Court was that *“in the event of Mr. Curi’s incapacitation or death, one of his children may be appointed to represent his interests or deal with his estate and they may have little interest in defending the proceedings.”*

[74] FHL asserts that in saying what she did, Ms. Savioli failed to draw to the Court’s attention the fact that:

- (a) FHL was subject to pre-existing contractual obligations to redeem the Class A Shares upon death or incapacitation;
- (b) the right of redemption had, on CIL’s case, already arisen;
- (c) the Children had held the Class B Shares issued by CIL and had themselves taken advantage of identical provisions. Therefore, there was no good, or any reason, why the same facility should not be available to Ms. Camacho, against whom no claims were asserted;
- (d) the Injunction operated to prevent FHL’s compliance with an obligation to a third party, namely, Ms. Camacho;

(e) since Mr. Curi was the sole director of FHL, the effect of his death and the provisions of FHL's Articles was that there would be nobody to effect the redemption of his Class A Shares, thus rendering FHL rudderless in that there would be no directors, no governing body to carry on its business and no one to direct the registered agent to ensure compliance with the provisions of the BVI BC Act.

[75] It was further argued by FHL that CIL had a continuing duty of full and frank disclosure, and an obligation to return to Court and seek to vary the Injunction if it could not be justified. CIL (and its Legal Practitioners) have done neither.

Abuse of Process

[76] FHL decided to deal frontally with a point which CIL has made in its written submissions regarding abuse of process. It seems convenient for me to just set out FHL's arguments at this juncture. CIL has argued that FHL having consented to the continuation of the Injunction, it is now precluded from bringing the Variation Application. This emerges from the principle that it is an abuse of process to re-litigate matters which have already been decided.

[77] Mr. Dennis KC submits that in England, the CPR Rule 3.1(7) provides that the Court may vary or revoke an order, and that the more modern cases on whether or not it is an abuse of the process of the Court to pursue an argument which was previously available have been decided on applications under that rule. Reference was made to the decision in **Tibbles v SIG**¹¹ as authority for the propositions that the Court's discretion should normally be exercised only where (1) there has been a material change in circumstances; (2) where the facts on the original application had been misstated; and (3) where there has been a manifest mistake on the part of the Judge dealing with the application. Reference was made by Mr. Dennis to the decision in **Floreat Real Estate v XY**¹² as a case where the Court of Appeal held that Wallbank J (Ag) was entitled to make an order appointing Provisional

¹¹ [2012] 1 WLR 2591

¹² BVIHCMAP 2023/0017

Liquidators on a second application, despite the fact that the earlier order (in **Wang**) had been discharged on full and frank disclosure grounds.

[78] FHL comments that it is not clear whether or not there was a reservation of FHL's position by Ms. Giffoni, for example in correspondence. O'Neal Webster say that they have had no access up to this time to Conyers' files in the matter. FHL argues that, however, in any event, this attempt by CIL to shut out argument is misconceived for the following reasons:

- (i) CIL clearly cannot be heard to say that the individual appointed to control the affairs of FHL (only because of the order which it had improperly obtained in the first place, did not do so and does not appear to have been put in funds to do so).
- (ii) There has clearly been a material change of circumstances since the original order, the Injunction was made; the deceased passed away on 22 September 2022, undoubtedly triggering the right to redemption, and the appointment of Ms. Giffoni has come to an end.
- (iii) Similarly, this is a case where the Court has been misled. All roads lead back to the fact that CIL obtained an order, to which they were not entitled, restricting the right of redemption; and worse, in circumstances where they had exercised the same right themselves in relation to the affairs of CIL.
- (iv) There has also been a clear and material change of circumstances in relation to (1) the need for a variation of the legal fees cap; and (2) to the extent that there has been expenditure which the order restricts, Mr. Dennis referred to **Halifax v Chandler**,¹³ a decision of the English Court of Appeal as authority for the proposition that an application to vary the order governing the payment of legal fees five days after the return date was an abuse of the process where the application could have been made at the return date. Mr. Dennis relies on this authority as holding that the

¹³ [2001] EWCA Civ 1750.

application would not be an abuse of the process where it was made after the legal fees had been spent (as Mr. Dennis submits they have here).

- (v) It is also relevant that Ms. Camacho plainly would be able to apply to the Court to vary or discharge the Injunction, as a third party affected by it. The argument continues that the administration of justice achieves nothing by refusing an application by FHL, but allowing an application to be made by her.

CIL's Arguments

- [79] Unfortunately, in its written submissions, some of CIL's arguments opposing the Variation Application got interspersed and overlapped with, its submissions on its proposed application to amend. One of the reasons I refused the adjournment aspect of CIL's Application was because some of the grounds relied upon were known to CIL over a year ago, in relation to FHL's August 2024 bank statements. Whilst I am not pre-judging the merits, it is quite clear to me that the application to amend seeks to re-cast CIL's case, and to now, for the first time, make claim directly against Ms. Camacho in these proceedings. This is occurring some five years after the original claim form was filed, and subsequently amended in 2022. As Mr. Dennis has argued, such a basis was not there when the Injunction was granted.

- [80] Most of CIL's 26- page SKA dealt with the amendment application and application to appoint a receiver.

- [81] Be that as it may, CIL made a few short submissions in relation to the Variation Application in its SKA, and supplemented those submissions orally.

Application to Redeem FHL's Class A shares

- [82] Mr. Saiffee submitted that the Court should refuse the application to redeem FHL's Class A Shares:

- a. In light of CIL's pending application to amend to claim a constructive trust over the 1000 Class A Shares held by Mr. Curi in FHL, the Injunction should not be varied with the effect of pre-determining that draft claim.
- b. The basis for CIL's draft claim to the shares existed at the time that the *Ex Parte* Injunction was made and therefore it was and remains appropriate to safeguard the Class A Shares in FHL. Further, CIL did broadly take issue with the effect of the convertible agreement in its submissions at the *Ex Parte* hearing.
- c. Because Ms. Camacho is now a director of FHL, she is able to exercise control over the company and has not suggested that she has been impeded or restricted in any way in her practical control of it.
- d. The failure to seek to restore that part of the Joinder and Variation Application can be understood on the basis that Ms. Camacho, in effect, obtained the power she sought when she was appointed as the sole director of FHL.
- e. Although Mr. Curi died after the Continuation Injunction was agreed by FHL, that is not a material change of circumstances because he had been incapacitated since 1st December 2019 and therefore the right to redeem (subject to the Injunction) existed at that time.

[83] In his oral submissions, Mr. Saifee asked the Court to focus on the fact that a shareholder has no right to dispose of the assets of a company, even where there is a sole shareholder. Reference was made to the judgment of the ECSC Court of Appeal in **Taruta v JSC VTB Bank**,¹⁴ where at paragraphs 45 and 46, Pereira CJ discussed the relevant principles as follows:

“[45]. It is, in my view, manifestly clear from the authorities, that a shareholder, whether or not he is a sole shareholder, has no right to dispose of the property of a company, either for his own behalf or for that of others. His rights certainly do not fall within the

¹⁴ BVIHCMAP 2021/0043

definition of a 'power' approved in **Tasarruf**. In that case, the settlor of the trust had an unfettered power of revocation over the trust assets and was entitled to call for them to be paid over to him at any time, for any reason or for no reason. He had no fiduciary duties whatsoever and the only discretion he had was whether to exercise the power in his own favour. This, as the Privy Council concluded, was a power tantamount to ownership.

[46] This line of reasoning cannot and could not have been applied to the present case in my view. While a sole shareholder of a company may have the power to direct the way the shares are voted, this de facto control does not bestow on that shareholder a right to deal with or dispose of the company's assets for any purpose other than the furtherance of the objectives of the company. In **JSC VTB Bank (a company incorporated in Russia) v Pavel Valerjevich Skurikhin and others**, Patricia Robertson Q.C. noted that:

'proof of de facto control may justify drawing the inference that the person exercising de facto control is the ultimate beneficial owner of the assets (at least, in a broad sense of that term)...Unless that inference can in all the circumstances properly be drawn, de facto control does not, in and of itself, warrant treating a third party's assets as belonging to a judgment debtor in equity and hence available to be enforced against.'

[84] Counsel asked the Court to take note of the context here where CIL alleges that it was asset-stripped and deprived of the value of a loan of U.S.\$6 Million.

[85] Mr. Saifee emphasized that as the Injunction is a proprietary injunction different rules apply. Thus, the standard orders in relation to general freezing orders do not apply here. Reference was made to the decision in **Angel v Davy**, paragraphs 34 and 35.

[86] Counsel claims that CIL's SKA at the *ex parte* Hearing, centered on the claim regarding the transfer of CIL's assets totaling approximately US\$ 26 Million and not approved by CIL's directors. Further, it was pointed out that no defences have been filed to the claim in these proceedings. Also, that there is no documentary evidence, no proper evidence that FHL is unable to defend these proceedings without accessing the injunctioned funds.

[87] Mr. Saifee further submitted that it is an abuse of the Court's process for FHL to challenge the agreed Continuation Order of 9th April 2021 by FHL failing to take a point about non-disclosure, without there being any material change in circumstances and after such a point was first reasonably available for FHL to take. Counsel says this is further demonstrated by the fact that the point was pursued as late as 2023, as part of Ms. Camacho's Joinder and Variation Application. Therefore, when Ms. Camacho did not pursue the Joinder and Variation Application she effectively abandoned the point.

[88] Reference was made to **Gee, on Commercial Injunctions**, 7th Edition, paragraph (x) 21-059, which states as follows:

“(x) 21-059

The principle preventing relitigation in the absence of a material change of circumstances, abuse of the process and the number of applications for variations so as to pay legal costs

.....

Where there is an interim order made after a hearing on the merits inter partes, the court will not entertain an application to set aside that order or part of it or which is inconsistent with that order, unless there has been a material change of circumstances, or the judge on the original application had been misled in a material respect, or if there has been a manifest mistake, or the applicant becoming aware of facts which he did not know and could not reasonably have discovered at the time of

the first hearing. This prevents relitigation of the same application, and applies when it was open to the applicant to take the same points on the original hearing even though he did not do so. The principle has the consequence that if a point was open to the applicant on an earlier interlocutory application and was not pursued, then it is not open to the applicant to take the point in a later application when there has been no material change of circumstances and no new facts. The burden is upon the applicant to satisfy the court that there has been a material change of circumstances. It applies when the defendant consents to continuation of a freezing injunction hearing and decided not to do so...without a hearing...It applies where the applicant had the opportunity to make the application at an earlier hearing and did not do so.....It is not sufficient to have thought of a new argument or where there has been no change of circumstances since the earlier hearing which is relevant to the new application.....

The principle applies to an application under CPR R.3.1(7) which enables a court... to vary or revoke [an] order and limits the availability of relief from sanctions under CPR 3.9.....

It is an abuse of the process of the court to rely upon a set of facts for obtaining a variation and then to apply again a short time afterwards for different relief based on the same facts or when there has been no material change in circumstances. In **Halifax Plc v Chandler** the defendant applied to the court for a different variation to govern payment of legal costs only five days after the court had already granted a variation but in a lower amount and to be funded from a different source of funds.

The Court of Appeal held that it was an abuse of the process of the court to do this and that the defendant should wait until he had exhausted the provision under the first variation before applying

again. When an application is made to the court for a variation the defendant should put before the court the full picture and if a different application is made almost immediately afterwards an explanation should be furnished showing a material change in circumstances. The court will not rehear an application which it has already heard and determined *inter partes*. A party aggrieved by such a determination will have to appeal.

In **Serious Fraud Office v X**, notwithstanding the normal rule stated in **Halifax**... the Court of Appeal contemplated that a further application might be made with more detailed evidence because in that case both sides had put in evidence shortly before the hearing and this had resulted in the evidence being less complete than might have been the case had evidence been served well beforehand, and because the losing defendant has *prima facie* an entitlement to use his assets for his criminal defence.

Subject to these limits, there is no restriction laid down as a matter of law or practice to the number of applications which can be made for variations to an injunction. Nevertheless, it is not cost efficient or desirable for a party to keep on making interlocutory applications to the court for variations for legal costs to cover the next stage of the litigation....”

[89] Counsel also referred to the letter from O’Neal Webster dated 6th October 2022. By that date, he submits, Ms. Camacho was represented and had access to the representations made to the Court on the *ex parte* application in September 2020.

[90] Counsel says that the application which Ms. Camacho was entitled to make was the Joinder and Variation Application, which was filed in January 2023. But then, inexplicably, he asserts, the Joinder and Variation Application fell away, and is now

sought to be resurrected in this Variation Application by FHL. Mr. Saifee submits that that is not permissible.

- [91] Counsel points out that Mr. Dennis has argued that the Joinder and Variation Application seeking variation became otiose. Mr. Saifee suggests that then so too has this Variation Application likewise become otiose. He (correctly) remarks that there is no evidence from Ms. Camacho providing an explanation as to why she has not pursued the Joinder and Variation Application.
- [92] Counsel submits that in the absence of any explanation on behalf of FHL, it is abusive for Ms. Camacho to seek through FHL, the same relief of variation, after abandoning her own application.
- [93] Counsel urged the Court to find paragraphs 35-38, and 40-45 of **Angel v Davy** instructive. Paragraph 35 was already set out above, but for ease of understanding the context, I repeat it here. Judge Hodge QC, sitting as a Judge in the Business and Property Court had this analysis to offer:

- “35...’(1) Does the claimant have an arguable proprietary claim to the funds in issue?
- (2) If yes, does the defendant have arguable grounds for denying that claim?
- (3) If yes, has the defendant demonstrated that, without the release of the funds in issue, he cannot effectively defend the proceedings (or, it may be added, meet his legitimate living expenses)?
- (4) If yes, where does the balance of justice lie as between, on the one hand, permitting the defendant to expend funds which might belong to the claimant and, on the other hand, refusing to allow the defendant to expend funds which might belong to it?’

36. In the course of his submissions, Mr. Lynch invited me to have regard, as I do, to all that Sales J had to say at paras. 18-23 of his judgment in the **Frederic Marino** case. In particular, Mr. Lynch emphasized what Sir Thomas Bingham MR had said in an earlier case:

“In this situation a careful and anxious judgment has to be made in a case where a proprietary claim is advanced by the plaintiff as to whether the injustice of permitting the use of the funds held by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may turn out to be a successful defence. Under the Civil Procedure Rules, the court should examine the question in the light of the overriding objective to deal with cases justly and at proportionate cost.”

37. I bear the overriding objective clearly in mind and, in particular, I consider the need to ensure, so far as practicable, the parties are on an equal footing. That requirement has a particular resonance in the present case, where, as evidenced by the representation before me, the defendant is, to adopt the words of Mr. Lynch “completely “outgunned” by the claimants.

38. In applying the principles set out by Sales LJ, I also bear in mind the following further points. First, as to the arguability of the claim, where a claimant has an arguable claim, the defendant will not be permitted to utilize the frozen funds unless he also has at least an arguable case that the frozen funds belong to him.

...

40. I also bear in mind that the need for the defendant to establish an arguable claim to the frozen monies is not properly a matter of discretion, but is one required to be established before any discretion arises.

41. Secondly, as to the point on there being no other assets, if both parties have an arguable proprietary claim to the frozen funds, the defendant

must establish on proper evidence that there are no other funds or assets available to him to be utilized for payment of his legal fees. The onus is on the defendant, and a defendant cannot clear this hurdle unless he provides evidence on affidavit giving a full and frank account of his finances to the court. Available assets include those which a defendant can sell or borrow against to meet legal expenses. The court is entitled to have a very healthy skepticism about unsupported assertions made by a defendant about the absence of assets, particularly where he, or those to whom his evidence or contentions relate, have been less than frank in dealing with the court or with the claimant.

42. Thirdly, as to the balance of justice, even if a defendant establishes that there are no funds available for professional representation without the release of injunctioned funds, the court must still decide where the balance of justice lies between, on the one hand, permitting the defendant to expend funds which belong to the claimant, and, on the other hand, refusing to allow the defendant to expend funds that might belong to it. The court will exercise a careful and anxious judgment where the claimant has a proprietary claim since there is an obvious risk of injustice if the plaintiff, successful at the end of the day, finds that his own money has been used to finance an unsuccessful defence.
43. In balancing the risk of injustice to each side, the merits of the parties' respective claims to the funds is an important factor. That is because the court's decision will be permanent and irremediable. The disputed monies will be used up; worst still, if the court's decision turns out to be wrong, unlike with most interim injunctions, the wronged party will not, in practice, be able easily to be compensated.
44. In relation to the court's approach to the release of funds, even if an application is granted, the court will act more cautiously, so as to ensure that the funds are not wasted, than it would in the case of a non-proprietary freezing order. That is because the exercise of discretion

must take into account the risk of injustice to a claimant in having his own money used to litigate against him. The court must therefore, ask itself how far the plaintiff's interests can be protected, consistently with the need to avoid injustice and unfairness to the defendant.

45. That may be achieved by limiting the amount to which the defendant is granted access, so as to work a limited injustice to the claimant in the event that he is wholly successful, even if that may cause a defendant to reassess how to pursue her case, or to consider alternative funding models. The question is to what extent the need to protect the defendant's need to secure representation outweighs the risk of erosion of the claimant's own money."

[94] As to the legal fee cap and absence of a business expenses clause, CIL takes the position that they should both remain in place. In this context CIL reiterates that the *ex parte* Injunction and the Continuation Injunction were made on a proprietary basis. CIL has made a claim for proprietary relief on the basis that over US\$20 M of its assets were wrongfully transferred to FHL. Claims were made for, amongst other matters, breach of fiduciary duties, breach of section 175 of the BCA and knowing receipt. It was pointed out that FHL has never filed a defence. It was argued that FHL has not complied with the terms of the Continuation Injunction order in giving details of the amount spent on legal fees. It was submitted that FHL has not demonstrated that, without the release of the funds in issue, it cannot effectively defend the proceedings. Mr. Saifee maintains that FHL has exhibited no bank statements to support its application to vary. It was also argued that under the Continuation Injunction, FHL could ask CIL for an increase in the sum set for legal fees and that has not been done. Further, the Continuation Order goes on to say that FHL can apply *ex parte* to increase the sum, none of which it appears to have done.

[95] As regards, Curi Holdings LLC it was asserted that no explanation has been given as to why FHL should pay any liabilities of its subsidiary. It was CIL's position that

the rental proceeds due to FHL's subsidiary are held in escrow, and from that set of proceeds, property-related expenses have been paid. CIL claims that Ms. Camacho and her son are the manager's of FHL 's subsidiary, Curi Holdings LLC, and avers that CIL has no visibility over what is happening to the rental proceeds. It was submitted that it cannot be appropriate for FHL to simply claim a right to pay out the liabilities of its subsidiary, but yet not account for the revenue it collects. Mr. Saifee comments that Ms. Camacho may well have a restitutionary claim against the subsidiary, but can make no direct claim from FHL to pay her recouperation for sums spent.

[96] A point repeatedly made by Mr. Dennis was that CIL has sought to prevent FHL from fulfilling the identical contractual obligations which CIL itself had fulfilled for the benefit of the Children. It was asserted that by virtue thereof, the Children had become the controllers of CIL by the time the Injunction was obtained. Mr. Saifee referred to the Affidavit of Ms. Savioli sworn on 31st August 2020 and relied upon in support of the Injunction Application at paragraph 89(k) to demonstrate that it is not true that CIL and Ms. Savioli acted after redeeming the Class A Shares in CIL.

[97] At paragraph 89 (k) Ms. Savioli stated as follows: *"An issue may be taken with my authority to file the Proceedings.....I believe that one director acting by themselves may have implied delegated power to authorize legal proceedings to be filed on behalf of a company, especially in urgent circumstances such as this where filing proceedings is unquestionably in the best interests of the company and cannot wait. In any event, my siblings are all aware and in favour of the Proceedings. In the event my father is certified as incapacitated or passes away (and the B shares subsequently become voting shares), my actions will be ratified by all of the shareholders. Further, in the unlikely event that I would still be held to be lacking authority to file the Proceedings, I and my siblings would be entitled to intervene and apply for permission to continue the Claim as a derivative action."*

Discussion and Analysis

- [98] This is a strange case. Some of the matters that complicate it are the fact that Mr. Curi, as the owner of the Class A Shares in each company CIL and FHL, used the companies for estate-planning for his two families, and may have at times treated the assets of each company as his own. Other matters that have added layers of complexity have been Mr. Curi's incapacitation and subsequent death, each requiring representational orders to be made. There has also been delay on the part of both FHL and CIL in bringing before the Court the true matters and issues they respectively require the Court to resolve.

1(a) of the Variation Application -variation to permit FHL to comply with its contractual obligations by allowing it to redeem its Class A Shares and update its Register of Members accordingly;

Redemption of the Shares

- [99] In my judgment, Mr. Dennis K.C. is correct in arguing that the order restraining FHL from complying with its contractual obligations to redeem its Class A Shares and to update its Register of Members should never have been made at all. There is no claim, and can be no proprietary claim, over Ms. Camacho's entitlement to a redemption of the Class A Shares, triggering her rights as the holder of the Class B Shares. Ms. Camacho has a right, and FHL an obligation, to comply with the statutory promise in FHL's Articles. Further, doing so does not reduce the value of FHL's assets.
- [100] As regards the Class A Shares, there can be no risk of dissipation of assets if the Deceased had no continuing interest in the shares; and there can be no improper dissipation if a third party in the position of Ms. Camacho has a legal right to them.
- [101] The cause of action asserted by CIL in its statements of case also did not support there being any restraint over the right of redemption- still less over Ms. Camacho's right to enforce that contract. No claim was (or could be) made to the

shares. The only claim at the time when the Injunction was granted was to the assets of FHL, and against the deceased.

[102] Further, it may be the case, as Mr. Saifee suggests, that at the time of the application for the Injunction in September 2020, CIL had not yet exercised the redemption right over the Class A Shares in favour of the Children. However, it is obvious from the terms of paragraph 89(k) of Ms. Savioli's Affidavit, where she states "*[i]n the event my father is certified as incapacitated or passes away (and the B shares subsequently become voting shares.....*", (and Mr. Curi did become incapacitated and subsequently passed away), that the Children have subsequent to the grant of the Injunction, secured rights in CIL that they have prevented Ms. Camacho from accessing in FHL. CIL has fulfilled contractual duties that it has prevented FHL from performing. This is not the most equitable situation (though of course I appreciate that it could be argued that it is CIL that claims against FHL, and FHL makes no claim against CIL).

[103] It seems to me that the proposed amendment included in CIL's Application is an attempt, a very late attempt, to fill a self-perceived lacuna in CIL's case. As I indicated at the time of refusing the Application for an adjournment, it was as if CIL had now come up with a new argument, five years after obtaining the Injunction, to try with hindsight to support a continuation of the restraint against the redemption of the shares. That order should not have been made in the first place. CIL's Application seeking to amend in my judgment is tantamount to an admission that the Injunction, as the claim is presently cast, cannot stand.

[104] At the point when the Injunction was obtained, CIL's own case was that the Deceased was incapacitated, or soon to be declared incapacitated. This would have triggered the immediate obligation of FHL to redeem the Class A Shares. But if that was so, then what was stated in paragraph 40 of CIL's SKA was not accurate. It was there asserted that the consequence of a redemption was that one of the Deceased's main assets would no longer be available. I accept learned

Counsel Mr. Dennis's submission that CIL's argument had no proper foundation because the Deceased's main asset (his shares in FHL), had no value upon his incapacity or death, given the terms of the statutory contract within the Articles which required the Company to redeem the Shares.

Abuse of Process

[105] Mr. Saifee made a very powerful argument that the Variation Application amounts to an abuse of process, particularly in light of the fact that during the period when Conyers represented FHL, on 9th April 2021 the Injunction was varied by consent. However, in my judgment, this aspect of FHL's application does not amount to an abuse of process. As described in the extract from **Gee**, paragraph 21(x)-059, referred to at paragraph [88] above, where there is an interim order made after a hearing on the merits *inter partes*, the court will not entertain an application to set aside that order or part of it or which is inconsistent with that order except in certain circumstances. In my view, some of those circumstances that are extant in the instant case are that there has been a manifest mistake, and there has also been a change in circumstances.

[106] There has been a manifest mistake in that there was no cause of action or proper foundation for the making of this order. Whilst I do not accept, as Mr. Dennis sought to argue, that the Judge was misled at the hearing, this order was clearly not one that ought to have been made. It is understandable, and is frequently the case, that in the hussle and haste surrounding *ex parte* applications, orders can be made in error or without the requisite foundation.

[107] The Consent Order continuing and varying the Injunction occurred on 9th April 2021. There has been a material change in circumstance since then, because Mr. Curi died on 21st September 2022. Upon his death, in my view, it then became plain that the Class A Shares were of no or negligible value, and FHL's obligation to redeem the Class A Shares unarguably arose. Mr. Curi's death would have

removed all doubt as to the value of the shares being negligible, against the contractual backdrop of FHL's Memorandum and Articles.

[108] In my view, this aspect of the Injunction order obtained by CIL should not remain. In effect, it operated to prevent Ms. Camacho, a third party, from taking control of her own asset, without an injunction against her, and without her being protected by any (or any meaningful) cross-undertaking in damages.

[109] Against FHL, it has been pointed out that Ms. Camacho appears to have abandoned the Joinder and Variation Application, which sought this same variation, without explanation. It has also been argued that FHL has delayed in making this application. However, in my judgment, the difficulties in the situation were compounded by the need for representation orders to be made, the First Representative Order in respect of Mr. Curi, and then after he passed, the Second Representative Order with regard to his Estate. There has also been a change in legal representation. Overall, these factors do not tip the scales in favour of maintaining in place an injunction order that should never have been granted.

[110] In my judgment, it is therefore appropriate and just, that this aspect of the Injunction be varied as sought by FHL. The relief sought at sub-paragraph 1(a) of the Variation Application is therefore granted as prayed.

1(b) of the Variation Application- to remove the cap placed on the company for spending money in relation to legal advice and representation.

[111] As is clear, the Injunction is a proprietary Injunction. Applying the principles set out in the decision in **Angel v Davy**, which both parties cited, in my view it is plain (and FHL has not argued otherwise), that the claimant has an arguable proprietary claim to the funds in issue. However, I must say, that other than the fact that FHL has not yet filed a defence, I have not been able to discern from the pleadings, and evidence filed to date, whether FHL has arguable grounds for denying CIL's claims. It may well have, particularly given that Mr. Curi is the common

denominator in both CIL and FHL's respective corporate structures and operations, under the umbrella of estate-planning. However, as stated in **Angel v Davy**, in balancing the risk of injustice to each side, the merits of the parties' respective claims to the funds is an important factor. I cannot effectively carry out that exercise and the overall merits of FHL's defence is not at this stage plain to me. I am not therefore minded to remove the cap.

[112] Nevertheless, I note that the terms of the Exceptions to the Consent Order entered on 9th April 2021 included a provision that FHL 's legal Counsel could agree with CIL's legal Counsel in writing that the spending limit of \$200,000 be varied. Further, that if CIL refused to agree an increase to spending limits, FHL could apply to the Court *ex parte* in order to seek approval for an increase in spending limits.

[113] Mr. Dennis' primary submission was that the cap should be removed. His fallback position was that the cap should be increased. Mr. Dennis has asserted that the \$200,000 appears to have already been extinguished. No estimate of fees or future fees has been provided, and I surmise that it would be difficult to say with great accuracy what the ultimate fees are likely to be. It does seem to me, given the stage the matter has reached, and in an attempt to strike a fair balance, that the fees will be at least double the figure of US \$200,000. I note that the Consent Order contemplated expenditure by each Respondent, which together totaled US \$400,000. It has been almost five years since the Consent Order was entered into. At the same time, increasing the cap to US \$400,000 will work only a potential and relatively limited injustice to CIL. In my view, it is therefore appropriate to increase the legal fees cap to US \$400,000.00. I bear in mind what is stated in **Gee, on Commercial Injunctions**, at paragraph (x) 21-059, referred to above at paragraph [88] i.e. that, it is not cost efficient or desirable for a party to keep on making interlocutory applications to the court for variations for legal costs to cover the next stage of the litigation. However, in the instant case, some years have passed, and FHL's rights to access justice, and the overriding objective's interest in seeing that,

so far as practicable, the parties are on an equal footing, are factors to be placed in the basket of considerations. In the circumstances, I am prepared to increase the legal fees cap based on the Variation Application as filed (i.e. without requiring FHL to make a new application), in order to save time and cost and to use the Court's resources proportionately and appropriately.

1(c) of the Variation Application- to permit FHL to make payments in the ordinary and regular course of its business, including to (i) permit the Applicant to discharge all outstanding property taxes and maintenance fees which are due and payable by Curi Holdings LLC and (ii) permit FHL to repay Suse Maria Gomes Camacho the sum of US \$106,382.64 in respect of debts of Curi Holdings LLC which she discharged on its behalf, pending the making of the Variation Application

- [114] I appreciate the point that Mr. Saifee makes about Curi Holdings LLC being a separate legal entity from FHL. However, the question of what FHL did in its ordinary course of business is wide enough to encompass an ordinary course of being responsible for its subsidiary Curi Holdings LLC's expenses. This is particularly so because Mr. Curi used FHL and Curi Holdings LLC as part of his estate planning in providing for his wife Ms. Camacho. The evidence is that in the past, FHL did take care of Curi Holding LLC's expenses since Curi Holdings LLC was merely a subsidiary of FHL, in the name of which the Florida property was held. In my judgment, it is just that FHL be permitted to discharge all outstanding property taxes and maintenance fees payable by Curi Holdings LLC as set out in the affidavit of Ms. Camacho. It also seems just that FHL should reimburse Ms. Camacho the sum of US\$106,382.64. Part of FHL's ordinary course of business prior to the grant of the Injunction was to be directly responsible for Curi Holding LLC's expenses. Mr. Saifee made a sound point about any revenue earned by Curi Holdings LLC from the property and I agree that FHL must provide accounting to show what the position is in relation to this.

1(d) of the Variation Application- to permit FHL to (1) transfer funds between its accounts, and (2) reinvest the funds maintained within its account with Julius Baer with another financial institution, provided that once transferred it deals with those assets in accordance with the terms of the Injunction.

- [115] As stated above, the parties during the hearing agreed that the funds maintained with Julius Baer should be re-invested with an agreed financial institution and I leave it to them to flesh out the details in the draft order.

Full and Frank Disclosure

- [116] I have read CIL's SKA presented at the *Ex Parte* hearing at which the Injunction was granted. I have also had the benefit of reading the Transcript of the hearing. It does not appear to me that the Judge was misled. Indeed, at page 11 of the Transcript the Judge clearly had absorbed the point. He queried of CIL's Counsel: *"But, insofar as you get a freezing order against Mr. Curi, you take it as it is. If Mr. Curi dies, then the value of the A share in FCuri becomes negligible, doesn't it?"* It seems to me that as with many *ex parte* hearings, there just was not time to consider all aspects of the Injunction concerning the restraint on the redemption of the Class A Shares from all angles. I therefore find that, it is a close call, but overall, there was no breach of the duty of full and frank disclosure.

Costs

- [117] In my judgment, FHL has largely succeeded on the Variation Application and is entitled to its costs, to be agreed or assessed within 21 days.
- [118] FHL is to prepare and file an Order that is line with the orders I have made in this Judgment.
- [119] I thank both Counsel and their teams for their helpful submissions.

Ingrid Mangatal
High Court Judge (Ag.)

BY THE COURT

Registrar