EASTERN CARIBBEAN SUPREME COURT

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO. BVIHCM2024/0111

BETWEEN:

(1) ELETSON CORPORATION
(2) ELETSON GAS LLC

Claimants

and

(1) LEVONA HOLDINGS LTD
(2) TROPICAL ISLAND INTERNATIONAL LTD

Defendants

Appearances:

Mr. David Allen, KC, with him Mr. David Barnard, Mr. Peter Ferrer and Ms. Kimberley Crabbe-Adams for the Claimants

Mr. Stephen Cogley, KC, with him Mr. Mark Forte and Mr. Kajetan Wandowicz for the Defendants

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2024: October 15, 16, 17 and 23;
2025: March 13.

JUDGMENT

1. Introduction

[1] **Wallbank J. (Ag.):** This is the Court's Judgment following a hearing conducted over four days in October 2024. That hearing was the substantive return date of a worldwide freezing order made by this Court on an *ex parte* basis at a hearing on 14th March 2024 ('the WFO'). That *ex parte* hearing took just over two and a half hours. The Court made the WFO upon the application of the

Claimants, Eletson Corporation ('Eletson Corp.') and Eletson Gas LLC ('Eletson Gas'), dated 8th March 2024, but deemed filed on 11th March 2024, against the Defendants, Levona Holdings Ltd ('Levona') and Tropical Island International Ltd ('Tropical Island'). Both Levona and Tropical Island are companies incorporated in this jurisdiction ('the BVI').

[2] Levona and Tropical Island are corporate vehicles used and controlled by the same group of people. Purely for convenience I will refer to them as 'Levona', except where distinction needs to be drawn between them. The various Eletson companies involved in this matter have historically been controlled by a different group of people – three Greek shipping families and their staff. For pure convenience I will also simply refer to them as 'Eletson', unless distinction needs to be drawn between them.

[3] It warrants stating at the outset that, as the hearing length implies, this is a complex and voluminous matter. The Claimants' skeleton argument for this return date hearing ran to some 88 pages. The Defendants' skeleton argument ran to some 61 pages. The hearing bundle comprised approximately 10,500 pages. This entails greater length, in terms of everything, for this return date than for many plenary trials, even in this BVI Commercial Court. I will try to limit this Judgment to what I consider to be the essentials.

[4] My relation of the following background derives from the submissions and documents before the Court, including the arbitration award which is one of the foundational documents to the present matter. I derive facts from this award merely for narrational purposes, conscious that Levona is seeking to have that award set aside and that it may, possibly (I put it no higher), succeed in doing so. At times I have used the parties' language, which I have gratefully adopted.

[5] The following summary largely mirrors the perspective which the Claimants are urging upon the Court, because it is important to show the shape of the matter as it had going into the substantive return date. After setting down this summary, I will, as justice requires, adjust the balance.

2. Background

[6] Eletson Corp and Eletson Gas applied for the WFO following receipt of the arbitration award I have just mentioned. That was a final New York Convention arbitration award which ordered the payment of substantial sums by Levona to Eletson Corp and to Eletson Gas. The arbitration was

an arbitration between Eletson Corp and a company called Eletson Holdings, Inc., as claimants, and Levona Holdings Ltd, as respondent. Eletson Gas was not a party to the arbitration.

[7] The arbitration commenced in July 2022 and ended in September 2023. It was conducted by a sole arbitrator, retired judge Hon. Ariel E. Belen ('the Arbitrator' and/or the 'Arbitral Tribunal'). The arbitration ('the Arbitration') took place in New York under the auspices of the Judicial Arbitration and Mediation Services ('JAMS'). It culminated in a Final Award dated 29th September 2023 ('the Award').

[8] The Arbitration was a plenary process, comprising, *inter alia*, pleadings, documentary disclosure, arguments and seven days of witness testimony in May 2023.

[9] Eletson Holdings, Inc. is the parent company of Eletson Corp. Eletson Holdings, Inc. holds the common shares in Eletson Gas.

[10] Levona, for its part so far as is relevant, is a finance vehicle controlled and managed by a company called Murchinson Ltd. Levona is owned (stated very basically) through two hedge funds. Murchinson is said by the Arbitrator to be owned by one Mr. Marc Bistricer.

[11] The Arbitrator noted that Levona does not have any employees, nor an email domain, nor its own bank accounts, nor disclosed financial records.

[12] The major issue in the Arbitration was the ownership of so-called preferred interests in Eletson Gas, i.e. whether they were owned by Levona (or not, as was ultimately concluded by the Arbitrator). The Claimants are the creditors of Levona following the Award which was issued in the Claimants' favour.

[13] The Award determined, *inter alia*, that Eletson Gas was entitled to compensatory and punitive damages from Levona, and that Levona was to pay Eletson's attorney's fees, costs, and expenses. The total amount payable pursuant to the Award is over US$100 million.

[14] The Claimants sought freezing relief in the amount of the compensatory damages payable to Eletson Gas (US$23,777,378.50) plus the attorney's fees, costs, and expenses payable to Eletson Corp (US$9,590,222.99), plus interest thereon, in the total amount of US$36,346,573.44.

[15] As at the date of submitting their *ex parte* application, 8th March 2024, the Claimants understood that Levona's only known assets were three lines of shareholdings, leading to two motor tanker

vessels for transporting liquefied petroleum gas ('LPG'), the MT 'Symi' and the MT 'Telendos' (together, 'the Vessels'). Levona Holdings Ltd was the 100% shareholder of Tropical Island (the Second Defendant), of Symi II Special Maritime Enterprise ('Symi SME') and of Telendos II Special Maritime Enterprise ('Telendos SME').

[16] Symi SME and Tropical Island are the bareboat charterers of the Vessels.

[17] To understand the background to the matter, we must go back in time to before Levona became involved.

[18] Eletson Gas was created in or around 2013 as the corporate vehicle for a US$700 million LPG shipping joint venture between Eletson Holdings, Inc. and funds managed by 'Blackstone Tactical Opportunities' ('Blackstone'). In a nutshell, the shipping families behind Eletson would provide the merchant shipping knowhow and experience, whilst Blackstone would provide funding. Blackstone was constituted as the 'preferred shareholder' of Eletson Gas. Eletson contributed five medium-sized gas carriers to the creation of Eletson Gas. Additionally, in 2020, Eletson contributed approximately US$5.5 million in liquidity support to Eletson Gas.

[19] At the beginning of 2022 Eletson Gas owned, directly or indirectly, 14 LPG carriers.

[20] The Eletson fleet was the second largest in the market, second only to Unigas, Eletson's primary competitor.

[21] Throughout Eletson's partnership with Blackstone, Eletson managed the vessels. For its management services, Eletson Corp earned management fees from the vessel subsidiaries.

[22] In early 2021, Blackstone sought to sell its interest in Eletson Gas. At some point, Blackstone reached a deal with Murchinson, whereby Murchinson would purchase 100% of Blackstone's interests in Eletson Gas for an initial investment of US$3 million. Murchinson created a special purpose vehicle to hold these interests, Levona Holdings Ltd.

[23] The legal relationship between the holders of membership interests in Eletson Gas was regulated by a Limited Liability Company Agreement ('LLCA') which contained an arbitration agreement.

[24] On 2nd November, 2021, Blackstone assigned its interest in Eletson Gas to Levona and appointed four representatives designated by Levona to the board of Eletson Gas. These directors were: Mr.

Eliyahu Hasset ('Mr.Hasset'), Mr. Joshua Fenttiman ('Mr. Fenttiman), Mr. Mark Lichtenstein ('Mr. Lichtenstein'), and Mr. Adam Spears ('Mr. Spears').

[25] Eletson's main witness in these present proceedings, Mr. Vassilis E. Kertsikoff, in his First Affidavit, provides the following account of what was taking place at that time:

> "28. As part of the transaction for Blackstone's exit from EG [i.e. Eletson Gas], on 2 November 2021, Blackstone assigned its preferred interest in EG to Levona and appointed four representatives designated by Levona to the board of EG. Levona replaced Blackstone as party to the LLCA, and signed a Joinder Agreement to that effect, agreeing to be fully bound by and subject to the provisions of the LLCA (SDNY Opinion and Order at 4 [106]).
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> 29. By early 2022, EG was in crisis: over a third of EG's fleet had been arrested by various creditors for non-payment of EG's liabilities (SDNY Opinion and Order at 5 [107]). Multiple arrested ships were scheduled to be sold at auction to pay these creditors. As it turned out, it became apparent from evidence in the JAMS Arbitration that Levona had actually caused EG's financiers to arrest vessels within the EG fleet (see para. ** below).
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> 30. On 22 February 2022, before we knew of Levona's involvement in EG's crisis, just three days before an auction of one of EG's fleet was set to proceed, Eletson and EG entered into an agreement with Levona – the 'Binding Offer Letter' (the BOL) (SDNY Opinion and Order at 5 [107]) to help raise badly needed cash."

[26] Picking up on this last paragraph, shortly after acquiring the Blackstone interests, Eletson's officers and Levona's representative, Mr. Spears, began discussing a deal that would enable Eletson to buy out Levona's recently acquired interests. The parties entered into a Binding Offer Letter ('BOL') on 22nd February 2022. We will return to the BOL.

[27] Following the execution of the BOL, on 11th March 2022 the parties entered into a series of agreements including the following: (i) an intra-group loan agreement, pursuant to which Levona provided Eletson Gas a loan facility of up to US$10 million for a term of up to two years; (ii) a share transfer agreement, pursuant to which Eletson Gas transferred to Levona 100% of the shares of the vessel owning companies for the Vessels; (iii) an assignment of claims, pursuant to which Eletson Corp assigned to Levona all of its claims relating to the management fees and liquidity support owed to it by Eletson Gas, or its subsidiaries; (iv) a deed of waiver and release; and (v) a fundamental action letter (collectively, the 'Transaction Documents'). In April 2022, the loan was amended to provide Eletson Gas with the ability to draw an additional US$4 million.

[28] About three months later, on 15th July 2022, Levona entered into a Letter of Intent with Unigas, the main competitor of Eletson Gas, to sell Eletson Gas's fleet of vessels for US$262 million ('Unigas LOI').

[29] At this point, it warrants explaining that Levona did not own the Vessels. The legal owner of MT 'Symi' was a company called OCM Maritime Danube LLC, an entity in a group of companies which we can refer to for convenience as 'Oaktree'. OCM Maritime Danube LLC in turn chartered MT 'Symi' out to Levona's subsidiary, Symi SME, on bareboat charterparty terms. Symi SME then traded the vessel. Similarly, the legal owner of MT 'Telendos' was a company called OCM Maritime Yangtze LLC, also an 'Oaktree' group entity. OCM Maritime Yangtze LLC bareboat chartered MT 'Telendos' out to Levona's subsidiary Tropical Island, which then traded the vessel.

[30] In essence, Blackstone had been Eletson's finance partner. With the sale to Levona of Blackstone's interests, Levona replaced Blackstone as Eletson's finance partner. Levona itself was reliant upon financing from Oaktree.

[31] Levona's relationship with Oaktree can be compared, broadly speaking, to Oaktree being Levona's lender with Oaktree holding the Vessels as security. This is to be distinguished from, let us say, a bank lending funds to a private individual to enable him to buy a house, with the bank taking a mortgage over the house. In such a case, the legal ownership of the house vests in the individual with the bank taking a charge over the house. Here Oaktree did not take a mortgage or charge as security, but the legal ownership of the Vessels. Oaktree then 'leased' the Vessels back to Levona's subsidiary companies so that they could continue to trade them, in return for charter hire payments. It was as if the bank took legal ownership of the house and leased the house to the purchaser for him to use until he had paid off the bank's loan by paying rent. Thus, the structure as between Levona and Oaktree can be understood in terms of a 'sale and leaseback' arrangement.

[32] Part of the terms of this 'sale and leaseback' arrangement was that Symi SME and Tropical Island have the option to purchase the Vessels at any time, and ultimately must purchase the Vessels upon the expiry of the bareboat charterparties.

[33] Symi SME and Tropical Island are also able to novate or assign the bareboat charterparties with Oaktree's consent.

[34] Contracts, almost by definition, reciprocate rights and obligations. It was no different here. Section 2.1 of the BOL provided that Levona was thereby granting Eletson Gas an option for Eletson Gas or its nominee to purchase all the membership interests held by Levona in Eletson Gas for an agreed consideration and upon certain terms.

[35] Eletson contends that before 15th July 2022, when Levona entered into the Letter of Intent with Unigas, Eletson had exercised its purchase option pursuant to section 2.1 of the BOL. Levona denied this.

[36] The Arbitrator summarised the matter as follows:

> "If the answer is "yes," [i.e. if the Eletson parties had exercised their purchase option] then at some point in time, Levona was no longer a member of the Company and did not have any rights under the LLCA to enter into the Unigas LOI, or otherwise act on behalf of [Eletson Gas]. Conversely, if Eletson did not fulfill the requirements under the Transaction Documents to exercise the purchase option, Levona's interests were not bought out and Eletson may have violated its obligations under the LLCA by refusing to, inter alia, engage in due diligence relating to the Unigas LOI."[1]

[37] The Arbitrator further summarised the parties' claims as follows. First, in respect of the Eletson parties:[2]

> "Eletson has asserted claims against Levona for breach of the LLCA and breach of the covenant of good faith and fair dealing. These claims can be grouped into four categories. First, Eletson asserts claims that Murchinson engaged in deceitful and wrongful conduct that voids ab initio its acquisition of Blackstone's preferred interests. Eletson claims that Murchinson bribed Eletson Corporation's CFO, Peter Kanelos, and caused him to disclose confidential Company information before Murchinson's purchase of the preferred interests in the Company. Eletson also claims that Murchinson, in breach of the NDA with Blackstone, communicated directly with Company financiers and lenders, and engaged in industrial sabotage that led to the arrest of Company's vessels prior to Levona's acquisition of preferred interests. These claims will be referred to as the "Pre-Acquisition Claims." Eletson seeks damages, under a theory of rescissory damages, in connection with the harm it alleges it suffered as a result of these claims.
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> Second, after acquiring Blackstone's interests, Eletson claims that Levona breached the LLCA in a number of ways. Immediately upon joining the Company, Eletson asserts that Levona breached the LLCA and the Company's management agreements by among other things, attempting to fire Eletson Corporation as the manager of the Company's or the Company's subsidiaries' vessels. In addition, Eletson claims that Levona failed to disclose its pre-acquisition misuse and breaches of confidential information, continued to conspire with Mr. Kanelos to liquidate and harm the Company, and conspired with the Company's

[1] See Hearing Bundle Vol. 1 page 103.
[2] See Hearing Bundle Vol. 1 page 103.

counsel, Watson Farley Williams ("WFW") against the Company's interests. I will refer to these claims as the "Post-Acquisition/Pre-BOL Claims." Eletson also alleges that the Levona-related entities violated the Status Quo Injunction (defined, infra,) on numerous occasions, including by wrongfully declaring the Company in default of the Loan made by Levona to the Company, trying to sell the Symi and Telendos, directing the purchase of a controlling position in debt securities of Holdings for the purpose of commencing litigation against Holdings and the involuntary bankruptcy against Holdings ("Status Quo Injunction Claims").

And finally, Eletson asserts claims for breach of the LLCA and breach of covenant of good faith and fair dealing against Levona for failing to acknowledge Eletson's compliance with the terms of the Transaction Documents, failing to transfer the preferred interests in the Company, and continuing to act on behalf of the Company in complete bad faith including by entering into the Unigas LOI. In addition to declaratory relief, Eletson seeks compensatory damages of at least $71 million, punitive damages in the range of 3 to 9.63 times the compensatory damages, pre-judgment interest at ten percent per annum, costs, and attorney's fees.

[38] Levona asserted cross-claims in the Arbitration, which the Arbitrator summarised as follows:[3]

> "Conversely, Levona asserts that through today, it remains the preferred interest holder. Accordingly, it seeks various declarations with respect to the rights it is afforded by virtue of the LLCA and/or the Fundamental Action Letter. It also seeks monetary damages allegedly arising from Eletson's failure to attend board meetings, which prevented the Company from refinancing certain debt and engage in due diligence in connection with the Unigas LOI. Levona also asserts a claim for tortious interference in connection with the Unigas LOI and conversion for denying Levona the ability to sell the Symi and Telendos. For all of its claims, Levona seeks compensatory damages of more than $3 million, plus an undefined amount that includes any profit it is due from the Company as preferred holder, and any decrease in net profit from the sale of the vessels as compared to the Unigas LOI. Levona also seeks $2 million in punitive damages, post-judgment interest, costs, and attorney's fees."

[39] In the Award, the Arbitrator determined that Eletson had exercised its BOL section 2.1 purchase option, through a course of conduct, by 11th March 2022, and that Levona had received the consideration from Eletson Gas for that purchase on that date. The arbitrator determined that:[4]

> "Levona, however, ceased being the beneficial owner of the preferred interests since March 11, 2022, and no longer had the right to vote those preferred shares."

[40] In consequence, the Arbitral Tribunal determined that Levona had not been entitled to enter into the Unigas LOI.[5]

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[3] See Hearing Bundle Vol. 1 page 103.
[4] See Hearing Bundle Vol. 1 page 139.
[5] See Hearing Bundle Vol. 1 page 141.

[41] During the Arbitration, Eletson ventured concern that Levona was seeking, or would seek, to alter the *status quo* by interfering with the business of Eletson Gas and unilaterally seek to strip it of any assets. Consequently, Eletson sought and obtained, on 10th October 2022, a temporary restraining order in the Arbitration (the 'TRO') which required the parties to maintain the *status quo* and prevented the parties from, *inter alia*, engaging in the transfer or sale of any assets of Eletson Gas or conducting any board meetings for that purpose.

[42] On 7th November 2022, following further disputes between the parties and concern that Levona would sell the Vessels, the Arbitrator clarified the TRO. *Inter alia*, the Arbitrator stated:[6]

> "[Levona's] interpretation of the TRO is incorrect. By its terms, the TRO directed the parties to "maintain the status quo". Any attempt to sell or otherwise transfer the Symi and Telendos vessels will be deemed to be in violation of the TRO.".

[43] Ultimately, on 12th January 2023 the Arbitral Tribunal extended the TRO through to the conclusion of the Arbitration, in favour of Eletson. For ease of reference, the combined terms of the TRO, the clarification and the extension can be referred to as the 'Status Quo Injunction'.

[44] The terms of the Status Quo Injunction provided that the parties:

> "shall not, among other things (1) engage in the transfer or sale of any assets of Eletson Gas LLC… absent the joint written consent of the parties, which shall be sent to the undersigned Arbitrator; or (2) Notice or conduct of any board meetings for the purpose of proposing or considering transfer or sale of any assets of [Levona]".[7]

[45] In the Award issued on 29th September 2023, the Arbitrator concluded that Levona had violated the Status Quo Injunction in a number of ways. The Arbitrator summarised these as follows on pages 95, 98 and 99 of the Award:[8]

> "A. Declaratory Relief
>
> I hereby enter the following findings, determinations, and declarations:
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> …
>
> 10. Violating this arbitration's Status Quo Injunction by:
>
> i. Wrongfully declaring the Company in default of the loan from Levona and wrongfully purporting to accelerate payment of the principal;

[6] See Hearing Bundle Vol. 1 page 108.
[7] See Hearing Bundle Vol. 1 page 108.
[8] See Hearing Bundle Vol. 1 page 189, 192 and 193.

ii. Trying to sell vessels, including the Symi and Telendos, while the Status Quo Injunction was in effect; and

iii. Directing and/or causing Levona's affiliates to purchase a controlling position in securities of Eletson Holdings in January 2023 for the purpose of wrongfully commencing and then actually causing the commencement of litigation against Eletson Holdings and the filing an involuntary bankruptcy petition against Eletson Holdings."

[46] It is also relevant to advert to certain of the other 'findings, determinations and declarations' made in the Award, at pages 96, 97 and 98:[9]

> "7. **The Status Quo Injunction shall stay in effect until the later of the final court judgment being entered on any Award or any further order of this Arbitrator.**
>
> 8. **Levona, Murchinson, and Pach Shemen, are each alter egos of the other** concerning every fact proven in this matter and every item of relief awarded herein. Any references to Levona herein are therefore to all the alter-egos and for the avoidance of doubt, any judgments against Levona are also against each alter-ego.
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> 9. **Levona breached its LLCA and related obligations**, including without limitation common law and contractual duties to Claimants and the Company, in at least the following ways:
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> i. **Bribing an Eletson Corporation employee**, and Company representative, Peter Kanelos, and causing him to disclose the Company's confidential information;
>
> ii. **Violating confidentiality obligations** by disclosing the Company's confidential information to third parties, failing to take steps to recover such information, and then **deceiving** Claimants and the Company concerning said breaches after it became a member of the Company;
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> iii. **actively engaging in unlawful behavior** by wrongfully influencing Company financiers to turn against the Company and Claimants, including without limitation by causing the arrest of five of the Company's vessels and not disclosing this misconduct to Eletson or the Company after it became a member of the Company;
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> iv. Failing to acknowledge that Eletson fully complied with the terms of the BOL Purchase Option, and **failing to act in good faith** by remaining silent about its purported belief that the Company would or might fail to meet its BOL terms;
>
> v. **Improperly purporting to act on behalf of the Company** in its business dealings with third parties, including by attempting to sell the Company's assets to its primary competitor, Unigas, and **concealing such misconduct from Claimants**;
>
> vi. **Improperly threatening Eletson and affiliated officers and directors**, including by pursuing litigation against them;

[9] See Hearing Bundle Vol. 1 page 190, 191 and 192.

vii. **Improperly purporting to seize control of the Company's board of directors** post-March 11, 2022;

viii. **Improperly purporting to direct the day-to-day operations** of the Company post-March 11, 2022;

ix. **Improperly purporting to assert control over the assets of the Company** post March 11, 2022;

x. **Improperly purporting to call and hold meetings of the Board of the Company** without following proper procedures and for unlawful and improper purposes of approving unlawful and improper conduct post March 11, 2022;

xi. Breaching its obligations under the LLCA, including without limitation by purporting to terminate management agreements that Eletson Corporation has with the Company's subsidiaries, purporting to change management of the Company's subsidiaries, precluding Eletson Corporation from communicating with the Company's financiers, all of which **Levona knew was unlawful and in breach of the LLCA**;" (Emphasis added.)

[47] We will return to some of these.

[48] After the commencement of the Arbitration but before the grant of the Award, on 7th March 2023, Levona related entity Pach Shemen LLC (which the Arbitrator determined was an *alter ego* of Levona) and two other creditors of Eletson Holdings, Inc. filed involuntary bankruptcy petitions in respect of Eletson Holdings, Inc. before the Bankruptcy Court of the Southern District of New York (the 'Bankruptcy Court') in case no. 23-10322-JPM (the 'US Bankruptcy Proceedings').

[49] Following the commencement of the US Bankruptcy Proceedings, on 10th March 2023, the Arbitrator informed the Arbitration parties that he was staying the Arbitration pending further order of the Bankruptcy Court. Thereafter, on 13th March 2023, Eletson Holdings, Inc. filed a motion for relief from the stay to enable the Arbitration to proceed.

[50] On 17th April 2023, the Hon. John P. Mastando III, United States Bankruptcy Judge in the US Bankruptcy Proceedings ('Judge Mastando'), allowed the Arbitration to proceed, but ordered that:[10]

> "any Arbitration Award, whether in favour of any Arbitration Party [(defined as Eletson Holdings, Eletson Corp and Levona)], shall be stayed pending further order of the Bankruptcy Court on a motion noticed following the issuance of the Arbitration Award."

[51] At the same time, Judge Mastando ordered that:[11]

[10] See Hearing Bundle Vol. 1 page 927.
[11] See Hearing Bundle Vol. 1 page 927.

> "For avoidance of doubt, no Arbitration Party shall transfer, dispose of, transact in, hypothecate, encumber, impair or otherwise use any such Arbitration Award or any asset or property related thereto absent a further order of this Court."

[52] We can adopt the terminology used by the parties and refer to this order of 17th April 2023 as 'the Lift Stay Order'.

[53] Eletson's position is that the Lift Stay Order operates independently of the Status Quo Injunction, such that the Lift Stay Order continues to prevent dealing in, or disposal of Levona's assets, including the Vessels, even if the Status Quo Injunction should fall away.

[54] However, Levona asserts that the Lift Stay Order does not cover the Vessels, such that the Vessels can be dealt with or disposed of, without violating the Lift Stay Order.

[55] On 18th August 2023, Eletson Corp and Eletson Holdings, Inc. commenced proceedings in the United States District Court for the Southern District of New York (the 'SDNY District Court') to have the Award recognised by way of a judgment (the 'Confirmation Proceedings').

[56] In response, Levona applied to dismiss and cross-petitioned to vacate the Award. The Confirmation Proceedings led to a ruling by Hon. Lewis J. Liman ('Judge Liman'), which can be referred to as the 'SDNY Opinion and Order', dated 9th February 2024.

[57] The Claimants maintained that the SDNY Opinion and Order substantially, but not entirely, confirmed the Award. Eletson's position is that the parts confirmed included the award of declaratory relief, compensatory damages, punitive damages, and the grant of attorneys' fees, costs, expenses, and pre-judgment interest.

[58] The SDNY Opinion and Order declined to confirm, and vacated, the following parts of the Award (insofar as is presently relevant):

(1) the declaration in the Award that "The Status Quo Injunction shall stay in effect until the later of the final court judgment being entered on any Award or any further order of this Arbitrator" (declaration A.7);

(2) awards of relief based upon the Status Quo Injunction;

(3) the relief as to Murchinson and Pach Shemen; and

(4) attorneys' fees, costs, and expenses as related to the Bankruptcy Proceedings and other related litigation.

[59] The SDNY District Court, in the SDNY Opinion and Order, directed the parties each to submit, by 23rd February 2024, a proposed judgment in accordance with the terms of the SDNY Opinion and Order, which they each subsequently did. The SDNY District Court later granted the parties until 5th March 2024 to respond to the other parties' filings, which they also did.

[60] Eletson's position is that this procedural course of events entailed that the SDNY District Court could be expected to enter judgment pursuant to the terms of the SDNY Opinion and Order imminently after 5th March 2024.

[61] The significance of the imminent entrance of a judgment is, as Eletson contended before this Court at the *ex parte* hearing, that, upon entry of that judgment, the Status Quo Injunction would stand discharged, because of the vacation of declaration A.7 in the Award.

[62] On 14th February 2024, Eletson applied to the SDNY District Court for a temporary restraining order and/or preliminary injunctive relief against Levona. They did so to protect their position before the judgment in the Confirmation Proceedings would be delivered (the 'US TRO Application').

[63] Eletson's US TRO Application was based upon, *inter alia*, a concern that the Vessels might be sold imminently by Levona at an undervalue.[12]

[64] The US TRO Application was heard on 15th February 2024 before Judge Liman and dismissed on the same day. The SDNY District Court found that 'there is on this record, and at present, no demonstration that there is a risk that, in any imminent time, the vessels will be disposed of.'[13] The court noted that Levona is 'under Eletson's argument, already restrained from selling the two vessels'[14] by virtue of the Lift Stay Order.

[65] Levona appeared at the hearing for the US TRO, as that hearing was an 'on-notice' hearing. Levona's position in the US TRO application was that 'it had repeatedly represented in writing that it will not dispose of the assets at issue in this motion pending issuance of a judgment'.[15]

[12] See Hearing Bundle Vol.1 page 1203 lines 1 to 24.
[13] See Hearing Bundle Vol. 1 page 1236 lines 22-24.
[14] See Hearing Bundle Vol. 1 page 1236 lines 1 - 2.
[15] See Hearing Bundle Vol. 1 page 1180.

[66] To round off the chronology for present introductory purposes, the present Claimants filed their *ex parte* application for the WFO against Levona in this Court about three weeks later on 8th March 2024. Because that application was filed after 4 p.m. on Friday 8th March 2024, it was deemed filed on the following Monday morning 11th March 2024.

[67] Three other details warrant observation here. Two can be stated most briefly:

(1) The Claimants were candid in their presentation of their *ex parte* application that enforcement of the Award is not presently possible, due to the stay order in the US Bankruptcy Proceedings. The Claimants contended that the purpose of the WFO is to facilitate enforcement as and when enforcement becomes possible.

(2) The Claimants consider that they have control of the board of directors of Symi SME (notwithstanding that Levona owns 100% of the shares in Symi SME) and thus the Claimants did not seek freezing relief directly against Symi SME, as they did in respect of Tropical Island. The Court is informed by the Claimants that there is a dispute concerning the constitution of the board of directors of Symi SME.

[68] The third detail is that Levona has demonstrated fundamental resistance to Eletson claims. So, for instance, Levona challenged the jurisdiction of JAMS with a 'motion to strike', dated 12th September 2022, on the basis that JAMS did not have jurisdiction concerning the majority of Eletson's claims. The Arbitrator ruled on 30th September 2022 that JAMS had jurisdiction over the dispute.

[69] Levona's resort to jurisdiction arguments was repeated in the Confirmation Proceedings. In the Confirmation Proceedings, Levona filed a Defence and cross-petition to vacate the Award. It alleged, *inter alia*, that the Arbitrator had exceeded his jurisdiction. The SDNY District Court, by Judge Liman, ruled against this on 9th February 2024.

[70] Most recently, on 3rd July 2024, i.e. almost four months after the *ex parte* hearing before this Court, Levona filed a motion with the SDNY District Court seeking permission to amend its Defence in order to allege that the Award was procured by fraud. On 9th September 2024, by an Opinion and Order (the 'September 2024 Opinion and Order'), Judge Liman granted Levona's motion, and 'permit[ted] discovery on facts relevant to equitable tolling and to whether the [Award] was

procured by fraud or undue means',[16] and subsequently set forth a schedule for discovery by both Levona and Eletson and a timetable leading to final briefings in January/February 2025. On 18th September 2024 Judge Liman explained:[17]

> "THE COURT: Keep in mind one thing that you're going to have to establish for me and the plaintiff is going to have a right, obviously, to address is whether the documents do support what you've asserted that they support. I've found that there's enough for you to go forward with discovery, but I made clear in my opinion that that was just sustaining the complaint; it was not finding that you have proven your claim."

[71] The legal proceedings I have outlined above are not the only ones. There are also arbitration proceedings commenced by Levona against Eletson Gas under the auspices of the London Court of International Arbitration ('LCIA') and three London Maritime Arbitrators Association ('LMAA') arbitrations. There are, furthermore, related legal proceedings before the English Commercial Court in relation to MT 'Symi'.

[72] There are other details which have a particular significance to this present return date, which it is convenient to describe in their proper contexts later.

[73] Against this background we can now turn in more detail to the *ex parte* application Eletson filed in this Court on 11th March 2024.

[74] As mentioned, the Eletson parties before this Court asked for and obtained a worldwide freezing order, to prevent Levona and Tropical Island from disposing of their assets other than in the ordinary course of business. Eletson was not seeking a blanket prohibition on Levona disposing of assets. Under English common law based BVI law, it was not open to Eletson to seek such a blanket prohibition, because a respondent to a freezing order should remain free as a matter of legal principle to deal with, or dispose of, his assets in the ordinary and proper course of his business.

[75] The legal principles for the grant of such injunctive relief are well known and settled, and they are very few. As summarised in the Privy Council case of **Broad Idea International Ltd v Convoy Collateral Ltd**[18] an applicant must show that:

[16] See Hearing Bundle Vol. 6 page 4070.
[17] See Hearing Bundle Vol. 4 page 1737.
[18] [2023] AC 389 at paragraph 101 (Lord Leggatt JSC).

"i) the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;

ii) the respondent holds assets (or, as discussed below, is liable to take steps other than in the ordinary course of business which will reduce the value of assets) against which such a judgment could be enforced; and

iii) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied".

[76] Lord Legatt continued:[19]

> "Although other factors are potentially relevant to the exercise of the discretion whether to grant a freezing injunction, there are no other relevant restrictions on the availability in principle of the remedy. In particular:
>
> (i) There is no requirement that the judgment should be a judgment of the domestic court – the principle applies equally to a foreign judgment or other award capable of enforcement in the same way as a judgment of the domestic court using the court's enforcement powers.
>
> (ii) Although it is the usual situation, there is no requirement that the judgment should be a judgment against the respondent. …"

[77] Behind these principles there is an enormous body of earlier authoritative court decisions, which I need not relate here.

[78] At the hearing on 14th March 2024, the Claimants persuaded me that they had satisfied these criteria, for the following reasons, in summary.

[79] In terms of an underlying good arguable case, the Claimants submitted that although the Award could not yet be enforced, it is an award that is *prima facie* enforceable in this jurisdiction, they are creditors of Levona pursuant to the Award for approximately US$36,346,573.44, awarded in their favour as against Levona, with a judgment imminently expected from the SDNY District Court in that amount. Moreover, the Award awarded 'Claimants payment of their attorney's fees, expenses and costs for the Arbitration in the total amount of US$9,590,222.99'. In circumstances where Eletson Corp funded the legal costs for the Arbitration, Eletson Corp were owed these sums by Levona.

[19] Ibid. at paragraph 102.

[80] In terms of the holding of assets, the Claimants submitted as follows:

> "14. Levona is a "special purpose vehicle" that was created by Murchinson "…to hold [the preferred] interests" in Eletson Gas, and that, as the Arbitral Tribunal found, "…does not have any employees" and "…does not have an email domain, its own bank accounts, or financial records of any kind" (the JAMS Final Award at 7, 20 [HB/5/84, 97]). Levona's assets are the shares it owns in Symi SME, Telendos SME and Tropical Island, and its valuable indirect interests in the "Symi" and the "Telendos", as set out above. Notably, Levona regards itself as the owner of the Vessels.
>
> 15. Aside from the Vessels, the Applicants understand that around US$1.6 million is being held in a USD account held with Optima Bank (Piraeus branch) in Greece in the name of Telendos SME, which primarily consists of charter hire for the "Symi" and the "Telendos". These sums are therefore beneficially owned by Symi SME and Tropical Island. The Applicants have no other information as to Levona's assets, primarily because Levona refused to produce financial records in the JAMS Arbitration, notwithstanding that it admitted such records exist and were kept by Murchinson (JAMS Final Award at 20 [HB/5/97]). Similarly, Levona commenced two LCIA Arbitrations against Eletson Gas in London on 21 July 2023 and 21 September 2023 (now consolidated, the LCIA Arbitration). Eletson Gas requested on several occasions (being 24 November 2023, 6 December 2023, 10 January 2024 and in its security for costs application on 20 February 2024) that Levona provide satisfactory evidence that it would be able to pay a costs award made against it in the LCIA Arbitration but, despite being given ample opportunity, Levona failed to provide any such evidence with its response. It is appropriate to infer that Levona does not have its own assets. By contrast, the Subsidiaries are the bareboat charterers of the Vessels: see paragraphs above; Kertsikoff Aff 1 at [HB/5/37 and 38]. Enforcement will therefore be possible against both of the Vessels."

[81] In relation to a risk of dissipation of assets, the Claimants contended the following:

> "60 The available evidence demonstrates that there is a real risk that the above assets will be dissipated at Levona's direction. The facts supporting that conclusion are set out in detail in Kertsikoff Aff 1 at [HB/5/58-60]. In short:
>
> (a) As noted above, the Arbitral Tribunal specifically found that Levona had violated the Status Quo Injunction by "[t]rying to sell vessels, including the Symi and Telendos, while the Status Quo Injunction was in effect" (the JAMS Final Award at 98) [HB/5/277]. For the avoidance of any doubt, this factual finding stands, notwithstanding that the SDNY Opinion and Order vacated awards of relief based upon violations of the Status Quo Injunction.
> (b) The JAMS Final Award details a calculated strategy perpetrated by Levona's affiliate, Pach Shemen to disrupt the status quo and find another path to obtain the assets of Eletson Gas, or the assets in dispute in the JAMS Arbitration. See paragraphs [HB/5/58].
> (c) There are countless references in the JAMS Final Award which demonstrate attempts by Levona to sell the "Symi" and "Telendos", even following the grant of the TRO (see JAMS Final Award page 98) [HB/5/277]. Further examples are provided in the Kertsikoff Aff 1 at para [79] [HB/5/54].

61 In addition, the following mala fides identified by the Arbitral Tribunal provide opportunities for inference that there is a real risk of dissipation of Levona's assets if it is not restrained from disposing of those assets pending enforcement of the JAMS Final Award:

(a) Murchinson's bribery of Peter Kanelos, a senior officer of Eletson Corp, to act against the company's interests;
(b) Levona's unauthorised entry into a letter of intent with Unigas, the main competitor of Eletson Gas, in an attempt to sell the fleet of vessels owned by Eletson Gas;
(c) Levona's refusal to provide financial records in the JAMS Arbitration (and in the LCIA Arbitration) despite being requested on multiple occasions to do so;
(d) Levona's breach of the covenant of good faith and fair dealing by causing the lenders of Eletson Gas to arrest five vessels and failing to disclose this conduct after it became a shareholder of Eletson Gas; and
(e) Levona's attempts to terminate management contracts and effect changes to the directors of the subsidiaries of Eletson Gas in breach of the agreement governing the relationship between the shareholders of Eletson Gas.

62 By way of further background to Levona's actions, Levona commenced the LCIA Arbitration, which substantially re-litigates the issue of whether Eletson Gas is owned by Levona or not: see paragraphs above and Kertsikoff Aff 1 at [HB/5/69]. By commencing that reference, Levona has demonstrated that it does not accept the conclusions reached in the JAMS Final Award, and plainly Levona will not satisfy the JAMS Final Award or any judgment entered thereon. This is yet a further example of Levona's attempts to avoid orders against it.

63 Briefly pulling together the above:
(a) Levona has attempted to, and has actually, breached previous orders, including the Status Quo Injunction;
(b) Levona's past conduct demonstrates that it is willing to act with mala fides in order to procure self-serving benefits;
(c) Levona continues to dispute the legitimacy of the JAMS Final Award (as in *Griffin*[20] (see [41]), despite it having been substantially confirmed by the SDNY Court, and Levona has made no efforts to satisfy the awards of damages therein; and
(d) Levona has been evasive about the existence of its assets.

64 As for recent behaviour, as noted in Kertsikoff Aff 1 (see paragraphs [100] to [115] at [HB/5/60 63]), the Applicants have recently learned the following.

(a) Levona has (in November 2023 and in February 2024) renewed its efforts to market and sell the "Telendos" by engaging brokers to solicit offers. These actions have been taken despite (i) the Status Quo Injunction remaining in force and (ii) the plain terms of the Bankruptcy Court Stay Order. Upon discovering Levona's efforts in February 2024, the Applicants made enquiries (with, amongst others, the classification society for the M/T "Telendos" and the Liberian Registry). As of 14 February 2024, it appears that no sale of the "Telendos" has been completed. However, there remains a risk that Levona and/or Tropical Island has entered into a contract to sell the "Telendos", pursuant to which delivery and sale could place at a later date.

[20] Griffin Underwriting Limited v Ion G Varouxakis [2021] EWHC 226 (Comm).

(b) Tropical Island, the present bareboat charterer of the "Telendos", wrote on 19 February 2024 to EMC Gas Corporation and EMC Investment Corporation (the commercial and financial managers respectively of the "Telendos", together the EMC Companies), purporting to give 10 days' notice terminating the financial management agreement dated 16 January 2020 between Telendos SME and the EMC Companies. (This correspondence was sent via Tropical Island's English lawyers Stephenson Harwood LLP. No further correspondence from Tropical Island or Stephenson Harwood LLP has been received in this regard.)

(c) Mr Kertsikoff recently received an email from brokers suggesting that financing was being sought for "a 2012 blt 35K MGC at USD 42 m.". While the name of the relevant vessel is not specified in the message, it is appropriate to infer that the brokers are referring either to the "Symi" or the "Telendos": the "Symi" was built in 2012 with a DWT of 26,597 MT and the "Telendos" was built in 2010 with a DWT of 26,634 MT, and both are 35,000 cubic meter ("35K") LPG carriers.

65 As to (b) above, EMC Gas Corporation is a subsidiary of Eletson Gas and, by virtue of its position as commercial manager, Eletson has some oversight over the "Telendos" (including as to its employment). The Applicants infer that Tropical Island, at Levona's direction, purported to terminate the management agreement in order to facilitate a sale of the "Telendos" without the Applicants becoming aware of that sale.

66 Moreover, and relatedly, in the Bankruptcy Proceedings, Levona has repeatedly contended that the "Symi" and the "Telendos" are not subject to the Bankruptcy Court Stay Order and accordingly that it may proceed to sell or transfer the vessels without restriction (see Kertsikoff Aff 1 at [HB/5/59] and page 20 of Levona's Opposition to Debtors Motion to "Enforce Three Orders" [HB/5/987]). The JAMS Final Award specifically addresses the rights in the Vessels (and the companies which own them), and the Vessels are available as assets and/or property to satisfy at least a portion of the JAMS Final Award (the JAMS Final Award at 37) [HB/5/216]. As a result, it is plain that the Vessels come within the Bankruptcy Court Stay Order. It is appropriate to infer that Levona's stance, despite the aforementioned clear wording of the Bankruptcy Court Stay Order, is based upon its continued desire to sell the Vessels as soon as the Status Quo Injunction is discharged; it would not otherwise be necessary for Levona to maintain that position.

67 Finally, leaving aside the difficulties associated with enforcement if the Vessels are indeed sold, the Applicants are concerned that the impending judgment in the Confirmation Proceedings may compel Levona to dispose of the "Symi" and/or the "Telendos" in short order and, as a result of the speed of the sale, potentially at below market value. Thus, there is a real concern that, if the Vessels were sold, any available funds would not be able to satisfy the amount owed to the Applicants.

68 For the above reasons, Levona's conduct, taken as a whole and even focusing solely upon its recent behaviour, justifies an inference that there is a real risk of the dissipation of assets, which will render enforcement more difficult. This inference is based upon "solid evidence" (per Males J in National Bank Trust v Yurov and the EC Court of Appeal in Charles Peterson v Douglas Riegels) concerning Levona's past and recent conduct."

[82] It warrants here visiting an aspect of the matters related above in more detail. This concerns Levona's/Murchinson's bribery of Mr. Peter Kanelos.

[83] The Arbitrator can be left to tell this essential part of the history in his own words in the Award. As elsewhere, when the Arbitrator referred to 'the Company', he was referring to Eletson Gas.[21]

> "Peter Kanelos was the CFO of Eletson Corporation and a representative of the Company. The parties dispute whether he was also CFO of the Company. The evidence demonstrates that before it acquired the preferred interests from Blackstone, Murchinson was secretly communicating with Kanelos about strategies for (a) lowering the purchase price to acquire the Blackstone shares and (b) what to do with the assets of the Company once Levona became the preferred holder.
>
> …
>
> Murchinson used Kanelos to acquire the Company's confidential information and to communicate that information to the Company's financiers, along with Murchinson's proposals, to refinance the Company's debt.
>
> Unbelievably, Kanelos, a long-time employee and confidant of the principals of the Eletson entities was promised compensation commensurate with the ultimate strategy Murchinson employed. For example, in an email dated October 1, 2021, Bistricer writes to Kanelos: "You will get 10% of whatever profit we make on this transaction, should it go forward. The 10% will be paid once we have received our capital back minus a reasonable return of capital."
>
> …
>
> It is beyond cavil that Kanelos was acting contrary to his duties as an officer or representative of Eletson and the Company, and that he and Murchinson actively concealed their communications. In all of the above-cited correspondence, Kanelos intentionally used his personal gmail account, not his Eletson email address. In an October 31, 2021 email, Kanelos admitted that he was working on behalf of Murchinson's interest. "After sourcing the deal for Murchinson I have worked very hard for a year in your team's interest (and continue to do so even if the plan is to ultimately liquidate the company. While I am happy to align my interests with Murchinson . . . .") …
>
> Murchinson and Kanelos both took active steps to conceal their clandestine communications. For example, on November 1, 2021, Lichtenstein sent Kanelos a "Confidential Summary of Terms" summarizing the compensation to be paid to Kanelos. …
>
> Then just a few days later, on November 5, 2021, the day Levona became the preferred interest holder, Lichtenstein sent Kanelos an email to his Eletson address, attaching the notices of replacement of Blackstone directors, acting as if he had never met Kanelos. Addressing him formally, Lichtenstein writes: "Dear Mr. Kanelos, Nice to meet you. I have located your contact information on the Eletson website and am hoping you can be of assistance." …
>
> There is also evidence that Kanelos would caution recipients of his emails not to disclose the communications or any negotiations to Eletson. (See, e.g., C-1704.) As one example, on May 5, 2021, Kanelos sent an email from his gmail account, on behalf of Murchinson

[21] See Hearing Bundle Vol. 1 page 116.

and stated that "[d]ue to the sensitivity of this deal ONLY use my Gmail to communicate to me."…

After Levona became the preferred holder, Murchinson formalized its compensation arrangement with Kanelos in a certain Services Agreement, dated December 19, 2021….

Levona/Murchinson followed through with its terms by wiring Kanelos $100,000 on December 21, 2021. …

In an attempt to defend its secret communications with Kanelos both pre- and post acquisition of Blackstone's interests, Levona has insisted that Kanelos was the CFO of the Company, not just Eletson Corporation, and that its communications with him were entirely proper as the preferred shareholder of the Company. Upon closer look, however, this argument quickly falls apart and only bolsters Eletson's assertions of impropriety. Even if he were the CFO of the Company, he was also the CFO of Eletson Corporation—he had duties to Eletson and his secret incentivization agreement with Murchinson was clearly a conflict of interest that was induced by Murchinson and never disclosed by anyone to Eletson. Moreover, the nature of the correspondence pre-November 2, 2021—before Murchinson/Levona had any claimed interest in the Company—makes it clear that Kanelos was acting against the interests of the Company and was aligned with Murchinson. Accordingly, even if Kanelos was the CFO of the Company, this does not absolve Murchinson.

…

… Murchinson/Levona knew Kanelos was sharing Eletson "privileged" information with Murchinson and receiving Murchinson "privileged" information.

…

As discussed, supra, the evidence establishes that Murchinson bribed Kanelos to act against the Company's interest. The clandestine relationship commenced prior to November 2, 2021, but continued after Levona/Murchinson became the preferred holder. Indeed, the illicit so-called "Services Agreement" was executed between Levona/Murchinson and Kanelos in December 2021 pursuant to which Murchinson wired $100,000 to Kanelos.

…

Murchinson took the position throughout the entirety of these proceedings that it is not a party to this arbitration. But as the evidence conclusively establishes, and as discussed, supra, Murchinson is the real party in interest in this arbitration. Despite this, Murchinson did not make a full production of documents and communications. It is only as a result of my orders directing Levona/Murchinson to produce its communications with Kanelos and WFW [Messrs. Watson Farley Williams] that we know about Murchinson's coordinated strategy (i.e., "Plan B") and the communications with the lenders. (CM-1999.) For the avoidance of doubt, I do not believe that Levona's counsel in this arbitration was an active participant in its client's gamesmanship, but rather another pawn in its perpetual deceit.

…

Each of the Murchinson witnesses admitted that they actively concealed their activities, including their bribing of Kanelos, from the Company, without shame."

[84] The Arbitrator's reference, in this narrative, to Lichtenstein, was to Mr. Mark Lichtenstein. The Arbitrator related that Mr. Lichtenstein graduated from law school in 2019, articled as a Canadian lawyer in 2020 and then joined Murchinson in 2021. Mr. Lichtenstein referred to himself as Levona's General Counsel, but the Arbitrator determined, upon cross-examination of Mr. Lichtenstein, that Mr. Lichtenstein had been lying under oath in this regard. The Arbitrator gave Mr. Lichtenstein's testimony in the Arbitration 'zero weight':[22]

> "as it is clear to me that he was either impermissibly listening into these proceedings remotely, or improperly speaking in depth with others who were in attendance during other witnesses' testimony so as to accomplish the very thing I intended to prevent—witness contamination."

[85] The Arbitrator went on:[23]

> "Lichtenstein went so far as to actually manufacture evidence in this case. He tried to argue that minutes of a March 10, 2022 Board meeting were created contemporaneously and proved that Eletson did not exercise the purchase option. (J-33.) However, this document, and Mr. Lichtenstein's testimony surrounding it, is not credible. As discussed above, Eletson credibly provided evidence about the metadata behind the document that supports the inference that it was edited by Mr. Lichtenstein after this arbitration commenced. (C-2023.) It is clear from his testimony that this young lawyer does not understand the most basic ethical obligations of an attorney including to at all times avoid the appearance of an impropriety."

[86] Furthermore:[24]

> "This is glaringly illustrated in the following colloquy during his hearing testimony:
>
> Q. You willingly participated in this -- you, as a lawyer, willingly participated in this communication, correct?
>
> A. I wrote this e-mail.
>
> Q. And, in fact, I think is what you are telling The Court is that you never, in fact, objected to doing this.
>
> A. Object to doing what?

[22] See Hearing Bundle Vol. 1 page 166.
[23] Ibid.
[24] See Hearing Bundle Vol. 1 page 166 - 167.

Q. Objecting -- objected to making pretend that you didn't know Mr. Kanelos when you did.
A. It was none of the other directors' -- they didn't have a need to know this.

Q. You were making pretend, right?

A. I don't know if the word is making pretend. It's just a game. (May 24, 2023 Transcript, p. 164)"

[87] The Arbitrator proceeded:[25]

> "Murchinson/Levona continue through today to engage in gamesmanship both in connection with their refusal to honor their obligations under the BOL including their attempts to control the Company's assets as well their continuation of the multiple legal proceedings they have commenced—through Spears and Lichtenstein—in violation of the Status Quo Injunction Order. This is none surprising since in the words of their own "General Counsel" this is all "just a game."

[88] It was not only Mr. Lichtenstein that the Arbitrator named as behind the bribing of Mr. Kanelos. He named Mr. Bistricer, as the extract quoted[26] above shows. He also specifically named Mr. Spears. We see this from the following summary, given by the Arbitrator:[27]

> "As discussed and cited throughout this Final Award, the record is replete with instances of Murchinson's agents engaging in deceitful and malicious behavior to further their own agenda: from Spears' secret dealings behind the Company's backs in which he bribed a Company officer and conspired with third-parties to the detriment of the Company (see, e.g., C-1698, C-1699 ("Services Agreement"); C-1107 (Spears writing "I CANT STRESS ENOUGH – PLEASE DO NOT CONTACT THE VASSILIS X2 ABOUT THESE.")); to Murchinson/Levona's intentional breach of the LLCA's confidentiality obligations; to Murchinson/Levona's intentional interference with the Company's relationships with its lenders, causing the arrest of the Company's vessels, and their subsequent failure to disclose these violations to the Company; to Levona/Murchinson intentionally and knowingly breaching the LLCA by attempting to terminate management agreements and knowingly falsely telling the Company's lender that Eletson Corporation had "no right to correspond or otherwise deal with" its lenders (C-1958); to Lichtenstein's attempt to manipulate the evidentiary record by creating purported minutes of the March 10, 2022 board meeting after this arbitration was commenced (C-2023); to Levona and its agents knowingly violating—multiple times—the Status Quo Injunction Order (discussed, supra); to attempting to manipulate and deceive this tribunal by hiding behind shell entities while refusing to produce relevant documents, and misleading, if not outright lying, under oath."

[89] The Claimants submitted that Levona's efforts to change the commercial management of the Vessels from Eletson Corp to a different manager were calculated to cut Eletson off from

[25] See Hearing Bundle Vol. 1 page 167.
[26] Hearing Bundle Vol. 1 page 116, see footnote 21.
[27] See Hearing Bundle Vol. 1 page 163.

information concerning the commercial activities – and, importantly in the context of risk of dissipation, money flows deriving therefrom - of the Vessels. The Arbitrator described in some detail how Levona sought to do this, and to achieve this communication break, on pages 58 and 59 of the Award.

[90] This summary by the Arbitrator is a catalogue of corruption, manipulation and deceit on the part of Levona, Murchinson and the principal controllers of these entities, Messrs. Bistricer, Spears and Lichtenstein.

[91] Nonetheless, Judge Liman, without descending to specifics, suggested that the position was not so clear:[28]

> "I've not confirmed any of the findings of the arbitrator. They are evidentiary, but there's evidence from the arbitration record that cuts the other way."

[92] The Claimants contended, and persuaded me, that Levona's conduct, taken as a whole and even focusing solely upon its recent behaviour, justifies an inference that there is a real risk of the dissipation of assets, which will render enforcement more difficult. I accepted that this inference was based upon 'solid evidence' (per Males J in **National Bank Trust v Yurov**[29] and our Court of Appeal in **Charles Peterson v Douglas Riegels**[30]) concerning Levona's past and recent conduct.

[93] In terms of justice and convenience, the Claimants contended as follows:

> "69 The Applicants require protection in the face of several calculated and strategic steps orchestrated by Levona to challenge and frustrate the JAMS Arbitration with a view ultimately to avoiding payment of the sums ordered in the JAMS Final Award and confirmed by judgment in the Confirmation Proceedings. If relief is not granted, the Applicants consider it likely that before enforcement measures can be taken: (i) Levona will transfer away assets it holds in the BVI (if any), and (ii) the Vessels and/or Levona's interests in the Subsidiaries will be sold (or, as regards the "Symi", Levona may attempt to sell it).
>
> 70 In broader terms, there is an outstanding arbitration award in the Applicants' favour. First, in those circumstances, the authorities are clear that there is a strong policy in favour of the enforcement of that award and the grant of freezing relief (see **Griffin** at [31]-[32], quoted above, citing **Masri**). Secondly, as set out above, by commencing the LCIA Arbitration – which seeks to re-litigate the same dispute as was determined in the JAMS Arbitration – Levona has demonstrated its intention not to comply with the JAMS Final Award (or any judgment entered thereon). Levona should not be allowed to ignore arbitral

[28] See Hearing Bundle Vol. 1 page 1235 lines 7 to 9.
[29] [2016] EWHC 1913.
[30] BVIHCVAP2021/0006 (unreported, delivered 9th February 2023).

> and Court orders. Taken with Levona's past and recent conduct, and its repeated refusal to disclose assets, the balance of convenience is clearly in favour of the grant of relief."

[94] The Claimants explained that their application was urgent:

> "The SDNY Opinion and Order was issued on 9 February 2024, which confirmed most of the JAMS Final Award and vacated certain aspects of it. Judgment in the Confirmation Proceedings is due to be handed down shortly after 5 March 2024. At the date of handing down of the judgment in the Confirmation Proceedings, the Status Quo Injunction almost certainly will fall away. Given that Levona has already demonstrated that it does not consider the Bankruptcy Court Stay Order to apply to the Vessels, there will be no unambiguous injunctive measures in place to prevent Levona from dissipating its assets including by way of causing the sale of the Subsidiaries or the Vessels. Injunctive relief is therefore required urgently. This application is made in advance of the discharge of the Status Quo Injunction in order to ensure that there is no 'gap' during which Levona could sell the Vessels."

[95] The Claimants went on to address the Court on matters of full and frank disclosure. They raised some 16 potential points of objection that Levona might raise. At the *ex parte* hearing, their Counsel, introducing the matter, pointed out:

> "I have no doubt that if you were to grant this order today, My Lord, it will be challenged and therefore, with your permission, I am going to take you through the papers in same detail so there is no allegation, hopefully, that can be made that we haven't complied with our duties of full and frank disclosure."

This observation proved prescient.

[96] Upon filing their *ex parte* application for the WFO, the Claimants filed a Certificate of Urgency. The key part of that certificate stated as follows:

> "7. Given the fast-approaching date on which judgment is due to be handed down, and the effect of that judgment, the Applicants are concerned that if there is no injunctive relief in place at the date that judgment is handed down, Levona will take imminent steps to dispose of the Levona Vessels. This proposition is bolstered by recent developments outlined at paragraphs 100 to 115 of the affidavit in support of the application herein, which confirms that Levona is in active pursuit of buyers to whom the Levona Vessels may be sold.
>
> 8 If the Levona Vessels are disposed of, any judgment on enforcement of the Award will be rendered nugatory, as the Levona Vessels are the only assets of Levona's of which the Applicants are aware."

[97] The Claimants did not, though, directly address the Court at the hearing on 14th March 2024, in their Certificate of Urgency, nor in their evidence in support of the application why they had brought their application on a 'without notice' basis. The Claimants' Counsel did, however, submit that the

Claimants were concerned not to tip off Levona. In the context of addressing full and frank disclosure, and various arguments Levona might raise, Counsel for the Claimants stated:

> "They [i.e. Levona] could say well we haven't asked for an undertaking and their [i.e. the Claimants'] answer to that is well if we do that, that could tip them off."[31]

[98] I will refer to this, for shorthand convenience, as 'Eletson's tipping off submission'.

[99] I acceded to the Claimants' application for a WFO at the *ex parte* hearing.

[100] Among a number of other provisions and exceptions, the WFO included, as I have said, an 'ordinary course of business exception'. This was in the following terms:

> "17. This Order does not prohibit the Respondents from dealing with or disposing of any of their assets in the ordinary and proper course of business, with liberty to apply to this court in relation to what constitutes dealing with or disposal of assets within the meaning of this order."

[101] The first return date was set down for 10th April 2024.

3. Levona's application to set aside the WFO

[102] In advance of the first return date, Levona filed a Notice of Application on 2nd April 2024 to set aside the WFO.

[103] The grounds for Levona's application were, in sum, *inter alia*, stated as follows:

(1) the Award is not an award capable of being recognised and/or enforced in any jurisdiction (including the US, England and the BVI) or, at the very least, its recognition and enforceability are questionable;

(2) The application for the WFO was made in contravention of the Lift Stay Order which had been granted by the US Bankruptcy Court, and the automatic stay of the US Bankruptcy Court;

(3) Eletson Gas is not a party to the Arbitration nor the Award and so cannot enforce it;

(4) As at the date of Levona's application, the SDNY District Court has not yet issued a judgment confirming the Award;

[31] Official transcript of the hearing on 14th March 2024, page 65 lines 10 to 12.

(5) Levona has compelling evidence that the Award was obtained (and the subject matter itself tainted) by fraud, including a recording of a conversation Mr. Spears of Levona had with Mr. Kertsikoff of Eletson on 15th July 2022;

(6) The Claimants have conceded that the SDNY District Court have recently (on 15th February 2024) refused to grant an order in similar terms to the WFO due to a finding that there is no risk that the vessels could be disposed of in 'any imminent time'.

(7) Levona's title in the vessels is contractual and not proprietary. Tropical Island holds a purchase option in respect of the vessel MT 'Telendos'. There is nothing to freeze and or dissipate. The vessel belongs to a third party and cannot be sold by Tropical Island momentarily as the Claimants allege;

(8) The balance of convenience lies in favour of setting aside / discharging the WFO. Eletson Holdings, Inc. (which holds the common shares in Eletson Gas) was, as at 10th April 2024, in Chapter 11 bankruptcy proceedings in New York (the same having started under Chapter 7) and it was anticipated that a bankruptcy trustee would soon be appointed and potentially on 9th April 2024. That is significant as the unsecured creditors' committee has expressed the view that the Award and the ultimate enforcement thereof is an asset that falls within the bankruptcy estate. This is a crucial issue on which the Court should have been addressed;

(9) There was no need and no justification for the Respondents to seek the WFO either urgently or on an *ex parte* basis. Although the Respondents have stated to this Court that an *ex parte* proceeding was necessary so as not to 'tip off' Levona, the Respondents violated their obligation of full and frank disclosure by failing to disclose two significant facts, each of which independently demonstrate that the Respondents' alleged concern about 'tipping off' Levona was untrue. First, directly contradicting the assertion that secrecy was necessary so as not to 'tip off' Levona, the Respondents had in fact repeatedly informed Levona and the US Bankruptcy Court of their intention to seek just such relief, for weeks prior to initiating this action. Second, the Eletson parties had no grounds for concern about 'tipping off' Levona because (i) in connection with the emergency motion in the SDNY District Court, Levona had represented in writing to the Respondents and the SDNY District Court, and on the record in the SDNY District Court, that Levona would not dispose of any of its assets other than in the ordinary course of business pending entry of judgment in the SDNY District Court (which has not yet occurred), and (ii) as Judge Liman

had observed, Eletson's interpretation of the Bankruptcy Court's Lift Stay Order already prevents Levona from selling the Vessels.

(10) The evidence disclosed in Eletson's WFO application was wholly inadequate and misleading;

(11) Levona have been made aware of the existence of certain documents (the '5 Documents'), belonging to Eletson, which have been disclosed in the US Bankruptcy Proceedings, and as such under seal therein. The redacted copy of an open document suggests that the 5 Documents contain evidence that the purchase option and the transfer of the preferred shares in Eletson Gas by Levona to the Cypriot nominees has never happened, which in turn may reveal that the Award was obtained by fraud.

[104] The Claimants, for their part, filed an application on 5th April 2024 to continue the WFO at the 10th April 2024 return date.

[105] A substantive return date was ultimately fixed for October 2024, at which the Court would hear argument as to whether the WFO should be continued, either as made or substantially varied, or discharged altogether.

4. The substantive return date hearing

[106] At the substantive return date hearing, Counsel for Levona sought to persuade the Court that the WFO should be discharged. He concentrated on a number of ***procedural*** aspects. This contrasts with the approach of the Eletson parties at the *ex parte* hearing, which was to concentrate upon the ***substance*** of the matter, and in particular upon Levona's egregious conduct as found by the Arbitration Tribunal.

[107] If I recount all the submissions made, this Judgment would be unnecessarily long. Just because I do not relate a particular point does not mean that I have not considered it. Nor does it mean that I do not consider it important, or that I have not given it due weight. I will abide by what I consider to be the essentials.

4.1 'Without notice' nature of the first hearing

[108] It is apt to refer to an express provision of our Civil Procedure Rules. There is what is described as a 'general rule' that an applicant must give notice of an application to each respondent, unless

permitted by a practice direction or rule: see Rule 11.8(1) and (2) of the Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023 ('CPR').

[109] Moreover, CPR 17 lays down a number of rules in relation to interim remedies.

[110] CPR 17.3(3) provides that:

> "The court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice."

[111] CPR 17.3(4) provides that:

> "The evidence in support of an application made without giving notice must state the reasons why notice has not been given."

[112] In relation to 'interim injunctions and similar orders' CPR 17.4(3) makes provision for applications to be heard on short notice:

> "(3) An application for an interim order under this rule may in the first instance be made on 3 days' notice to the respondent."

[113] CPR 17.4(4), still in relation to 'interim injunctions and similar orders', provides:

> "(4) The court may grant an interim order under this rule on an application made without notice for a period of not more than 28 days (unless any of these rules permits a longer period) if it is satisfied that –
>
> (a) in a case of urgency no notice is possible; or
>
> (b) that to give notice would defeat the purpose of the application."

[114] The WFO in this case clearly came within the category of 'interim injunctions and similar orders'. The provisions of CPR 17.3 and 17.4 applied to it.

[115] In the present case, the Notice of Application, filed on 11th March 2024, represented that:

> "The application needs to be urgently determined on account that the Status Quo Injunction currently in place will fall away immediately after judgment is handed down in the Confirmation Proceedings, which is expected to take place shortly after 5 March 2024."

[116] The evidence filed by the Claimants in support of their *ex parte* application, the First Affidavit of Mr. Kertsikoff also dated 11th March 2024, twice[32] stated Eletson's application for the WFO was being brought on a 'without notice' basis.

[117] Mr. Kertsikoff's First Affidavit was a somewhat lengthy, detail-packed document. It comprised 42 pages and 168 paragraphs. Its exhibit ran to about 1400 pages.

[118] Mr. Kertsikoff's First Affidavit did not directly explain why Eletson were proceeding on a 'without notice' basis. He did, though, state this:

> "E.3. Urgency
>
> 123. As noted above, on 9 February 2024, US District Judge Lewis J Liman issued an Opinion and Order confirming the majority of the JAMS Final Award, and vacating certain aspects of it. Judgment on the JAMS Final Award is due to be handed down shortly after 5 March 2024.
>
> 124. At present, the Status Quo Injunction remains in place. It is, however, due to fall away once judgment on the JAMS Final Award is handed down. Once the Status Quo Injunction falls away, there will be no injunctive measures in place to prevent Levona dissipating its assets.
>
> 125. Given the fast-approaching date on which judgment on the JAMS Final Award is due to be handed down, and Levona's recent actions in relation to the "Symi" and the "Telendos", the injunctive relief sought in this application is urgent."

[119] Counsel for Levona contended that Eletson's argument that Eletson had not engaged with Levona concerning provision of undertakings so as not to tip off Levona was 'invalid'.

[120] As I have related earlier, at the *ex parte* hearing Counsel for Eletson did not address the Court on the reason(s) why Eletson was making the application on a without notice basis. Rather, the Court was presented by Eletson with a host of factual matters which painted Levona in an extremely bad light. I was left in no doubt that Eletson had presented solid evidence of a real risk of dissipation on the part of Levona; that Levona could indeed sell the Vessels at short notice; and that there was a real risk that Levona would put assets or proceeds of sale beyond the reach of Eletson in order to frustrate Eletson's enforcement of the Award. Against this presentation, Eletson's tipping off submission made sense.

[32] At paragraphs 2 and 78.

[121] It thus seemed rather obvious to me that the application for the WFO should proceed on a 'without notice' basis. Put differently, in the words of CPR 17.3(3), it appeared to me that there were good reasons for not giving notice. Being satisfied of this, it seemed open to the Court under CPR 17.3(3) that it could grant the interim relief sought on a 'without notice' basis.

[122] With the benefit of a broader perspective and of hindsight, I now realise that I was mistaken.

[123] Mr. Kertsikoff's First Affidavit did not state the reasons why notice was not given. That was a breach of the mandatory requirement in CPR 17.3(4).

[124] On this occasion it was not merely a technical breach. The reason why an applicant is required to give evidence as to why an application is being brought on a 'without notice' basis is so that the Court can consider:

(1) whether the application is sufficiently urgent to displace the usual notice requirements and response periods for non-urgent applications;

(2) if so, whether the application could still be brought on three days' notice under CPR 17.4(3) or on some other short notice; or

(3) whether urgency is such that no notice is possible (pursuant to CPR 17.4(4)(a)); or

(4) whether giving notice would defeat the purpose of the application (with reference to CPR 17.4(4)(b)).

[125] Considering these issues is important because CPR 17.4(4) lays down the circumstances in which the Court is permitted to make an order on a 'without notice' basis, as an exception to the usual requirement for a respondent to have an opportunity to make representations.

[126] These CPR rules reflect a principle that in general, some notice is better than none. The rules establish a formal short notice period of three days. This strikes some balance between bringing an urgent application on for hearing within a short time and giving a respondent some time to instruct legal representatives, collect his thoughts and his main responsive material, and put his position before the court. The three day rule – for that is what it literally is – also avoids strategic lip-service being given to notice by an applicant wanting his application to be heard on even less notice, to avoid becoming under an obligation of full and frank disclosure at an *ex parte* hearing, but at the same time to prevent the respondent from preparing sufficiently to put forward a meaningful

opposition. That said, the Court has the power under CPR 26.1(2)(x) to dispense with the three-day notice requirement in 'special circumstances, on the application of a party'.

[127] *Ex parte* hearings are, in practice, the most likely to lead to a court into serious error. This happens time and again. *Ex parte* presentations are inherently partial (*sic*) in both senses of 'partial': incomplete and on behalf of one side only. Logically, our legal system seeks to minimize the use of 'without notice' procedures.

[128] The requirement to give evidence for the reasons for proceeding *ex parte* serves the purpose of increasing the likelihood that the reasons are genuine, in that there is a range of remedies available where it is suspected that evidence has been given falsely.

[129] Here, Eletson's evidence, namely Mr. Kertsikoff's First Affidavit, was silent on:

(1) why the application was made 'without notice';
(2) why no notice was possible;
(3) why three days', or some other short notice was not possible;
(4) why notice would defeat the purpose of the application.

[130] Whilst there were no such explanations, the closest reasons proffered by Counsel for Eletson were urgency, and the alleged danger of tipping off.

[131] That said, urgency was not stated anywhere by Eletson to be a reason for proceeding on a 'without notice' basis. Rather, alleged urgency was used by Eletson to create an impression that the application should proceed on a 'without notice' basis. I will return to alleged urgency.

4.2 Tipping off

[132] In relation to Eletson's tipping off submission, this was not a reason given in Eletson's evidence for proceeding without notice. It was proffered by Eletson's Counsel at the *ex parte* hearing.

[133] Tipping off would, of course, be the classic and invariably used reason for wishing to proceed on an *ex parte* basis. But in this case, at the substantive return date, Counsel for Levona demonstrated comprehensively that any such tipping off had already occurred a considerable amount of time before the *ex parte* hearing on 14th March 2024. The following is what Levona contends happened.

[134] On 15th February 2024, about a month before the *ex parte* hearing before this Court, Eletson brought an application with file number 23 CV 7331 (LJL) before the SDNY District Court, presided over by Judge Liman. Eletson was the applicant, and Levona was a respondent. That was a telephone hearing. Both sides were represented by attorneys. Seven attorneys were recorded as appearing for Eletson, and five for Levona.[33]

[135] At that hearing, Eletson sought to persuade that court to grant:

(1) 'a prejudgment restraining notice against Levona under CPLR 5229, made available through FRCP 64'; and/or

(2) a preliminary injunction to the same extent; or

(3) a temporary restraining order

against Levona to prevent Levona disposing of assets so as to render nugatory a judgment confirming the Award.[34]

[136] Eletson explained the purpose of this:

> "In short, Eletson seeks tailored relief which is presently needed to ensure that, when it is time to enforce the confirmed award, there remain assets through which it can be enforced."[35]

[137] Pausing here, this relief was not stated as being sought because the Status Quo Injunction was about to fall away upon confirmation of the Award by way of a judgment. Nor did it in terms include an ordinary course of business exception.

[138] Judge Liman heard both sides. Eletson sought to persuade the court that there was a risk of imminent disposal of the Vessels at an undervalue. Levona countered this on a number of grounds. Levona represented that it would not be selling the Vessels pending entry of a judgment. Judge Liman denied the application for a temporary restraining order and left it open to Eletson to return to him on the request for a preliminary injunction.[36]

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[33] See Hearing Bundle Vol.1 page 1197.

[34] See Eletson's Memorandum of Law in support of Prejudgment Relief, Hearing Bundle Vol.1 page 1133 at pages 1139 – 1140.

[35] See Eletson's Memorandum of Law in support of Prejudgment Relief, Hearing Bundle Vol.1 at page 1139.

[36] See Hearing Bundle Vol.1 pages 1202 line 14 – 1235 line 10.

[139] At this hearing, Judge Liman summarised his reasons for denying Eletson a temporary restraining order as follows:[37]

> "Number one, there's no reason that has been offered to me that if the vessels are sold, that they will be sold for less than their fair market value.
>
> Number two, there has been no showing that's been made to me that Levona will imminently dispose of its assets and of the vessels or of the shares in the SMEs.
>
> There is the representation from Levona that it will not do so. In addition — and this will play a role with respect to a TRO generally — under Eletson's argument, Levona is already restrained from selling the two vessels.
>
> As I've indicated, I'm not sure that that is the right interpretation of the bankruptcy stay order. But whether it's the right interpretation or the wrong interpretation, I'm not the judge who issued that order — Judge Mastando is. Judge Mastando is the party who is in charge with enforcing it. And on Eletson's own argument, it has an alternative avenue of relief if there is a risk that those vessels will be sold."

[140] In the context of tipping off, it warrants recording also that at the hearing before Judge Liman, Counsel for Levona pointed out that Eletson had raised similar arguments since November 2023 concerning alleged risk of dissipation before Judge Mastando, who was presiding over the Eletson bankruptcy proceedings:[38]

> "So, your Honor, the exhibits attached to their brief today, the declaration attached to their brief today, **the arguments they're making about selling and marketing of the ships and all of this, it's all the same stuff that they were talking to Judge Mastando about in the motion that they filed in November.** We filed an opposition to that. We had a lengthy - there was a status conference before Judge Mastando that turned into a mini argument on the merits of that motion. At the end of that — that was in the middle of December — John Mastando directed the debtors to coordinate a day for an evidentiary hearing on the motion. And what happened since then, since mid-December, is exactly nothing. The debtors made no effort to schedule an evidentiary hearing. They haven't even served a reply brief in support of their motion.
>
> And so, **your Honor, the notion that we have here, you know, suggested in their brief today, that there's some kind of an urgent emergency that they recently discovered all of this horrifying conduct, it's just false. This is conduct that they put in front of the bankruptcy court two, three months ago, that they were given the opportunity, and, in fact, the instruction from the bankruptcy court, to pursue, and yet they chose not to pursue**. They've been sitting on their hands. As far as I can tell, they've decided to abandon the motion. So for them to wake up now and decide that, oh, we're going to deploy all of these same arguments that we've been sitting on for months and months in support of a suggestion that the Court has to issue a temporary restraining order, which is

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[37] See Hearing Bundle Vol.1 pages 1235 line 18 – 1236 line 9.
[38] See Hearing Bundle Vol.1 pages 1207 line 10 – 1208 line 16.

just the most extraordinary relief a court is permitted -- among the most extraordinary forms of relief available to the Court, is just not well taken." (Emphasis added.)

[141] It appears that Levona had been 'tipped off' that Eletson might be intending to seek injunctive relief against Levona to prevent disposal of assets at least since November 2023. But there is more.

[142] After Eletson's unsuccessful attempt to obtain a temporary restraining order from Judge Liman, Eletson took the opportunity in a hearing before Judge Mastando on 27th February 2024 to seek a pronouncement as to whether or not the Lift Stay Order restrained disposal of the Vessels.[39] That took place just over two weeks before the *ex parte* hearing in this Court.[40] Multiple parties attended that hearing before Judge Mastando, including Eletson and Levona.[41]

[143] Eletson's Counsel addressed Judge Mastando as follows:[42]

> "Judge Liman denied the TRO based on a representation from Levona, made twice, that it wasn't going to take steps to sell. But we are in a position where Levona is pursuing an arbitration in London, raising the exact same issues as Justice Belen decided this on behalf of Gas. Levona is purporting to fire Eletson management on one of the ships. Levona says that its sale of those ships isn't covered by Your Honor's order. **So yes, we do intend, unless Your Honor wishes it to be otherwise, to restrain, not to get money and pocket it and transfer it, but to restrain, to preserve the assets until such time as the judgment is then final and appealed. But we do intend to do that, unless Levona right now wants to admit or acknowledge what we acknowledge. And that is Your Honor's lift stay order does include those two ships, the Levona assets, and then we're all fine.**" (Emphasis added.)

[144] After hearing arguments from various parties, including Levona, Judge Mastando stated that he was not going to clarify interpretation of the lift stay order on that occasion. In doing so, he noted that Levona 'seem to be saying the two ships aren't – the sale of the ships is not subject to the stipulated relief order'.[43]

[145] With Levona indicating their position that the Bankruptcy Court's lift stay order did not restrain sale of the Vessels, and Eletson's unequivocal indication that Eletson would seek restraining orders if Judge Mastando would not confirm that the lift stay order did restrain sale of the vessels, Levona

[39] See Hearing Bundle Vol.1 pages 1063 line 25 – 1093 line 17.
[40] See Hearing Bundle Vol.1 page 1010.
[41] See Hearing Bundle Vol.1 pages 1015 – 1019.
[42] See Hearing Bundle Vol.1 pages 1064 line 7 – line 21.
[43] See Hearing Bundle Vol.1 page 1089 line 8 - line 14.

were given the clear message that Eletson would apply for restraining orders to prevent such sale. That was 'tipping off' to Levona in the clearest of terms.

[146] Eletson did not bring these exchanges before Judges Liman and Mastando to this Court's attention at the *ex parte* hearing. Had Eletson done so, it would immediately have been apparent that the purported need to avoid tipping Levona off was non-existent because it had already happened.

[147] Tipping off had already occurred at the latest on 27th February 2024. That was at least two weeks before the hearing on 14th March 2024. Eletson's Counsel was wrong to contend that Eletson had not engaged with Levona prior to applying for the WFO to avoid tipping off Levona.

[148] The Court was misled by Eletson's 'tipping off' submission into thinking that this was a sound basis for acceding to a WFO on a 'without notice' basis.

[149] We will return to 'tipping off' in the context of alleged urgency.

4.3 Alleged urgency

[150] As we have seen, Eletson's application for the WFO was dated 8th March 2024. In Eletson's evidence in support, Mr. Kertsikoff attested that:

> "107. On 6 March 2024, I received an email from brokers, which stated: "a colleague today had a Norwegian bank asking for advice on the MGC markets related to what turned out to be connected to their possible financing of a 2012 blt 35K MGC at USD 42 m.. Apparently [sic] the vessel would be operated by Columbia and the owner had also recently acquired the sister vessel."

Mr. Kertsikoff explained at paragraph 108 that the vessel in question was with an 'extremely high probability' MT 'Symi'.

[151] The impression created was that this email of 6th March 2024 precipitated Eletson's *ex parte* application two days later.

[152] Indeed, at the substantive return date, Eletson's skeleton argument contended that Eletson was coming on an *ex parte* basis so as not to tip Levona off that Eletson had received this further 'market intelligence', as Counsel for Eletson called it, on 6th March 2024.[44] This was not a reason advanced by Eletson at the *ex parte* hearing.

[44] See Eletson's substantive return date skeleton, paragraph 258 and paragraphs 123-135.

[153] This appears to me to be a gymnastic attempt to get out of the difficulty that Eletson had already tipped off Levona by 27th February 2024, by alleging a new event that Levona should not be tipped off about.

[154] I say this for a number of reasons.

[155] First, it cannot in fact be the case that this email of 6th March 2024 sent Eletson rushing to this Court two days later on 8th March 2024. This is borne out by an earlier email sent by Eletson's Mr. Vasilis Hadjieleftheriadis to Eletson colleagues and Eletson's United States attorney Mr. Lou Solomon at Messrs. Reed Smith. Mr. Hadjieleftheriadis's email was dated 14th February 2024 – the same day as Eletson filed its motion for a temporary restraining order and/or preliminary injunction in the SDNY District Court, and the day before Judge Liman heard and determined that motion. The email read:

> "Hi all. fyi, we have been getting renewed messages this morning (as per below) that the telendos may have been sold/agreed to be sold. we have checked with liberian registry/vessel's class/oaktree and they don't seem to be aware of any movements, however, i am writing this first, if you think it is appropriate to change any of the docs you plan to file today **and second to urge charlie to get the information required for the levona/bvi actions**. Thanks" (Emphasis added.)

[156] It is apparent from this that Eletson was already working upon instigating these BVI proceedings **before 14th February 2024**. That is also commensurate with the large volume of Eletson's *ex parte* application dated 8th March 2024 (but deemed filed on 11th March 2024) – it is distinctly improbable that the affidavit in support of that application, running as it did to 42 pages and 168 paragraphs, with an exhibit of about 1400 pages, could have been prepared within two days.

[157] Then, it warrants observing that the 'market intelligence' email of 6th March 2024, assuming it to be genuine, did not speak of a disposal or sale of a vessel, but a 'possible financing'. Nor did it give any indication or suggestion of a transaction that was outside the ordinary course of business. It has to be remembered that in this jurisdiction Eletson could not prevent Levona or Tropical Island disposing of their assets in the ordinary course of business. This is not to say that an applicant for a freezing order needs to adduce evidence of an imminent dealing or disposal outside the ordinary course of business to establish a real risk of dissipation; a general conclusion from the overall circumstances that a respondent may take steps to deal with or dispose of assets to frustrate

enforcement suffices.[45] At the same time, when considering the merit of Eletson's submission at the return date hearing that Eletson did not want to tip off Levona that Eletson had the 'market intelligence' of 6th March 2024, it is necessary for the Court to consider the quality of that recent evidence. This entails looking at what the email of 6th March 2024 does and does not say. The sum total is that it might, or might not, indicate that Levona or Tropical Island intended imminently to deal with one of the Vessels, and any such dealing might, or might not, be in the ordinary course of business, but it does not suggest that it would be outside the ordinary course of business or anything else improper.

[158] Despite Eletson seeking to prompt the Court into seeing the 'market intelligence' email of 6th March 2024 as setting off alarm bells justifying them to have urgent 'without notice' recourse to this Court, the email fell short of that.

[159] Indeed, if that email indeed alarmed Eletson so much, this begs the question why Eletson did not immediately seek to return before Judge Liman or Judge Mastando for urgent relief.

[160] The short answer is that the email of 6th March 2024 is not of itself evidence of dissipation. In terms of evidence, it was neutral.

[161] I have come to the view that the email of 6th March 2024 was being invoked by Eletson as a pretext, to dress up as urgent an application that was already long in preparation, and portrayed as so sensitive that the hearing had to proceed on a 'without notice' basis.

[162] Often parties who apply for urgent freezing order relief, even in complex commercial situations, do so within a very short time, sometimes even within a matter of hours. Such applications are, by their nature, frequently unpolished, patchy and incomplete, and allowances can be made for that, including in relation to fulfilment of the duty of full and frank disclosure and fair presentation. By contrast, a preparation time of three weeks, as here, appears relatively leisurely. This suggests that the alleged urgency was non-existent or, otherwise of Eletson's own making.

[163] I have come to the view that Eletson's representations as to purported urgency were an artificial construct, calculated to precipitate this Court into proceeding on a 'without notice' basis, when in fact there was no urgency and at least some notice could and should have been given.

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[45] BVIHCVAP2021/0006 (unreported, delivered 9th February 2023) Charles Peterson v Douglas Riegels at paragraph [29] (Theodore JA (Ag.)).

4.4 Eletson's inconsistent approach as between New York and the BVI

[164] We have seen that 'urgency' was predicated by Eletson upon the Status Quo Injunction allegedly falling away upon the SDNY District Court entering judgment confirming the Award, anticipated, so Eletson urged, shortly after 5th March 2024. An initial legal reaction would be to ask oneself whether, as a matter of New York law, Judge Liman's Opinion and Order of 9th February 2024 would have to await entry of judgment upon it to have effect.

[165] The reason this question suggests itself is because Judge Liman, in his Opinion and Order, expressly withheld confirmation for Declaration A.7 in the Award, which had been in terms that

> "The Status Quo Injunction shall stay in effect until the later of the final court judgment being entered on any Award or any further order of this Arbitrator."

[166] Judge Liman stated this:[46]

> "The Court confirms the Award as stated in Dkt. No. 67-58, beginning on page 95, including the award of compensatory and punitive damages and the grant of attorneys' fees, costs, expenses, and pre-judgment interest, with the following exceptions:
>
> • **Paragraphs A.7**, A.8, A.10(i), and A.10(iii) **are vacated**.
>
> • All awards of relief against Murchinson and Pach Shemen are vacated.
>
> • All awards of relief, including compensatory and punitive damages, based upon violations of the Status Quo Injunction are vacated.
>
> • All awards of attorneys' fees, costs, and expenses relating to the involuntary bankruptcy petition and Bondholder Litigation are vacated.
>
> **Parties are directed to each submit a proposed judgment in accordance with this Opinion and Order** by February 23, 2024. The Clerk of Court **is** respectfully **directed** to close Dkt. Nos. 28, 49.
>
> **SO ORDERED**.
>
> Dated: February 9, 2024 New York, New York" (Emphasis added.)

[167] The record shows that Judge Liman signed this Opinion and Order, and that it was filed electronically as 'Document 83' in 'Case 1:23-cv-07331-LJL' on 9th February 2024. These details indicate that this Opinion and Order has some formal, definitive status, as opposed to being a draft document.

[46] See Hearing Bundle Vol.1 pages 319 - 320.

[168] Upon its own terms, the Opinion and Order reads as if the material paragraph A.7, i.e. the Status Quo Injunction, was vacated by Judge Liman's Opinion and Order. After all, it expressly stated that this was 'so ordered'.

[169] An understanding that the Opinion and Order vacated the Status Quo Injunction is bolstered by the fact that the Opinion and Order also directed the parties to submit a proposed judgment by a deadline. Such a direction itself would appear not to be effective if a judgment is required to make the Opinion and Order effective. This yields a circular problem: there would be nothing to compel production of the judgment if a direction to produce a judgment itself requires a judgment. The Opinion and Order would seem logically to have had at least the effect of issuing a direction to the parties, and no judgment appears to have been necessary to achieve that. It is unclear to me why a direction so ordered should be effective without a judgment, but not an order vacating part of an arbitration award.

[170] Eletson took a position before this Court that paragraph A.7, the Status Quo Injunction had not been vacated by Judge Liman's Opinion and Order, requiring entry of judgment to have this effect.

[171] Eletson did not articulate the legal basis for such a position, nor did it adduce expert evidence of New York law..

[172] However, this Court need not go so far as to concern itself with answering the question, which is one of New York law, whether that is the correct legal position. That is because Eletson, Judge Liman, and Levona all proceeded to deal with Eletson's motion for a temporary restraining order and/or preliminary injunction on 15th February 2024 on the basis that

(1) the Status Quo Injunction ***<u>had already been vacated</u>*** by Judge Liman's Opinion and Order; and that

(2) the Lift Stay Order ***<u>alone</u>*** restrained, or arguably restrained, Levona from disposing of assets.

We can see this from the following extracts.

[173] It is convenient to start with Eletson's 'Memorandum of Law in Support of Prejudgment Relief'.[47] There, Eletson submitted:

[47] See Hearing Bundle Vol. 1 page 1133.

"…Justice Belen's Status Quo Injunction **was vacated** along with related relief;[48]
…
Second, Eletson has been careful here to seek relief commensurate with (1) what **was** in place pursuant to the TRO **and Status Quo Injunction**; and (2) what **is** unambiguously provided for by the **Lift Stay Order**.[49]
…
… Eletson would be subject to immediate harm **absent a temporary restraining order** because there is evidence that Levona is currently marketing the Telendos (Kertsikoff Decl. ¶ 7 and Ex. A), and, most troublingly, has declined to concede that the **Lift Stay Order** precludes it from transferring its assets (Underwood Decl. Exs. 4 & 5). Accordingly, there is a very real potential that **if Levona is not restrained from doing so**, it will deplete its assets before judgment is even entered in this action.[50] (Emphasis added.)

[174] Then, in Eletson's oral submissions before Judge Liman on 15th February 2024, Eletson summarised its position as follows:

> "So we're here seeking your assistance in protecting the assets of Levona, whether or not they're subject to the **lift-stay order**, to preclude Levona from dissipating its assets in advance of a $100 million judgment being entered."[51]

This submission by Eletson logically suggests that apart from the Lift Stay Order, there was at that point in time (15th February 2024) no other relief in place to restrain Levona from dissipating its assets prior to entry of a money judgment.

[175] Judge Liman himself noted:[52]

> "…I **vacated** certain portions of the arbitrator's award." (Emphasis added.)

Judge Liman's use of the simple past tense suggests that he understood the effect of his Opinion and Order dated 9th February 2024 to have been to vacate parts of the award.

[176] The matter, though, does not rest purely on linguistics. One of the substantive grounds for Judge Liman to deny the relief was that Eletson already had the protective benefit of the Lift Stay Order of

[48] See Hearing Bundle Vol. 1 page 1145.
[49] See Hearing Bundle Vol. 1 page 1159.
[50] See Hearing Bundle Vol. 1 page 1161.
[51] See Hearing Bundle Vol. 1 page 1228 lines 19 – 22.
[52] See Hearing Bundle Vol. 1 page 1233 line 8.

the Bankruptcy Court, at least on Eletson's interpretation of the Lift Stay Order. Judge Liman considered the motion before him on the basis that the Status Quo Injunction had already been vacated, but that the Lift Stay Order remained (on Eletson's own case) in effect.

[177] As Levona's Counsel submitted before this Court: if the Status Quo Injunction had remained until Judgment, then (a) Eletson would not have applied to Judge Liman for a temporary restraining order pending the entry of Judgment, and (b) the parties and Judge Liman would not have conducted the entire hearing on the basis that there was no restraint in place, other than, on Eletson's own case, the Lift Stay Order. I accept this submission.

[178] Furthermore, before Judge Mastando on 27th February 2024, there was no discussion of the Status Quo Injunction subsisting. In relation to restraining relief, the discussion revolved around the meaning of the provisions of the Lift Stay Order. I am satisfied that the entire motivation for Eletson's seeking Judge Mastando's clarification on this point was because no other restraining orders were in place. Indeed, if there had been, there would have been no need for Eletson to inform Judge Mastando and the other parties present, including Levona, that Eletson would apply for injunctive relief if Judge Mastando refused to confirm the Lift Stay Order meant what Eletson thought it meant.

[179] What we see is Eletson, before this Court, taking a new, diametrically opposite position. Eletson's Counsel did not bring their fundamentally different position in the United States proceedings to this Court's attention at the *ex parte* hearing.

[180] I have come to the conclusion that Eletson took this new position to create a case for urgency, in circumstances where:

(1) Eletson no longer had the benefit of the Status Quo Injunction since 9th February 2024 – approximately a month; but

(2) Levona had not disposed of the Vessels in that time, despite on Levona's own case being free to do so; and

(3) Eletson continued, arguably, and on its own interpretation of the Lift Stay Order, to have the benefit of the restraints in the Lift Stay Order.

[181] It is difficult to escape the conclusion that Eletson set out to maneuver this Court into hearing their application for a WFO on a 'without notice' basis, by manufacturing a case of urgency, when in fact such a basis did not exist.

[182] That there was no genuine urgency warranting a 'without notice' hearing is moreover borne out by the fact that Judge Liman expressly left it open for Eletson to return to him to continue their motion for a preliminary injunction.[53] Had there been genuine urgency, Eletson had an open procedural path available to it.

[183] Furthermore, the court presided over by Judge Liman had shown itself, with the hearing convened on extremely short notice on 15th February 2024, to be sufficiently accommodating to enable genuinely urgent hearings to be conducted almost immediately.

[184] Moreover, Judge Mastando also left it open to the parties to return to him to seek clarification of the Lift Stay Order.[54] If Eletson was genuinely in need of urgent freezing or injunctive relief it already had two court doors open to it in New York.

[185] Not only were the doors of two United States courts already open, but those courts had judges already very familiar with the matter.

[186] I am driven to conclude that Eletson's application before this Court was not genuinely so urgent that no notice was possible.

[187] In such circumstances, at the very least, there would appear to have been no reason why Eletson's hearing before this Court could not have proceeded on some kind of notice, as Eletson had done before Judge Liman and Judge Mastando.

[188] Instead, at the *ex parte* hearing, this Court only heard part of the story of what had happened and had been going on in the New York courts.

[189] The transcripts of the hearings before Judge Liman and Judge Mastando, together with the written memoranda of law submitted in respect of those hearings, show that Eletson and Levona were

[53] See Hearing Bundle Vol.1 page 1237 lines 2 to 12.
[54] See Hearing Bundle Vol.1 page 1089 lines 14 to 22 (with reference to Levona, but applicable mutatis mutandis to Eletson).

engaged upon an extremely complex set of legal procedures in New York, with an intricate interplay between two different United States courts.

[190] On the one hand there were confirmation proceedings, and proceedings ancillary to that, before Judge Liman in the SDNY District Court, to do with confirmation of the Award.

[191] On the other hand, there were multi-party proceedings before Judge Mastando in the US Bankruptcy Court. Levona was at pains to submit before Judge Liman on 15th February 2024 that 'in any event, everyone agrees that they're [i.e. Eletson] going to have to go to Judge Mastando before they seek enforcement'[55] of a confirmed arbitral award.

[192] We see also from the transcript of the hearing before Judge Liman that there was disagreement over how far Judge Liman could go in the judgment upon the Opinion and Order. Eletson was holding out for entry of a monetary judgment, with Judge Liman repeatedly voicing that his understanding was that the appropriate judgment was simply to confirm the Award. Judge Liman asked the parties to file 'letter briefs' (i.e. written submissions) on the point if they continued to disagree on it.[56]

[193] We also see from the transcripts that there had already been at least one mediation attempt, before Judge Gropper, with Judge Mastando hearing the parties before him (including Eletson and Levona) agreeing to a further round of mediation[57] and stating that he was going to direct the parties to mediate further before Judge Gropper.[58]

[194] Eletson's presentation at the *ex parte* hearing before this Court did not portray these complex dynamics.

[195] Eletson made no mention of the mediation, nor of the parties' agreement to further mediation. Agreement to mediation generally (but not always) suggests a willingness of both sides to attempt to resolve their differences on a consensual basis, generally (but again not always) rendering it less likely that the debtor or prospective debtor (here Levona) would engage upon the sharp

[55] See Hearing Bundle Vol.1 page 1222 lines 23 – 25.
[56] See e.g. Hearing Bundle Vol. 1 page 1223 line 24 – page 1224 line 11.
[57] See Hearing Bundle Vol. 1 page 1097 at line 10.
[58] See Hearing Bundle Vol. 1 page 1099 at lines 2 - 3.

practice of dissipating assets pending the mediation. Mediation is material for a court to know about when considering the grant of injunctive relief.

[196] Instead, this Court was presented with a neatly packaged narrative that Judge Liman had 'substantially'[59] confirmed the Award; that Judge Liman was expected imminently to enter a substantial money judgment in Eletson's favour against Levona,[60] and the effect of that judgment would be to cause the still extant Status Quo Injunction to fall away 'in very short order',[61] leaving it open to Levona to dissipate assets to render enforcement nugatory.[62]

[197] I am also satisfied that this neatly packaged narrative was an artificial construct calculated to influence this Court: ***nobody*** in the various New York proceedings treated the Status Quo Injunction as subsisting after Judge Liman vacated it in his Opinion and Order of 9th February 2024. ***Everybody*** in the various New York proceedings proceeded on the basis that the only restraining relief arguably in place after 9th February 2024 was the Lift Stay Order.

[198] It should be noted that it is materially irrelevant whether, as a matter of New York law, an Opinion and Order requires a judgment to be entered for it to take effect. Indeed, Eletson had not adduced expert evidence of New York law on this point at the *ex parte* hearing. The alleged subsistence of the Status Quo Injunction was ***nowhere*** mentioned in Eletson's attempt on 14th/15th February 2024 to obtain a temporary restraining order and/or preliminary injunction from Judge Liman, nor in Eletson's attempt to obtain clarification of the Lift Stay Order from Judge Mastando. Before Judges Liman and Mastando, Eletson was proceeding on the basis that the Status Quo Injunction was not subsisting.

[199] The narrative that the Status Quo Injunction subsisted until entry of judgment hid the (for Eletson's case) inconvenient fact that Levona had not disposed of the Vessels in the month that elapsed between Judge Liman's Opinion and Order of 9th February 2024 and the filing of Eletson's application for a WFO before this Court on 11th March 2024. That fact reduced (a) the risk of dissipation and (b) the need for urgency.

[59] See e.g. paragraph 15 of Eletson's Skeleton Argument for the *ex parte* hearing.
[60] See e.g. paragraph 54 of Eletson's Skeleton Argument for the *ex parte* hearing.
[61] See paragraph 5(d) of Eletson's Skeleton Argument for the *ex parte* hearing.
[62] See paragraph 5(c) of Eletson's Skeleton Argument for the *ex parte* hearing.

[200] I am moreover persuaded that Eletson's coming to this Court on an ostensibly urgent, *ex parte* basis was a case of strategic forum-shopping, in order to obtain an order Eletson knew Judge Liman or Judge Mastando were unlikely to grant – precisely because, amongst the other reasons recorded in the transcripts of the hearings before those courts, the Lift Stay Order continued to protect Eletson, on Eletson's own case.

[201] It warrants observing that Eletson has shown no reason why even short notice could not have been given, as it had in the SDNY District Court.

[202] Instead, learned Counsel for Eletson pitched his oral submissions at the substantive return date that the circumstances taken in the round – of a continuing and constant campaign of deceit and dishonesty on the part of those controlling Levona and Tropical Island, coupled with intelligence received in February and March from brokers which indicated Levona was working upon some kind of dealing in relation to at least one of the Vessels – was enough to justify an urgent, *ex parte* application.

[203] Had Eletson's application for the WFO occurred on an 'on notice' basis, even on short notice, a more balanced consideration of the complex matters before the New York courts could have been laid before this Court.

[204] In short, I am persuaded that Eletson secured an illegitimate advantage from this Court in the shape of the *ex parte* WFO.

[205] The question then arises what the Court should do about it.

[206] Levona argued that the WFO should be set aside. They submitted that the WFO is inherently an *ex parte* order, as reflected by numerous features of it, and since Eletson was not properly entitled to an *ex parte* order, Eletson should not be allowed to keep its benefit.

[207] I cannot fault this reasoning, although it leaves open the possibility that the WFO contains relief that Eletson might still be entitled to, if the purely substantive factual circumstances fall for consideration.

4.5 Failure to give full and frank disclosure and fair presentation

[208] Levona otherwise approached the matter from the perspective of a failure on the part of Eletson to give full and frank disclosure and fair presentation.

. **4.5.1 Full and frank disclosure – the law**

[209] The legal principles pertaining to the duty of full and frank disclosure and fair presentation, as well as to what the courts can and generally should do when that duty has been breached, is well settled. Indeed, I cannot think of a single case before this Court where an applicant seeks to discharge an *ex parte* order without resort to allegations of breach of the duty. Such allegations may be well worn but they often succeed.

[210] For present purposes I can do little better than to quote Levona's skeleton argument, as follows.

> "(a) The duties
>
> 89. The duties of a party applying ex parte for a WFO are well-known (including to Mr Kertsikoff, to whom this was explained [91]), and many restatements, summaries, and lengthy selections and citations from previous cases can be found in the authorities. Recent summaries of the principles are to be found in the oft-cited English cases of **Tugushev v Orlov, Fundo Soberano**, **Les Ambassadeurs Club Ltd v Albluewi** and **Alliance Bank JSC v Zhunus**.[92] The Court of Appeal has recently cited with approval the summary from **Tugushev v Orlov**, noting that the principles set out in that case "are echoed, to a large extent, in decisions of this Court."[93]
>
> [Fn 91: Kertsikoff 1, ¶77 {1/71}.
>
> Fn 92: **Tugushev v Orlov [2019] EWHC 2031 (Comm)**, at [7]; **Fundo Soberano de Angola v Jose Filomeno dos Santos** [2018] EWHC 2199 (Comm), at [50]–[53] (Popplewell J); **Les Ambassadeurs Club Ltd v Albluewi** [2020] EWHC 1313 (QB), at [66]–[74] (Freedman J); **Alliance Bank JSC v Zhunus** [2015] EWHC 714 (Comm), at [66] (Cooke J).
>
> Fn 93: **Chia Hsing Wang v HY** BVIHCMAP2022/0055, at [219]-[221].]
>
> 90. The fundamental principle is that an applicant without notice is under a stringent duty to act with utmost good faith in presenting the application fairly to the Court; that is the price which it pays for depriving the other party of its fundamental right to be heard.
>
> 91. For present purposes, it is worth highlighting the following specific principles:
>
> 91.1. The duty goes beyond identifying the points of defence which may be taken by the respondent;[94] it extends to everything which reasonably could or would be taken into account by the Court in deciding whether to grant the application, [95] whether they be matters of fact, law or procedure.[96]
>
> [Fn 94: **Alliance Bank JSC v Zhunus** [2015] EWHC 714 (Comm), at [66(1)].
>
> Fn 95: **Siporex Trade SA v Comdel Commodities** [1986] 2 Lloyd's Rep. 428, at p.437.

Fn 96: **Alliance Bank JSC v Zhunus** [2015] EWHC 714 (Comm), at [66(3),(5)].]

91.2. The test for materiality can be expressed variously, but it is an objective test. A fact is material "if it would have influenced the judge when deciding whether to make the order, or deciding upon the terms upon which it should be made"; or if it is "one which the judge would need (or wish) to take into account".[97]

[Fn 97: **Tethyan Copper Company v Pakistan** BVIHC (COM) 2020/0196, at [95], referring with approval to two well known English cases.]

91.3. If a point would have been relevant to the exercise of the Court's discretion (whether that be in relation to whether to make the order at all, or in relation to the terms upon which to make it), then it is material for the purposes of full and frank disclosure.[98]

[Fn 98: **Alliance Bank JSC v Zhunus** [2015] EWHC 714 (Comm), at [65].]

91.4. Whether the point would have been relevant is an objective test and not a matter of the subjective judgement of the applicant (or its lawyers).[99]

[Fn 99: **Alliance Bank JSC v Zhunus** [2015] EWHC 714 (Comm), at [65].]

91.5. Unawareness of any matter which the applicant omits to state, or of its importance, provides no excuse because the applicant must positively investigate the matter from both sides;100 the duty applies to any matter of which the applicant would have been aware had it made proper enquiries.101

[Fn 100: **Siporex Trade SA v Comdel Commodities** [1986] 2 Lloyd's Rep. 428, at p.437; **Alliance Bank JSC v Zhunus** [2015] EWHC 714 (Comm), at [66(3)].

Fn 101: **Fundo Soberano de Angola v Jose Filomeno dos Santos** [2018] EWHC 2199 (Comm), at [50(3)].]

91.6. The duty of full and frank disclosure is not met by reliance on general statements and the mere exhibiting of documents.[102]

[Fn 102: **Alliance Bank JSC v Zhunus** [2015] EWHC 714 (Comm), at [66(2)].]

91.7. The applicant's without notice duties are not limited to full and frank disclosure alone; such disclosure has to be accompanied by a fair, thorough and objective presentation of the application.[103]

[Fn 103: **Alliance Bank JSC v Zhunus** [2015] EWHC 714 (Comm), at [66(6)].]

(b) The consequences of breach

92. It is well established that the applicant's duties on a without notice application are owed to the Court itself, securing the integrity of the Court's process when it derogates from one of the most fundamental rules of its process: both parties being heard.

93. The duty is of cardinal importance:

> "The rule requiring full disclosure seems to me to be one of the most fundamental importance, particularly in the context of the Draconian remedy of the Mareva Injunction. It is in effect, together with the Anton Piller order, one of the law's two

> ‘nuclear’ weapons. If access to such a weapon is obtained without the fullest and frankest disclosure, I have no doubt at all that it should be revoked.”[104]

[Fn 104: **Bank Mellat v Nikpour** [1985] FSR 87 (CA), at p.92.]

94. As such, in the event of material breach of that duty, “the Court strongly inclines” towards discharging the injunction without re-granting it [105] even if otherwise it would have continued it (or re-granted it upon discharge). Discharging the injunction without renewal is the means by which the Court enforces this fundamental duty.[106]

[Fn 105: **In re OJSC ANK Yugraneft** [2008] EWHC 2614 (Ch), at [104].

Fn 106: **In re OJSC ANK Yugraneft** [2008] EWHC 2614 (Ch), at [104].]

95. In **JSC BTA Bank v Sabyrbaev**, this Court (Wallbank J) recited the following précis of the law:

> “They contended that where the Court has found that there was non-disclosure at the ex parte stage the following principles apply: (1) the Court will be justified in discharging the order, even although the party might afterwards be in a position to make another application. (2) the general rule is that the Court should discharge the order obtained in breach and refuse to renew the order until trial. Notwithstanding, the Court has jurisdiction to continue or regrant the order. (3) the Court should assess the degree and extent of any culpability on the part of the applicant. While there is no general rule that a deliberate breach will always attract the sanction of the discharge of the service out order, equally there is no general rule that an innocent breach will escape that sanction. (4) prejudice to the defendant is relevant. (5) if an applicant who is guilty of non-disclosure wishes the court to treat it as innocent, it is incumbent upon it to explain how it came about. (6) while there are no hard and fast rules as to whether the Court should continue or re-grant the order, the Court should incline strongly to discharging the order and not renewing it in the event of any substantial breach – and even where the breach may be innocent. Where the breach is deliberate, it would almost always be appropriate for the Court to impose the sanction.” [107]

[Fn 107: **JSC BTA Bank v Sabyrbaev** BVIHCM 2021/0171, at [136].]

96. The Court of Appeal has recently emphasised that “the discretion to continue the order despite the failure of disclosure […] should be exercised sparingly and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.” [108] An ex parte order was on this basis discharged and not renewed in **Tethyan Copper Company v Pakistan**, where the claimant failed to adequately explain the legal analysis of its assertion of jurisdiction [109] – something which echoes in the present case.

[Fn 108: **Emmerson International Corporation v Renova Holding Ltd** BVIHCMAP2019/0018, at [98].

Fn 109: **Tethyan Copper Company v Pakistan** BVIHC (COM) 2020/0196.]”

[211] Eletson, for its part, accepted the essential principles, but urged a note of caution. Eletson submitted that the English courts have emphasised that sensible limits have to be drawn in significant commercial cases;[63] that compliance with the duty should not be assessed with hindsight;[64] and that an applicant need only raise arguments which it could reasonably anticipate that the absent party would wish to raise.[65]

[212] Eletson pointed out that the English courts have provided further warnings against applications to discharge a freezing order which turn into a 'mini trial',[66] and that where a discharge applicant comes with 'a long shopping list of alleged failures of disclosure, with no attempt made to identify the relatively few points which really matter, it should simply decline to consider the issue at all'.[67]

[213] This is what the English Court of Appeal stated in **Mex Group Worldwide Limited v Ford et al.**:[68]

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

[214] Eletson also cites the classic *dicta* of Slade LJ in **Brink's Mat Ltd v Elcombe**[69] warning against taking the principle of full and frank disclosure and fair presentation to 'extreme lengths'.

[215] Eletson emphasised the following point:

> "… the court should not consider the supporting affidavit as though it were marking an examination paper, deciding one way or the other merely on the basis of the extent to which the affidavit could have been improved. The primary question should be whether in

[63] Crown Resources AG v Vinogradsky (15 June 2001), Toulson J, applied by the English Court of Appeal in Kazakhstan Kagazy Plc v Arip [2014] EWCA Civ 381 and in Derma Med Limited v Dr Zack Ally [2024] EWCA Civ 175 at [30]; JSC BTA Bank v Khrapunov [2018] EWHC 259 (Comm) at paragraph 73 (Andrew Smith J).
[64] National Bank Trust v Yurov [2016] EWHC 1913 (Comm) at paragraph 22 (Males J).
[65] Banca Turco Romana SA v Cortuk [2018] EWHC 662 (Comm); The 'Nicholas M' [2008] EWHC 1615 (Comm).
[66] National Bank Trust v Yurov [2016] EWHC 1913 (Comm) at paragraph 19 (Males J).
[67] Mex Group Worldwide Limited v Ford et al. [2024] EWCA Civ 959 at paragraph 112 (Males LJ).
[68] Ibid.
[69] [1988] 1 WLR 1350 at 1359D.

all the circumstances the effect of the affidavit is such as to mislead the court in any material respect concerning its jurisdiction and discretion under the rule."[70]

[216] Indeed, Eletson's learned Counsel urged that this Court should send out a strong message rejecting the examination paper marking approach.

[217] Eletson further urged that it is inappropriate to set aside a freezing order for non-disclosure based on facts which are themselves in issue, relying upon the English Court of Appeal decision in **Kazakhstan Kagazy Plc v Maksat Askaruly Arip**.[71]

4.5.2 Application of principles

[218] Levona submitted that there were some 19 areas in which Eletson had failed to give full and frank disclosure. I accept Eletson's submission that Levona's approach was akin to marking an examination paper, as deprecated in **BP Exploration v Hunt**.[72]

[219] In the present matter I do not need to consider all Levona's objections. I need go no further than to consider the issue of how Eletson had represented the position of the parties taken in New York in relation to the alleged subsistence of the Status Quo Injunction in relation to urgency.

[220] Levona argued that:

(1) "Cs' case on urgency is wrong: the SQI/TRO [the Status Quo Injunction] had already gone because Judge Liman vacated it on 9 February."

(2) "The 'tipping off' point is equally invalid: the hearing before Judge Liman on 15 February was on notice, so was the one before Judge Mastando on 27 February, as well as the hearing the previous December where Eletson already raised the supposed 'market rumours' about vessels being sold off. … They repeated that case to Judge Liman two months later. … Any tipping off would therefore long have occurred by the time of the *ex parte* application – and yet no Vessels had been sold. One may ask why, if this, the BVI Court was the appropriate Court in which to seek relief, and matters were as concerning to Cs as they suggested to Wallbank J on the WFO hearing, that they didn't immediately seek the WFO in this Court as soon as they had the February Opinion on 9th February

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[70] BP Exploration v Hunt [1976] All ER 879 at 894 (Kerr J), applied by Marcus Smith J in Microsoft Mobile OY (Ltd) v Sony Europe Limited & ors [2017] EWHC 374 (Ch) at paragraph 203.
[71] [2014] EWCA Civ 381 at paragraph 36 (Longmore LJ).
[72] [1976] All ER 879 at 894 (Kerr J).

2024. They didn't do that: they applied (on a misconceived basis) to the 'correct' Court- the supervisory Court - where they were unsuccessful. All that has happened - albeit with severe consequences for Levona, is that seeing the writing on the wall in NY, Eletson and its lawyers re-grouped and came up with another strategy - applying in the BVI, with a different and inconsistent narrative, which inconsistences and narrative were not scrutinised as they applied *ex parte*."

[221] I cannot fault this reasoning on its own terms.

[222] Levona argued many other points too, but I do not have to deal with them because there are prior determinative factors.

5. Discussion

5.1 Urgency and *ex parte*

[223] The first matter the Court needs to review in respect of Eletson's *ex parte* application concerns the alleged urgency and need to proceed without notice to Levona. These are threshold issues.

[224] In the present case, as we have seen, Eletson's case on urgency was founded upon a narrative that the Status Quo Injunction subsisted but was likely to fall away imminently. This narrative was inconsistent with the record of proceedings before the New York courts. There, neither Eletson, nor Levona, nor Judges Liman and Mastando, proceeded on a basis that the Status Quo Injunction subsisted. Indeed, they all assumed it did not subsist after 9th February 2024.

[225] Eletson did not explain this inconsistency at the *ex parte* hearing.

[226] This inconsistency was material to:

(1) whether or not the application for a WFO was truly urgent; and
(2) the risk of dissipation.

[227] I have earlier described this narrative as an artificial construct. The effect of this was to influence the Court into determining Eletson's WFO application immediately, without even short notice to Levona.

[228] I am in no doubt that this was intentional.

[229] This resulted in Eletson omitting to explain the position of the parties and judges in New York on the vacation of the Status Quo Injunction.

[230] Eletson should have done so but did not. The position of the parties and judges in New York was incompatible with Eletson's case concept before this Court. Eletson had a heavy responsibility to inform this Court that this was an inconsistency which could be taken against Eletson, and then to make submissions on it. Eletson failed to discharge its responsibility in this regard. Whilst it would, in my view, be too simplistic to brand this failure as 'deliberate', in the sense of purposefully setting out to deceive this Court, it was a serious failure. In the sense of a serious failure which should not have happened, this was not an innocent oversight.

5.2 Failure to comply with CPR 17.3(4)

[231] We have also seen that Eletson did not put in any evidence explaining why it was appropriate for the Court to determine the application on an *ex parte* basis, as mandated by CPR 17.3(4).

[232] Eletson sought to explain its proceeding without notice by submitting that if notice was given, Levona would be tipped off. As we have seen, this ignored the fact that Eletson had already made it known, in clear terms, during the hearing before Judge Mastando on 27th February 2024, that Eletson would file an application for further restraining relief.

[233] We can see from this that it would have been impossible for Eletson to have given its tipping off submission in the form of evidence on oath on a basis that it was (a) true; (b) sufficient to justify an *ex parte* hearing; and (c) full and frank.

[234] What this means is that Eletson's failure to comply with the evidentiary requirements in CPR 17.3(4) was not merely a failure of form, but of substance. A failure of form can be indulged, if the circumstances, taken in the round, demonstrate sufficient reason for an application nonetheless to proceed on an *ex parte* basis. But where the failure is one of substance, its absence is foundational: one of the elements of the application mandated by the CPR is missing.

[235] Here there is nothing in the circumstances that cures that omission. The tipping off, upon which Eletson had put so much store at the *ex parte* hearing, had already occurred by 27th February 2024, and the 'market intelligence' email of 6th March 2024, upon which Eletson relied to revivify its tipping off submission, was on its own content not evidence of disposal of either of the Vessels outside the ordinary course of business.

[236] This drives me to conclude that the WFO should be discharged for failure on the part of Eletson to provide evidence for its reasons for proceeding without notice.

[237] There is a further consideration, which leads to the same conclusion. Since one of the foundational, mandatory elements of an *ex parte* application is to include the evidence stipulated by CPR 17.3(4), it follows as a matter of logic that an applicant's duty of full and frank disclosure and fair presentation extends to the reasons for proceeding on an *ex parte* basis. Here, Eletson's tipping off submission was neither full, nor frank, nor a fair presentation.

[238] This was a serious and inherently material breach of Eletson's duty. It was, in fact, misleading.

[239] It warrants observation that the requirements of CPR 17.3(4) have been a fixture for many years; in the 2000 edition of the CPR, the identical provision was at CPR 17.3(3). No excuse was proffered by Eletson for failing to comply with it.

[240] Tracking the principles summarised in **JSC BTA Bank v Sabyrbaev** as quoted above:

(1) in light of these breaches of Eletson's duty of full and frank disclosure and fair presentation, the Court is first of all justified in discharging the WFO;

(2) the Court must then ask itself whether or not it should exercise its discretion to do so;

(3) the Court's exercise of discretion is to be informed by the general rule that the Court should discharge an order obtained in breach of the duty and refuse to renew the order until trial, but mindful that the Court does have jurisdiction to continue or regrant the order, with the overall justice of the case being the main criterion;

(4) the degree of culpability on the part of Eletson is significant. Eletson's omission to explain to this Court the position of the parties and judges in New York on the vacation of the Status Quo Injunction and that Levona/Tropical Island's controlling minds had already been tipped off was not innocent. Eletson offered no excuse for omitting the mandatory evidence required by CPR 17.3(4), and indeed could not have truthfully, fully and frankly given evidence in the terms of its tipping off submission as that was fundamentally inconsistent with the tipping off that had already occurred in New York;

(5) in terms of prejudice to Levona/Tropical Island, at the very least they were put to the inconvenience and expense of seeking discharge of an improperly obtained WFO. Beyond this, the position is less clear and the Court would have to hear the parties further. This is because Levona has at all material times arguably been restrained anyway from

disposing of its only known assets, the Vessels, by the Lift Stay Order. Moreover, Levona had already represented to the New York courts that it would not dispose of the Vessels prior to entry of the judgment confirming the Award, and such entry has not yet occurred. Furthermore, the WFO left Levona/Tropical Island free to deal with or dispose of their assets, including the Vessels, in the ordinary course of business;

(6) Eletson did not explain how the failures to give full and frank disclosure came about; thus the Court has no explanation from Eletson that would assist the Court in treating them as innocent; and

(7) here, the breaches were substantial and not merely procedural or technical.

[241] In light of these considerations, the standard position is that the Court should thus incline strongly towards discharging the order and not to continue or regrant it.

[242] In the present case, taken in the round there are, in my respectful judgment, insufficient grounds why the Court should dispart from the standard position.

[243] I would observe that at the end of the substantive return date, my overall sense was that the conduct of the controlling minds of Levona/Tropical Island, as found by the Arbitrator, retired Judge Belen, presented a clear risk that they could, and would, dissipate these companies' assets to frustrate enforcement if it suited their interests. I remain of this view, as I have been shown no material which indicates that the Arbitrator was wrong on this.

[244] There are, however, other factors which go to the degree of risk of dissipation and whether it would be just and convenient to continue or regrant the WFO.

[245] Levona/Tropical Island did not 'dissipate' their assets between 9th February to 11th March 2024, although on Levona's own case they were free to do so. This Court cannot speculate why they did not. Quite apart from any professional propriety those controlling minds might have, it is also possible they had other, more sophisticated strategies for furthering their interests than crudely putting their assets beyond Eletson's reach outside the ordinary course of business. Indeed, Levona had formally represented to the New York courts that it would not dispose of the Vessels prior to judgment being entered.

[246] I am conscious that an argument that no dissipation has occurred should not be taken too far. This does not ***negate*** a real risk of dissipation, but it can reduce it. All else being equal, if the

circumstances of a particular case, and the conduct of the respondent, present solid evidence of a real risk of dissipation, justice and convenience are usually served by making a freezing order, as it is better to be safe than sorry. Much of an actual risk of dissipation, or not, as the case may be comes down to the respondent's intentions and it is difficult for others, including the Court, to be certain what they may be. So, a degree of prudence on the part of the Court is called for.

[247] It is also relevant that Eletson has continuing protection, on its own case. On Eletson's own case, the Lift Stay Order prevents Levona from directly or indirectly (i.e. through others, such as Tropical Island) disposing of Levona's assets.

[248] If that is not enough, Eletson has an undetermined application for a preliminary injunction lying on the SDNY District Court file, waiting to be activated if circumstances warrant it.

[249] In other words, despite Levona/Tropical Island's apparent lack of scruples, the risk of 'dissipation' on their part seems low. Moreover, since Eletson has open avenues of recourse to injunctive relief in New York, Eletson does not require stand-alone freezing relief from this Court.

[250] In some cases where an applicant has breached his duty of full and frank disclosure, even not innocently, the overall justice of the situation calls out for him to keep the protection of a freezing order to avoid an even greater injustice. I do not see that this is such a case.

[251] Where this leaves the Court is that this Court should, upon the application of established legal principles, discharge the WFO, without a regrant.

5.3 Other matters

5.3.1 Full and frank disclosure – clouds of objections

[252] Since the WFO falls to be discharged on the threshold issues of urgency and notice, the Court does not need to consider the merits of other grounds for discharge advanced by Levona/Tropical Island.

[253] I would, though, briefly remark upon the following.

[254] I agree with Eletson's position that in making allegations of a breach of full and frank disclosure, it is unhelpful for a party to raise a cloud of supposed omissions. I agree with Eletson that the Court could and, in appropriate case, should resist the lure of considering each of them, to avoid embarking upon a mini trial. I also agree with Eletson that Levona was raising such a cloud, with

its 19 areas of alleged breaches of the duty. I agree with Eletson that the Court's task is not to mark an *ex parte* application as if it were an examination paper. Such an approach is unhelpful, but it is a by-product of one side being dissatisfied with the way in which the opponent has characterised his case. I readily recognise that this has become the prevalent practice, and that if the Court were to be required to analyse and adjudicate on each of a morass of points, this greatly adds to the judicial burden of deciding cases expeditiously, to the detriment of other Court users who also have a call upon the Court's limited resources.

[255] In most cases where an *ex parte* application falls to be set aside at a substantive return date, the *ex parte* application suffers from a predominant fault or perhaps a small number of real problems. It is more than enough to point these out. There is much to be said for incisive intellectual economy. It has however become common for a discharge applicant to bloat his case with details that the other side views in a different light. Sight must not be lost of the fact that it is unreal to expect an *ex parte* applicant to act as the perfect ventriloquist for the opponent. Where the overall answer is already clear on other grounds it is unnecessary to require the Court to pronounce meticulously – or indeed at all – upon myriad other allegations of breach of the duty of full and frank disclosure.

[256] Having identified such other clear grounds here, I will conserve the Court's limited time and resources by refraining from addressing Levona's other full and frank disclosure points. I will dismiss them as unnecessary.

5.3.2 'WFO application premature'

[257] Turning to another aspect, I reject Levona's first ground for setting aside the WFO that the application for a WFO was premature. It is entirely normal to apply for freezing relief before a claim is filed. It is entirely normal that it can take months or years for a claim to come to trial. In this case, Eletson had the benefit of a final, *prima facie* enforceable arbitration award against Levona, even though it could not yet be enforced as a judgment of a court. To my mind, that was enough to establish that Eletson had a good arguable case against Levona. It was enough at least to trigger the Court's jurisdiction to consider further whether there was real risk of Levona/Tropical Island dissipating their assets and the justice and convenience of making a freezing order.

5.3.3 'WFO application contravened Lift Stay Order'

[258] Levona contended that the application for the WFO was made in contravention of the Lift Stay Order. That was its second stated ground in their application for discharge dated 2nd April 2024. I decline to be drawn into deciding this issue, which requires application of United States law, on which this Court received no independent expert evidence. The US Bankruptcy Court made the Lift Stay Order and can presumably enforce it.

5.3.4 'Eletson obtained the Award by fraud'

[259] Levona/Tropical Island cited the following as another ground:

> "The Applicants have compelling evidence that the Award was obtained (and the subject matter itself tainted) by fraud, including an audio recording of a conversation Mr Adam Warren Spears of the Applicants had with Mr. Kertsikoff of the Respondents on 15 July 2022. Further, the existence of documentation in the US bankruptcy proceedings that has recently come to light may support this."

[260] This ground also featured as on one of Levona's breach of full and frank disclosure allegations. At the substantive return date, Levona/Tropical Island were pressing this as a major issue. Eletson, for their part, played it down. Eletson submitted that as at the date of the *ex parte* application allegations of fraud made by Levona against Eletson had not yet been made in relation to confirmation of the Award, and Eletson could not be expected to raise matters at the *ex parte* hearing that had not yet arisen. Eletson also pointed out that the alleged conversation on 15th July 2022 of which Levona claimed to have a recording took place prior to the Arbitration and they did not deploy any fraud argument then despite having the opportunity and the forum for doing so. Levona argued that Eletson had nefariously kept the knowledge of the fraud allegations away from this Court, successfully obtaining the WFO from this Court just days before document disclosure in relation to the allegations was ordered in the United States. Levona argued that the reason they had not yet made formal claims of fraud was because Eletson had resisted disclosure of the documents in its possession that would have enabled Levona to do so.

[261] In my respectful view, whilst the dispute about the alleged fraud allegations had been brewing for a considerable time, the fact of the matter was that as at the *ex parte* hearing date Eletson had the benefit of a final arbitration award and confirmation proceedings had reached the stage where the SDNY District Court had pronounced its Opinion and Order, and, ordinarily, the last step would be for judgment to be entered, following, in this case, competing arguments from the parties as to the form and content of the judgment. The fraud allegations had not yet been formally raised. This

meant that as at the date of the *ex parte* hearing, it could be said with very considerable justification that Eletson had a good arguable case for a viable claim against Levona for enforcement of the Award. It should be recalled that a 'good arguable case' is one that is 'more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success'.[73]

[262] I do not accept Levona's contention that Eletson nefariously withheld the fraud allegation from the Court in breach of Eletson's duty of full and frank disclosure. Whilst Levona ***now*** wishes to make much of the fraud allegation, it did so after the Arbitration, and after the SDNY court had already conducted and pronounced upon the confirmation proceedings in the form of the Order and Opinion of 9th February 2024. Levona had the record of the conversation upon which they now put so much weight before those proceedings took place. Yet Levona chose to keep its thoughts that this showed fraud to itself. Eletson was justified in not mentioning the issue. The authorities, such as **Brink's Mat Ltd v Elcombe**,[74] guard against taking application of the duty of full and frank disclosure to extremes. *Ex parte* applicants cannot be required to hypothesise minutely about what might or might not happen in the future in the litigation.

[263] In the final reckoning as at the substantive return date, to get a more balanced, independent view of the force of the fraud allegations Levona now stridently wishes to run against Eletson, the Court can do no better than to take note of an observation made by Judge Liman at a hearing on 18th September 2024 (i.e. several months after the *ex parte* hearing date and shortly before the substantive return date). There he said this to Levona's Counsel:[75]

> "THE COURT: Keep in mind one thing that you're going to have to establish for me and the plaintiff [Eletson] is going to have a right, obviously, to address is whether the documents do support what you've asserted that they support. I've found that there's enough for you to go forward with discovery, but I made clear in my opinion that that was just sustaining the complaint; it was not finding that you have proven your claim [in fraud]."

[264] Although Levona were arguing at the substantive return date that the Award would not be confirmed in the SDNY District Court anytime soon, if at all, the SDNY District Court was taking a cautious view of the merits of Levona's fraud arguments. In my respectful judgment, that being the

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[73] Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft GmbH ('Niedersachsen') [1983] 2 Lloyd's Rep. 600 at 605 (Mustill J).
[74] [1988] 1 WLR 1350 at 1359D (Slade LJ).
[75] Hearing Bundle Vol. 4 lines 8 to 14.

case, the merits of the allegations were insufficiently strong, as at the substantive return date, to warrant discharge of the WFO on grounds of failure to ventilate these matters before this Court at the *ex parte* hearing.

[265] As at the *ex parte* hearing, the discovery had not yet been ordered, and it might never have been. Even at the substantive return date, as Judge Liman's observation makes clear, the merits of the fraud allegation remained open. As at the *ex parte* hearing, even if Eletson had presented the fraud allegations in a manner reflecting Judge Liman's balanced perspective, it is unlikely, in my respectful view, that the Court would have seen this as negating Eletson's good arguable case against Levona. The fraud allegations were merely unproven allegations, whereas Eletson had a final arbitration award in hand, as well as a SDNY Opinion and Order confirming it. In other words, the fraud allegation would not have made any difference to this Court's grant of a WFO.

5.3.5 Non-standard exception in WFO

[266] The WFO had included the following provision:

> "16 This Order does not prohibit the Respondents from spending a reasonable sum on legal advice and representation. Before spending any money the Respondents must tell the Applicants' legal representatives how much and where the money is to come from."

[267] Levona objected to inclusion of 'how much'. They argued that a requirement to reveal how much a WFO respondent intends to spend on legal advice and representation was 'non-standard'. They also submitted that Eletson had 'smuggled' this in. They contended that Eletson had obtained this requirement without addressing the Court on why it should be included.

[268] Levona attached great importance to the legitimacy or otherwise of including 'how much'.

[269] Levona argued that in litigation of the magnitude that engages Levona and Eletson, 'if, all of a sudden, we are going to spend 500K on legal expenses, they're going to be thinking, hang on a minute, what's coming over the hill.'

[270] Levona argued that a party who benefits from such an order has a 'great tactical advantage' if it can see how much the other side is spending. Levona postulated that such an applicant can then come up with a tactical objection, based perhaps on some alleged discrepancy with the respondent's asset disclosure, to delay or derail a forthcoming proceeding.

[271] Eletson submitted that in this jurisdiction, as a matter of practice, the requirement is not non-standard. Eletson adverted to four recent examples of orders containing such a term.

[272] Eletson submitted that the words in issue were not hidden from the Court at the *ex parte* hearing, but that I had been taken to them in terms.

[273] Eletson submitted that moreover, this issue came before this Court (Webster J (Ag.)) at an *inter partes* hearing prior to the substantive return date. At that hearing Levona had also argued that these words were non-standard, but this Court nevertheless endorsed those same words, requiring Levona to comply with them.

[274] As Levona contended, the position in relation to inclusion of this requirement is one of considerable general importance. I am not aware of any specific judicial pronouncement on this and I was not taken to any. My following remarks are *obiter.*

[275] Ordinarily, in the English common-law system a claimant takes a chance that if he succeeds in establishing liability with his claim, the defendant may not, or no longer, be good for the money when it comes to enforcement.

[276] In such an ordinary case, both sides retain all the autonomy, rights and privileges of a legal or natural person. The assumption is that both sides will treat each other honourably.

[277] Where a claimant is granted a freezing order over assets of the respondent, it is a feature of our English common-law system that such an order confers no security interest in favour of the claimant over the respondent's frozen assets. The respondent's frozen assets remain entirely the respondent's own assets. For that reason, the respondent in general remains free to deal with his frozen assets in the ordinary course of business. It is only dealings and disposals intended to frustrate eventual enforcement that are being prevented by the freezing order.

[278] It also warrants recalling that freezing order relief is available only where, *inter alia*, the claimant adduces solid evidence that there is a real risk a respondent will dissipate his assets to frustrate enforcement.

[279] So far, this historical summary might sound trite. This reflects both the on-shore as well as off-shore position in commercial litigation. But there is a practical difference between on-shore and off-shore litigation. It is safe to say that in on-shore commercial litigation, freezing relief is a rare

form of relief, and it is intended to be so. In very many cases it is not needed, as where reputable commercial entities litigate robustly with each other, sometimes in many different lawsuits over the years, whilst they continue to trade happily and profitably with each other. In the off-shore world, freezing order and other injunctive relief is less rare. This reflects the fact that many businessmen choose to organise their affairs through deliberately complex off-shore corporate layers, as well as with increasingly fluid informal arrangements, and convenient legal fictions, precisely to make it difficult for eventual opponents to enforce awards or judgments against their assets. For many such businessmen, honour and decency do not feature when it comes to furthering their all-important and all-consuming financial self-interest.

[280] It is also well established that asset disclosure provisions are an essential feature of freezing order relief. Their purpose is to create transparency for the claimant to see whether the respondent is complying with the freezing order. After all, it would defy common sense to take a respondent at his word when there is solid evidence that he presents a real risk of 'dissipation'.

[281] Typically, asset disclosure is required to be given by a respondent in the form of affidavit evidence, which is to say, on oath. This enables a claimant, in theory at least, to engage a range of further remedies, such as cross-examination, de-barring orders and contempt of court proceedings if a respondent does not give proper disclosure.

[282] In some instances before this Court, respondents to a freezing order do not comply properly with their disclosure obligations, or at all. This, of itself, often confirms what the claimant has adduced evidence of from the beginning, namely that the respondent presents a real risk of dissipation. Even stronger, and even more expensive, relief, in the form of receivership orders is often then called for.

[283] Asset disclosure orders are not intended to interfere with a respondent's ordinary and proper course of business. That includes his ability to obtain legal advice and representation, both in relation to his affairs generally and to the claim against him. The respondent also enjoys the full protection of legal professional privilege.

[284] But, in light of the solid evidence of a real risk of the respondent dissipating assets and of the freezing order, the respondent cannot be permitted to invoke the same entitlement to privacy that is enjoyed by an ordinary defendant. His entitlement to privacy has to be compromised to ensure a proper balance of justice.

[285] It is in this context that the issue arises whether an asset disclosure provision should contain a requirement that the respondent must say how much he is going to spend on legal advice and representation.

[286] First it warrants observation that it is the respondent's problem if the information he gives in purported compliance is inconsistent with his other asset disclosure. The respondent cannot be heard to complain if the claimant picks up on such an inconsistency and brings an objection based on this to the Court. The respondent's duty is to give full and truthful disclosure of the matters he is ordered to disclose in the first place.

[287] Ordering a respondent to disclose not only the source but also the amount of funding for his legal expenses is a valuable tool for testing the completeness and veracity of the respondent's asset disclosure. Such an order increases transparency, whilst not trespassing on a respondent's legal privilege. Nor does it, of itself, trespass upon a respondent's legitimate commercial privacy or confidentiality for his ordinary and proper course of business. Only the amount and source need to be revealed. A *bona fide* businessman has nothing to fear from such transparency. Where he might have reason to keep commercial information confidential, appropriate safeguards can be crafted by the Court to keep such information private.

[288] Such a provision does something more. It gives timely cognizance to the unfortunate fact that law firms' client accounts can be used as conduits for dissipation, and that legal services can be used as a front for disguising money transfers, such as through the use of sham litigation.

[289] That disclosing merely the amount, as well as the source of intended legal expenditure, might give the claimant a litigation advantage is not a reason for reducing the transparency in the WFO respondent's favour. No litigant has a right of ambush, or of presenting the other side with a *fait accompli*. That the claimant might, with the notice of high legal expenditure on the part of the respondent, raise an objection in order to delay or derail the respondent's legal project is a possibility, but the Court has the tools to deprive a claimant of undue benefits he has obtained by virtue of a freezing order. Where a respondent has presented, on solid evidence, a real risk of 'dissipation', the Court is generally, in my respectful judicial view, right to lean towards requiring this inherently anodyne disclosure, rather than to allow a respondent who is a dissipation risk to have the further cover of darkness within which he could unlawfully deal in or conceal his assets.

There is obviously a balance to be struck, but it should come down in favour of the claimant as the putative victim, rather than in favour of the putative perpetrator or his asset holding/dealing vehicle.

[290] In sum, the provision serves a useful purpose of increasing transparency over a freezing order respondent's assets, without trespassing into areas where such a respondent enjoys legal privileges and confidentiality. I see nothing wrong with it. In the offshore context, such a provision should readily be granted if requested, as the benefits are obvious, as is the mischief it seeks to avoid or reduce.

6. Disposition

[291] For the reasons outlined above, I am driven to conclude that the WFO should be discharged in its entirety, without a regrant.

[292] The Court will hear the parties on any other consequential matters, including costs.

[293] I take this opportunity to thank both sides' learned Counsel for their assistance.

Gerhard Wallbank
High Court Judge

By the Court
Registrar