

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0064

BETWEEN

[1] JULIAN SVIRSKY
[2] DENNIS DONIN

Appellants

and

[1] ARMAN OYEKENOV
[2] TENSIGMA LIMITED

Respondent

First Defendant

[3] DIGITAL ASSET EXCHANGE LIMITED

Fourth Defendant

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Gerard St. C. Farara
The Hon. Mr. Eddy D. Ventose

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

Appearances:

Mr. Robert Nader and Mr. Ben Giblin for the Appellants
Mr. Stephen Ryan for the Respondent
Mr. Andre McKenzie appearing on a watching brief for the receiver of Tensigma Limited.

2023: October 4;
2024: February 12.

Civil appeal – Civil Procedure Rules 2000 – Failure to provide sufficient notice under rule 11.11 of the Civil Procedure Rules 2000 – What effect, if any, did the lack of 7 days’ notice have on the October Hearing and consequently the Receivership Order – Procedural irregularity – Whether the procedural irregularity would result in an unfair trial or lead to an injustice – Unless order – Whether the unless order complied with the requirements of rule 26.4 of the Civil Procedure Rules 2000 – Failure to require the party in default to remedy the default by a specified date

On 22nd April 2021, the learned judge granted an *ex parte* worldwide freezing order on the application of the respondent, Mr. Arman Oyekenov (the “Freezing Order”). The Freezing Order prohibited the appellants, Mr. Julian Svirsky and Mr. Dennis Donin from disposing or diminishing the value of any worldwide assets of Tensigma Limited (“Tensigma”) up to the value of US\$22,850,000.00. On 22nd December 2021, Tensigma was restored to the register of companies, with Ms. Anna Silver of FFP Limited appointed as the voluntary liquidator.

On 28th September 2022, the respondent applied to the court for various orders including: (1) that Ms. Silver be appointed as receiver over the assets of Tensigma including all cryptocurrency referred to at paragraph 5 of the Freezing Order (the “Cryptocurrency”); (2) that control of the Cryptocurrency be transferred to Ms. Silver (in her capacity as liquidator and/or receiver) within 24 hours after the date of service of the order; (3) that the transfer of control be effected by the appellants providing the private keys of various public blockchain addresses to Ms. Silver; (4) that the appellants comply with paragraph 21 of the Freezing Order and provide to the respondent’s solicitors specific information concerning the Cryptocurrency, including the name of the exchange or exchanges at which the Bitcoin and the Ethereum are held; and (5) unless the appellants comply with (4) above: (i) the amended defence be struck out and judgment entered for the respondent; or (ii) the appellants be debarred from further participation in the proceedings (the “Receivership Application”). In support of the Receivership Application, the respondent stated that the appellants breached the Freezing Order by: (1) dissipating 4.2981 Bitcoin on 12th September 2022 with a value on that date of US\$96,384.03; and (2) failing to provide information to the respondent’s solicitors as required by paragraph 21 of the Freezing Order.

The Receivership Application came on for hearing before the learned judge, who on 6th October 2022 (the “October Hearing”) made the Receivership Order in which he granted the reliefs sought by the respondent. At the October Hearing, all parties were represented including the voluntary liquidator of Tensigma. The learned judge made the Receivership Order and ordered that unless the appellants comply with paragraph 21 of the Freezing Order and provide specific information to the respondent’s solicitors: (1) the amended defence be struck out and judgment entered for the respondent; and (2) the respondent be declared the owner of 16,500 shares out of a total of 50,000 shares issued in Tensigma (the “Unless Order”).

Dissatisfied with the decision of the learned judge, the appellants filed a notice of appeal against his decision stating that both the Receivership Order and the Unless

Order were: (1) wrong in law; (2) not justified on the facts; (3) subject to serious procedural irregularities; (4) wrongly based on an assessment of the facts and findings at an interlocutory stage. The two main issues that arise in this appeal are as follows: (1) what effect, if any, did the lack of 7 days' notice have on the October Hearing and consequently the Receivership Order; and (2) whether the Unless Order complied with the requirements of rule 26.4 of the Civil Procedure Rules 2000 ("CPR").

Held: allowing the appeal against the Receivership Order and the Unless Order; setting aside the Receivership Order and the Unless Order; remitting the Receivership Application to be heard before a different judge of the Commercial Court; and ordering that the respondent pay all costs of the appellants on appeal and in the court below, to be assessed by a judge of the Commercial Court if not agreed within 21 days, that:

1. A litigant who challenges a case management decision or order must reach a very high threshold in order to justify an appellate court's interference with such a decision or order. The test for interfering with a judge's case management decision or order is not whether the Court of Appeal would have exercised its discretion differently or made a different order or come to a different decision. The Court must be satisfied that the decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 followed; **Multibank FX International Corporation v Von Der Heydt Invest SA** BVIHCMAP2022/0061 (delivered 5th July 2023, unreported) followed.

2. CPR 11.11 provides that a notice of an application must be served as soon as practicable after the day on which it is issued and at least 7 days before the court is to deal with the application. The rationale for 7 days' notice in the context of applications generally is: (1) to allow the respondent to the application adequate time in which to consider the applicant's case on both factual and legal issues; and (2) to enable the respondent to be properly prepared to be able to: (i) address all relevant issues of fact and of law; (ii) adduce all relevant evidence; and (iii) make full submissions on all legal and factual issues. In this case, it has been accepted that the appellants received less than 7 days' notice of the October Hearing as required by CPR 11.11 and as a result, it was a procedural irregularity. As such, the Court must determine whether the procedural irregularity would result in an unfair trial or lead to an injustice and that fairness involved fairness to both parties.

Rule 11.11 of the **Civil Procedure Rules 2000** applied; **CEF Holdings Ltd v Munday** [2012] EWHC 1524 (QB); [2012] FSR 35 applied.

3. It is clear that the breach of the requirement to give 7 days' notice of the October Hearing meant that the appellants were not able to prepare properly or at all for the legal and factual issues arising from the Receivership Application. At the October Hearing, the appellants were not able to adduce all relevant evidence in opposition to the Receivership Application and to make any submissions on any legal and factual issues. The counsel who appeared for the appellants at the October Hearing was not prepared to respond to the Receivership Application and made it clear to the learned judge that they did not wish to represent the appellants on a *pro bono* basis. Further, the learned judge did not allow the appellants to make submissions to the court, stating that since the appellants had counsel representing them at the October Hearing, the court would only hear from the legal practitioner, not the parties themselves. In considering the fairness to the respondent, the learned judge had options available to him rather than proceeding with the Receivership Application without hearing evidence and submissions from the appellants. It was also open to the learned judge to treat the October Hearing as an *ex parte* hearing with a return date at which the appellants would be entitled to be heard. The evidence in support of the Receivership Application did not require the learned judge to proceed as he did. Considering all these circumstances, the decision by the learned judge to proceed with the hearing of the Receivership Application on two (2) days' notice resulted in serious injustice and unfairness to the appellants. Consequently, the appellants' appeal on this ground succeeds.

St Clair v King and another [2018] EWHC 682 considered; **Labrousche v Frey (Practice Note)** [2012] EWCA Civ 881; [2012] 1 WLR 3160 considered; **Dunbar Assets plc v Dorcas Holdings Ltd and others** [2013] EWCA Civ 864 applied; **Bilta (UK) Ltd (In Liquidation) v Tradition Financial Services Ltd** [2021] EWCA Civ 221 applied.

4. Where a party has failed to comply with any court order which does not contain a sanction for non-compliance any other party may apply to the court for an "unless order" in accordance with CPR 26.4. The application may be made without notice but must be supported by evidence on affidavit which: (a) contains a certificate that the other party is in default; (b) identifies the rule or order which has not been complied with; and (c) states the nature of the breach. The court office must immediately refer any such application to a judge, master, or registrar. If an appointment is fixed to consider the application, the court must give 7 days' notice of the date, time, and place of the appointment to all parties. An unless order, if granted by the court, must identify the breach and require the party in default to remedy the default by a specified date. Where the defaulting party fails to comply with the terms of any "unless order" made by the court that party's statement of case shall be struck out.

Rules 26.4 (2), (4) and (5) of the Civil Procedure Rules 2000 applied.

5. In this case, while the respondent's Receivership Application did contain a certificate that the appellants were in default, and the learned judge identified the breach by the appellants in paragraph 21 of the Freezing Order, the appellants received less than 7 days' notice of the October Hearing as required by CPR 26.4 and the Unless Order failed to comply with the requirement that the party in default to remedy the default by a specified date. When read, the Unless Order seemingly requires the appellants to perform an act that was impossible because the time specified in paragraph 21 of the Freezing Order had already lapsed. Even if one could read into paragraph 16 of the Receivership Order a requirement to comply with the 48-hour period as stated in paragraph 21 of the Freezing Order from receiving notice of the Receivership Order, this would not cure the failure to adhere to the requirement in CPR 26.4(5) for the "unless order" to require the party in default to remedy the default by a specified date. The reference in paragraph 16 of the Receivership Order to paragraph 21 of the Freezing Order would also not satisfy the requirement that any such specified date should be reasonably ascertainable if contained in any other document or order. The appellants therefore succeed on this ground of appeal.

Rules 26.4 (2), (4) and (5) of the Civil Procedure Rules 2000 applied; **Khan and another v Burke** [2023] EWHC 534 (Ch) at [20] applied.

6. In relation to the appellants' concerns about the judge's encouragement of arguments by the respondent's counsel, the dismissal of information emailed to his clerk on the day of the October Hearing, that the October Hearing ought to have been *ex parte*, and statements surrounding the alleged worthless undertaking and fortification, the Court found these grounds lacked merit, as the appellants failed to demonstrate errors in the judge's discretion.

JUDGMENT

- [1] **VENTOSE JA [AG.]:** This is an appeal by the appellants, Mr. Julian Svirsky and Mr. Dennis Donin, against the decision of the learned judge, dated 6th October 2022 in which he appointed a receiver over the First Defendant, Tensigma Limited ("Tensigma") (the "Receivership Order") and made an unless order against the appellants.

Background

- [2] On 22nd April 2021, the learned judge on the application of the respondent, Mr. Arman Oyekenov, granted *ex parte* a worldwide freezing order (the “Freezing Order”) prohibiting the appellants, save for US\$100,000.00 to be used for the ordinary business purposes of Tensigma, until the return date, from disposing or diminishing the value of any worldwide assets of Tensigma up to the value of US\$22,850,000.00. On 10th November 2021 the learned judge continued the Freezing Order until 4:00 p.m. on 10th December 2021 (the “November Order”). On 9th December 2021, the learned judge varied the November Order to continue the Freezing Order until the final determination of an application to restore Tensigma into liquidation (the “December Order”). On 22nd December 2021, the learned judge granted an order restoring Tensigma to the register of companies with Ms. Anna Silver (“Ms. Silver”) of FFP Limited being appointed as the voluntary liquidator of Tensigma (the “Restoration Order”). The learned judge also granted an order on 24th December 2021 to continue the Freezing Order until the determination of the respondent’s application for a new freezing order. This Court on 8th November 2023 dismissed the appellants’ appeal against the November Order and the December Order. There was no appeal against the Restoration Order.
- [3] On 28th September 2022, the respondent applied to the court for various orders in summary as follows: (1) that Ms. Silver be appointed as receiver over the assets of Tensigma including all cryptocurrency referred to at paragraph 5 of the Freezing Order (the “Cryptocurrency”); (2) that control of the Cryptocurrency be transferred to Ms. Silver (in her capacity as liquidator and/or receiver) within 24 hours after the date of service of the order; (3) that the transfer of control be effected by the appellants providing the private keys of various public blockchain addresses to Ms. Silver; (4) that the appellants comply with paragraph 21 of the Freezing Order and provide to the respondent’s solicitors specific information concerning the Cryptocurrency, including the name of the exchange or exchanges at which the Bitcoin and the Ethereum are held; and (5) unless the appellants comply with (4) above: (i) the amended defence be struck out and judgment entered for the respondent; or (ii) the

appellants be debarred from further participation in the proceedings (the “Receivership Application”).

- [4] In support of the Receivership Application, the respondent stated in an affidavit filed on 5th October 2022 (“Malik 1”) that the appellants breached the Freezing Order by: (1) dissipating 4.2981 Bitcoin on 12th September 2022 with a value on that date of US\$96,384.03; and (2) failing to provide information to the respondent’s solicitors as required by paragraph 21 of the Freezing Order.
- [5] The Receivership Application came on for hearing before the learned judge who on 6th October 2022 (the “October Hearing”) made the Receivership Order. At the October Hearing, all parties were represented including the voluntary liquidator of Tensigma. The learned judge made the Receivership Order and ordered that unless the appellants comply with paragraph 21 of the Freezing Order and provide specific information to the respondent’s solicitors: (1) the amended defence be struck out and judgment entered for the respondent; and (2) the respondent be declared the owner of 16,500 shares out of a total of 50,000 shares issued in Tensigma (the “Unless Order”).

The Appeal

- [6] The appellants filed on 28th October 2022 a notice of appeal against the decision of the learned judge to make both the Receivership Order and the Unless Order contending that these orders were: (1) wrong in law; (2) not justified on the facts; (3) subject to serious procedural irregularities; (4) wrongly based on an assessment of the facts and findings at an interlocutory stage, that the disputed facts had been established beyond a reasonable doubt. The appellants stated that: (1) the Unless Order did not comply with the requirements of rule 26.4 of the **Civil Procedure Rules 2000** (the “CPR” or “CPR 2000”); (2) the October Hearing ought to have been an *ex parte* hearing because of the lack of proper notice and the time between service and the date of the October Hearing; (3) the learned judge ignored the appellants’ suggested modifications to the draft Receivership and Unless Orders and signed the

draft orders that were submitted to him by counsel for the respondent; (4) the learned judge erred in law in accepting the limited and worthless undertaking as to damages offered by the respondent; and (5) the learned judge erred in disregarding an arbitral award from another court of law, which was emailed to the court because of the appellants' inability to file the arbitral award without the benefit of legal practitioners and the expedited hearing timeline.

- [7] The two main issues that arise in this appeal are as follows: (1) what effect, if any, did the lack of 7 days' notice have on the October Hearing and consequently the Receivership Order; and (2) whether the Unless Order complied with the requirements of CPR 26.4.

Requirement for Notice and the October Hearing

- [8] At the end of the hearing of the appeal, the Court requested of the parties to file submissions and authorities on the issue of "what should be the effect on an order where the court finds there has been a procedural irregularity that may have led to unfairness".

The Appellants' Submissions

- [9] The appellants argue that, first, the appellants were given only one (1) clear day notice of the hearing to consider the Receivership Application; second, the appellants were informed of the date for the October Hearing on 4th October 2022 and the hearing took place on 6th October 2022; third, the date of the October Hearing coincided with the Jewish holidays and that also put the appellants at a further disadvantage; and, fourth, the court had no discretion in relation to the requirement that the hearing of an application for an unless order must be on at least 7 days' notice. However, in the notice of appeal, the appellants accepted that the Receivership Application was filed and served on 28th September 2022 but was listed for hearing five (5) clear days after service contrary to CPR 11.11. At the hearing of the appeal, the new counsel for the appellants accepted that the appellants received two (2) days' notice of the October Hearing and five (5) days' notice of the

Receivership Application. The appellants submit that there was no application by the respondent at the October Hearing to truncate the time period required by CPR 26.4(4).

[10] The appellants submit that there appears to be at least two species of procedural irregularities at issue: (a) the fact of the October Hearing proceeding on radically truncated notice, without an application being made by the respondent to enable him to proceed on that basis and without proper justification (and the related decision in any event by the learned judge to allow the matter to proceed); and (b) the decision of the learned judge in that context to insist that submissions be made by legal practitioners who were not willing, prepared or able to do so, to the exclusion of the appellants and with the effect that the appellants were prevented from making submissions on their own account on the Receivership Application. The appellants further submit that the effect of both is the same, namely, that the appellants were afforded no or no proper opportunity to engage with the merits of the Receivership Application. The appellants submit that the appellants were shut out from any opportunity to make submissions at the October Hearing and that the appellants did not even have the opportunity to file any evidence in opposition to the Receivership Application.

[11] The appellants contend that if the Court concludes that there has been a “serious procedural irregularity” that led to injustice (in particular because the appellants were deprived of the opportunity to make a merits-based presentation or file evidence in opposition to the Receivership Application and because of the lack of proper notice generally) then the Court should: (a) set aside the Receivership Order and remit the matter for a properly case managed hearing before a different judge of the Commercial Court; and (b) in light of the concessions made by the respondent at the hearing of the appeal, set aside the Unless Order without any direction for re-hearing.

The Respondent's Submissions

- [12] The respondent submits that if this Court were to consider the wider facts and the interests of justice, it would find that no prejudice to the appellants has occurred because the appellants had one (1) clear day notice of the October Hearing. The respondent further submits that the appellants received the Receivership Application and draft order since 28th September 2022. The respondent contends that the appellants' arguments that their counsel was not prepared at the October Hearing to deal with the Receivership Application is not the concern of the court because it was a consequence of the appellants' own actions. The respondent submits that, in any event, counsel for the appellants raised the lack of notice before the learned judge at the October Hearing.
- [13] The respondent submits that the principles that emerge from the English cases dealing with procedural irregularity may be summarised as follows: (1) to succeed on appeal an appellant must show both a serious irregularity and that the decision was thereby rendered unjust, which will depend on all the circumstances of the case, including whether the lower court reached the correct result such that there would be no purpose in remitting the case for rehearing; and (2) there is a residual, exceptional category of "grave procedural irregularity" where the irregularity necessarily renders the decision unjust. The respondent contends that in cases of possible procedural irregularity, the effect on the lower court's order depends upon: (i) whether there is serious procedural irregularity and (ii) unless that serious procedural irregularity is sufficiently grave as to render any decision necessarily unjust, whether, in all the circumstances, it would be unjust not to remit the case for rehearing. The respondent further contends that outside exceptional cases of grave irregularity, it is only if both of those conditions are satisfied that the Court will set aside the order and remit the case for rehearing.
- [14] The respondent submits that the instant appeal is not a case of grave procedural irregularity and that it is readily distinguishable from cases like **Labrousche v Frey**

(Practice Note)¹ and *Dunbar Assets plc v Dorcas Holdings Ltd and others*,² in which litigants were wholly shut out of making oral submissions on serious issues. The respondent also submits that, in this case, the appellants were not prevented from making submissions. They did so through their counsel, who declined to make submissions on the merits, despite repeated invitations to do so by the learned judge. The respondent states that CPR 63.4 required the appellants to file a notice of acting in person if they wished to represent themselves. The respondent also states that, whilst the appellants' counsel sought an adjournment to allow the appellants time to obtain new legal representatives, the decision of the learned judge not to grant an adjournment has not been appealed by the appellants. The respondent contends that, in those circumstances, the case does not even meet the threshold of serious procedural irregularity, and even if it did, it cannot be said that it would be unjust not to remit the case for rehearing, particularly because the grounds for an Unless Order and the Receivership Order were obviously made out in the face of clear non-compliance by the appellants.

Discussion and Analysis

- [15] The starting point for any consideration of whether any of the procedural requirements of the CPR 2000 were not complied with in respect of the October Hearing must commence with an examination of the notice period found in CPR 11.11 which provides as follows:

“Service of notice of application

11.11 (1) The general rule is that a notice of an application must be served – (a) as soon as practicable after the day on which it is issued; and (b) **at least 7 days before the court is to deal with the application.**

(2) The period in paragraph (1) (b) does not apply if any rule or practice direction specifies some other period for service.” (Emphasis added)

- [16] In relation to the Unless Order, CPR 26.4(4) governs and is as follows:

“(4) If an appointment is fixed the court must give 7 days notice of the date, time and place of the appointment to all parties.”

¹ [2012] EWCA Civ 881; [2012] 1 WLR 3160.

² [2013] EWCA Civ 864.

- [17] The issue of the effect of any procedural irregularity is the focal point of this aspect of the appeal. First, it must be determined whether there was any procedural irregularity. Second, the rationale for the requirement that notice of an application must be served at least 7 days before the court is to deal with the application must be ascertained. Third, whether in the circumstances of this case the failure to provide less than 7 days' notice of the October Hearing resulted in unfairness or injustice to the appellants.

The Procedural Irregularity

- [18] It can be accepted without demur that the appellants received less than 7 days' notice of the October Hearing as required by both CPR 11.11(1) and CPR 26.4(4). The respondent disavows any responsibility for the noncompliance with CPR 26.4(4), indicating that the error was that of the court office and not the respondent. The respondent submits that if the respondent had failed to give adequate notice (rather than the issue being the listing by the court office), the starting position would be to refuse to hear the application. In such circumstances, the respondent would have to make an application for relief from sanctions under CPR 26.8, which provides the test and factors for the court to consider. However, the respondent contends that because the listing of the October Hearing was the error of the court office, the respondent lost his opportunity to make an application for relief from sanctions. The respondent does not dispute that when the October Hearing took place there was less than 7 days' notice. It is the responsibility of the court office to list matters for hearing and in doing so, the court office must always have regard to the timelines set out in the CPR 2000. This was not done in relation to the October Hearing with the result that there was a procedural irregularity.

The Rationale for the 7 Days' Notice

- [19] In **CEF Holdings Ltd v Munday**,³ Silber J stated:

“181. The purpose of this requirement imposed on an applicant for an injunction of giving 'not less than 3 days notice' is to allow the respondents to the application adequate time in which to consider the applicant's case

³ [2012] EWHC 1524 (QB); [2012] FSR 35.

on both factual and legal issues and also to enable them to be properly prepared so as not only to be able to address all relevant issues of fact and of law, but also to be able to adduce all relevant evidence and to make full submissions on all legal and factual issues. In other words, the period of three clear days is the minimum period specified to ensure that proper legal and factual submissions of the respondent can be put before the court so as to represent their interests.

182. It follows that if a shorter period of notice (and particularly if a much shorter period of notice is given), then the respondents to the application cannot be expected to be properly prepared and to be able to put all the relevant legal and factual information before the court. In those circumstances, the obligation of full and frank disclosure continues, but it is subject to one qualification. Obviously, if the respondent who has been given inadequate notice, appears and then deals with all the factual and legal issues in the way in which the applicant for the injunction would have been obliged to have done as satisfying his obligation to give full and frank disclosure, then the applicant for the interim relief is discharged from the obligation to give any further information as it had already been supplied by the respondent.”

- [20] Although the statements made in **Mundey** related to 3 days’ notice in the context of an application for an interim injunction, they are equally applicable here. The rationale for 7 days’ notice in the context of applications generally under Part 11 is: (1) to allow the respondent to the application adequate time in which to consider the applicant’s case on both factual and legal issues; and (2) to enable the respondent to be properly prepared to be able to: (i) address all relevant issues of fact and of law; (ii) adduce all relevant evidence; and (iii) make full submissions on all legal and factual issues.

Legal Principles Relating to Procedural Irregularity

- [21] Numerous decisions have considered the effect of any procedural irregularity on a party in proceedings. It must be emphasised that some of the decisions of the High Court and Court of Appeal of England and Wales are based on general principles of unfairness resulting in an unjust decision or the English CPR 52.21(3) which provides as follows:

“**Hearing of appeals**

52.21

...

- (3) The appeal court will allow an appeal where the decision of the lower court was—
(a) wrong; or
(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.”

[22] However, for present purposes, the applicable principles are the same whether based on general principles or the application of the English CPR 52.21(3). The respondent cites the decisions of **Frey** and **Dorcas**. In **Frey**, the trial judge at the commencement of a hearing of applications to strike out a claim for abuse of process indicated that it was a pointless exercise for counsel to try and persuade him to the contrary. On appeal, the Court of Appeal of England and Wales explained that:

“[22] It is a fundamental feature of the English civil justice system, and indeed any civilised modern justice system, that a party should be allowed to bring his application to court, and make his case out to a judge. Of course, this principle is subject to some exceptions and limitations, which exist to ensure the proper administration of justice. Thus, the court may refuse to entertain argument from a party who is in contempt of court, a civil restraint order can fetter the right of access in the case of a person who has used the court process to harass others, and time limits are routinely imposed for hearings. However, even where a party is in contempt or is subject to a civil restraint order, the court will ensure that he is not prevented from making an application or submissions where it would be unjust to shut him out; and time limits are imposed simply to ensure that a party is not allowed an extravagant amount of time to the detriment of other court users.

[23] Accordingly, it seems to me clear that, where an application is brought to strike out the whole or part of a claim, then, unless for instance the applicant is in contempt or subject to a civil restraint order, the judge before whom the application is listed has a duty to consider it properly. In particular, the judge is bound to listen to oral argument in support of the application (unless he is satisfied by what he has read, before coming into court, that the application should be granted, in which case he could call immediately on the respondent to the application—but that is not always a wise course). Particularly where the judge has had the benefit of time to read all the papers, and to consider a full written argument on behalf of the applicant (and the respondent), he may quite properly be able to dispose of the hearing of the application far more quickly than the parties and their advisers may have expected. For instance, while again it often may be unwise to do so, the judge could (i) begin by saying that, having read the papers, his provisional view was that the application should be rejected on one of the many grounds raised by the respondent, (ii) then give the applicant a fair opportunity to disabuse him of this view through oral

argument, and (iii) if the judge was unpersuaded by that argument, end the hearing by giving judgment for the respondent on the ground in question.

[24] But what a judge cannot properly do, however much he believes that he has fully read and fully understood all the documents and arguments before coming into court, is to dismiss the application without giving the applicant a fair opportunity to make out his case orally. It is vital that justice is seen to be done, but that is by no means the only, or even the main, reason for this. It is also because it is vital that justice is done. Any experienced judge worthy of his office will have had the experience of coming into court with a view, sometimes a strongly held view, as to the likely outcome of the hearing, only to find himself of a very different view once he has heard oral argument.”

[23] The Court of Appeal concluded that the trial judge was wrong to refuse to hear the strike out applications and that, consequently, “the only way of putting things right is to remit the applications to the Chancery Division for a hearing”.⁴ While this case did not concern a breach of a CPR rule and specifically related to the right of an applicant to have a fair opportunity to make out his case orally at a hearing before a decision is made, the applicable principle is the same – the Court of Appeal will set aside orders on grounds of serious procedural irregularity in circumstances where defendants had not been given the opportunity of responding to applications to strike out their respective applications made for the first time before the trial judge.

[24] In **Dorcas**, the trial judge decided to hear a claim for possession summarily without a trial. It was argued by the appellant that the order for possession made by the trial judge was unjust because of a serious procedural irregularity made in the conduct of the hearing by the trial judge. The Court of Appeal of England and Wales stated that:

“[28] Perhaps more importantly, it is not every case in which a conclusion that a judge’s decision was right prevents a serious procedural irregularity from amounting to an injustice. As the **Labrousse** case makes clear, the denial to a party of any opportunity to make submissions in support (or defence) of its case is a fundamental denial of procedural justice in its own right, regardless of the consequences. While there will be many cases in which, (as noted in the 2013 White Book Vol. 1 at page 1754), the absence of any adverse consequences flowing from a serious procedural irregularity will mean that an appeal based upon on it will fail, there is a residue of cases

⁴ Ibid at [27].

of grave procedural irregularity, and the present case is one of them, where the absence of consequences does not displace the injustice constituted by the inappropriate treatment of the complaining party.”

[25] The appellants cite the decision of **St Clair v King and another**,⁵ which was an appeal from a decision of a master to the High Court of England and Wales. The claimant in **St. Clair** argued that the decision of the master was unjust because of a serious procedural or other irregularity, pursuant to English CPR 52.21(3)(b) in that the master ought not to have struck out her claims on the basis that they had no real prospect of success but instead should have adjourned the defendants’ strike out application in order to give her an opportunity to take legal advice and make a further application for permission to amend. Mr. Andrew Sutcliffe QC, sitting as a High Court Judge, accepted the submissions of counsel for the claimant that the fact that the claimant did not herself seek an adjournment, either because she was unaware that she could do so or that it would be in her interests to do so or because of overconfidence in her own case, did not detract from the court’s duty to do justice and treat the parties fairly, particularly having regard to the claimant’s lack of legal representation.

[26] Mr. Andrew Sutcliffe QC explained that it was crucial to the outcome of this procedural ground of appeal that the master decided to proceed on the basis that what he had before him was an application for summary judgment when what was in fact before him was an application to strike out, alleging that the claimant’s statement of case disclosed no reasonable grounds for bringing the claim and/or that it was an abuse of process. He explained that:

“28. In appropriate circumstances the court has a discretion to treat an application under Rule 3.4 as including an application for summary judgment under CPR Part 24. I was referred to the note at paragraph 3.4.6 in the 2017 White Book and to *S v Gloucestershire County Council* [2000] 3 All ER 346 at pages 372c-373f, *Taylor v Midland Bank Trust Co Ltd* [2002] WTLR 95 at pages 107C-108H and 113E-G, and *Moroney v Anglo-European College of Chiropractic* [2009] EWCA Civ 1560. However, it is clear that in none of these cases was there any procedural unfairness to the claimants in proceeding in this way because they had had a full

⁵ [2018] EWHC 682 (Ch).

opportunity to meet the application for summary judgment. In other cases the court has refused to grant summary judgment in the absence of a formal application, particularly if the party is left in doubt that he is facing an application for summary judgment. In *Ministry of Defence v AB and others* [2010] EWCA Civ 1317, the Court of Appeal indicated that it would have set aside a summary judgment made without formal notice (in fact it did not have to do so because, although the application was allowed to be made, it was dismissed) on the grounds that it was not appropriate on the facts of that case to place on the judge the decision as to whether or not to exercise the jurisdiction under CPR Part 24 of his own motion.

29. There are procedural requirements which should be complied with when making an application for summary judgment. CPR 24.4(3) stipulates that a respondent must be given at least 14 days' notice of a summary judgment hearing. It is obvious that this procedural requirement was not complied with in this case."

[27] Mr. Andrew Sutcliffe QC concluded that:

"37. For these reasons, I accept Mr. Acton's submission that the Master's decision to proceed on the basis that the Defendants had made a summary judgment application amounted to a serious procedural irregularity, serious in the sense that it was not trivial or of no real significance. Given that the Defendants' application to strike out had only been issued some 3 working days prior to the hearing, it is likely that had the procedural and substantive consequences of the Defendants making a summary judgment application been explained to the Claimant at the hearing, she would have sought and been granted an adjournment in order to seek professional advice and her claim would thereafter have been properly formulated and argued in the manner that has occurred on this appeal.

38. I was referred by Ms. Hargreaves to *Serene Construction Ltd v Barclays Bank plc* [2016] EWCA Civ 1379, where Hamblen LJ said at paragraph 33: "In order to succeed on the appeal the company needs to show (1) that the judge exercised his case management discretion unreasonably, giving rise to procedural irregularity, and (2) that this made the decision unjust". For the avoidance of doubt, I take the view that the procedural irregularity which occurred as a result of the Master treating the Defendants' application to strike out the claim as an application for summary judgment rendered his decision unjust."

Application of Legal Principles

[28] The decisions cited by the parties on this question make it clear that the question is whether the procedural irregularity will result in an unfair trial or lead to an injustice

and that fairness involved fairness to both parties.⁶ In **Bilta (UK) Ltd (In Liquidation) v Tradition Financial Services Ltd**,⁷ the respondent made an application for an adjournment of a five-week trial on the basis that three of the four witnesses had expressed concerns in attending the trial in December 2020 because of the increase in COVID-19 cases in the United Kingdom and the serious illness of the fourth witness from which she was not expected soon to recover. The trial judge refused the adjournment. The Court of Appeal of England and Wales summarised the principles as follows:

“30. In those circumstances we were taken to a number of authorities, dating back to long before the introduction of the CPR, and received much more extensive submissions on the law than it appears the Judge did. I consider the authorities below, but it may be helpful if I indicate my conclusions on the relevant principles at the outset. These are that Mr. Scorey is right that the guiding principle in an application to adjourn of this type is whether if the trial goes ahead it will be fair in all the circumstances; that the assessment of what is fair is a fact-sensitive one, and not one to be judged by the mechanistic application of any particular checklist; that although the inability of a party himself to attend trial through illness will almost always be a highly material consideration, it is artificial to seek to draw a sharp distinction between that case and the unavailability of a witness; and that the significance to be attached to the inability of an important witness to attend through illness will vary from case to case, but that it will usually be material, and may be decisive. And if the refusal of an adjournment would make the resulting trial unfair, an adjournment should ordinarily be granted, regardless of inconvenience to the other party or other court users, unless this were outweighed by injustice to the other party that could not be compensated for.”

[29] As mentioned above, the appellants did not have the required 7 days’ notice of the October Hearing. Consequently, the appellants did not have adequate time in which to consider the Receivership Application on both factual and legal issues and to prepare to address any of those issues. At the October Hearing, the appellants were not able to adduce any relevant evidence and to make full submissions on any of legal and factual issues that might have been raised in the Receivership Application. Counsel for the appellants, having succeeded in their application to come off the

⁶ See *Bilta (UK) Ltd (In Liquidation) v Tradition Financial Services Ltd* [2021] EWCA Civ 221, at [30] and [49](4)

⁷ *Ibid.*

record after the end of the October Hearing, indicated to the learned judge that they had terminated their retainer with the appellants and that they were not prepared to represent the appellants *pro bono* because their fees were not being paid. Counsel for the appellants, therefore, requested an adjournment because the appellants were not afforded the opportunity to properly defend and oppose the Receivership Application.

- [30] The respondent submits that the appellants were not prevented from making submissions and that they did so through their counsel, who declined to make submissions on the merits, despite repeated invitations to do so by the learned judge. This is not surprising given that the appellants, having been served with arguably only 2 days' notice, would have lost the opportunity properly to prepare and respond to the Receivership Application by filing any affidavit in opposition and making submissions on any factual and legal issues at the October Hearing. Additionally, the learned judge would have known that the then counsel for the appellants had successfully applied to come off the record as legal practitioners for the appellants.
- [31] The respondent submits that even if there was a procedural irregularity, it cannot be said that it would be unjust not to remit the case for rehearing, particularly because the grounds for an Unless Order and the Receivership Order were obviously made out in the face of clear non-compliance by the appellants. In **Dorcas**, the English Court of Appeal stated that there is a residue of cases of grave procedural irregularity where the absence of consequences does not displace the injustice constituted by the inappropriate treatment of the complaining party. It is also important to note that the appellants were not permitted by the learned judge to provide evidence or make submissions to the court when they attempted to do so at the October Hearing. The learned judge explained that since the appellants were represented by counsel at the October Hearing then the correct person to make submissions to the court is the legal practitioner. The learned judge, in refusing to allow the appellants to be heard on the Receivership Application, also explained that the reasons why the appellants then

counsel did not wish to represent them at the October Hearing was a matter that does not concern the court.

[32] The learned judge enquired of counsel for the appellants appearing at the October Hearing if the court was to grant an adjournment and whether counsel was able to indicate a date to which the Receivership Application should be adjourned. Counsel replied that: (1) the Receivership Application should be adjourned to 28th October 2022 (22 days after the October Hearing) to give the appellants further time to communicate with their lawyers and see if they can get access to legal representation, which will be fair in the circumstances; and (2) the appellants can update the court as to their funding position, which would enable them to get access to legal counsel. Given those responses, the learned judge did not accede to counsel for the appellants' request for an adjournment because they provided the court with no certainty that the appellants would be in a position at the possible adjourned date to deal with the Receivership Application. However, the learned judge always had the option of treating the October Hearing as an *ex parte* application, making the Receivership Order, and giving the appellants a return date by which they could apply to set aside or vary the Receivership Application if they wished to do so. The appellants would then get an opportunity properly to respond to the Receivership Application and to adduce any relevant evidence in support, satisfying the requirements of fairness in all the circumstances as is usually done with *ex parte* orders.

[33] The learned judge was acutely aware that the Receivership Application was on very short notice, but he nonetheless proceeded to hear the application before him. The learned judge stated that, first, he was satisfied that there would be greater harm to the respondent than to the appellants in not making an immediate receivership order; and second, the need to safeguard the assets of Tensigma from further dissipation was greater than the need for the appellants to have new counsel. There is no question that the decision to proceed with the October Hearing notwithstanding the lack of 7 days' notice to the appellants was an exercise of judicial discretion by a trial

judge that the Court of Appeal would not disturb unless the judge made an error in principle and, as a result, his decision is outside the generous ambit of reasonable disagreement and is blatantly wrong. This principle has been restated many times in decisions of this Court from **Dufour and Others v Helenair Corporation Ltd and Others**⁸ and most recently in **Multibank FX International Corporation v Von Der Heydt Invest SA**⁹ where this Court stated that:

“[55] As the CPR expressly entrusts the High Court with the power and responsibility to actively manage its cases, great deference is paid to a judge’s exercise of discretion in case management decisions. Accordingly, a litigant who challenges a case management decision or order must reach a very high threshold in order to justify an appellate court’s interference with such a decision or order. The test for interfering with a judge’s case management decision or order is not whether the Court of Appeal would have exercised its discretion differently or made a different order or come to a different decision; the Court must be satisfied that the decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

- [34] The breach of the requirement to give 7 days’ notice of the October Hearing meant that the appellants were not able to prepare properly or at all on the legal and factual issues arising from the Receivership Application. At the October Hearing, the appellants were not able to adduce all relevant evidence in opposition to the Receivership Application and to make any submissions on any legal and factual issues. The counsel who appeared for the appellants at the October Hearing was not prepared to respond to the Receivership Application and made it clear to the learned judge that they did not wish to represent the appellants on a *pro bono* basis. The learned judge did not allow one of the appellants to make submissions to the court, stating that since the appellants had counsel representing them at the October Hearing the court will only hear from the legal practitioner not the parties themselves. In considering the fairness to the respondent, the learned judge had options available to him rather than proceeding with the Receivership Application without hearing evidence and submissions from the appellants. As mentioned above, because of the potential unfairness to the appellants that might be occasioned, it was open to the

⁸ (1996) 52 WIR 188.

⁹ BVIHCMAP2022/0061 (delivered 5th July 2023, unreported).

learned judge to treat the October Hearing as an *ex parte* hearing with a return date at which the appellants would be entitled to be heard. The evidence in support of the Receivership Application did not require the learned judge to proceed as he did. In the circumstances that resulted in unfairness to the appellants.

- [35] Considering all these circumstances, the decision by the learned judge to proceed with the hearing the Receivership Application on two (2) days' notice resulted in serious injustice and unfairness to the appellants. The unfairness to the appellants is the same whether one looks at the matter from the injustice flowing from either: (1) proceeding with the October Hearing considering the circumstances outlined above; or (2) refusing to grant an adjournment despite the existence of these circumstances. While the appellants may not have appealed against the refusal by the learned judge to adjourn the October Hearing, that does not affect the resulting unfairness or serious injustice occasioned by proceeding with the October Hearing where the appellants had significantly less than 7 days' notice as required by CPR 11.11(1)(b). Consequently, the appellants succeed on this ground of appeal.

The Unless Order and CPR 2000

The Appellants' Submissions

- [36] The appellants submit that it is settled law that an unless order is not strictly a matter of enforcement but rather a case management order. The appellants further submit that the Unless Order does not identify the breach by the appellants, nor does it specify the date by which the breach is to be remedied by the appellants as required by CPR 26.4(5) which states that an unless order must identify the breach and require the party in default to remedy the default by a specified date. The appellants contend that, consequently, the Unless Order is bad in law and should be set aside. The appellants further contend that the correct legal position is that the decision of whether or not to make an unless order is at the discretion of the court but that the following requirements are not part of that discretion: (1) the things that the party against whom the unless order is made is required to do must be specified and must be clear; (2) the time for compliance must be specified; and (3) the consequences

for failing to comply must be stated. The appellants submit that no certificate that the appellants were in default was contained in any of the evidence filed on behalf of the respondent in support of the Receivership Application as required by CPR 26.4(2)(a).

The Respondent's Submissions

[37] The respondent argues that the process for making an unless order under CPR 26.4 is as follows. Firstly, a party must have failed to comply with a rule contained in the CPR or a court order for which no sanction applies. In these circumstances, any other party may apply for an unless order under CPR 26.4(1). That application, which may be made *ex parte*, must comply with the requirements set out in CPR 26.4(2). Secondly, pursuant to CPR 26.4(3) the court office must refer the application to a judge, master or registrar who may either: (a) grant the application without a hearing; (b) direct that an appointment be fixed to consider the application; or (c) invite submissions from the other side. Thirdly, if an appointment is fixed, the court office must give 7 days' notice of the date, time and place of the appointment to all parties pursuant to CPR 26.4(4). The respondent further argues that the first two options do not exclude the possibility that the application could be made on an *ex parte* basis, with the consequence that a hearing could be listed to deal with the application without notice to the other party, which would make CPR 26.4(4) superfluous.

[38] The respondent submits that two (2) of the recitals to the Receivership Order expressly identify the specific paragraph of the Freezing Order that the appellants breached as follows:

“AND UPON paragraph 21 of the Freezing Injunction requiring the provision of information by the Second and Third Defendants within 48 hours of recovering notice of the Freezing Injunction

AND UPON the Second and Third Defendants not providing that information”

[39] The respondent also submits that paragraph 16 of the Receivership Order identifies paragraph 21 of the Freezing Order as having not been complied with and reiterates the information that the appellants were already ordered to provide in the Freezing Order. The respondent contends that, in paragraph 21 of the Freezing Order, the

appellants were ordered to provide specific information within 48 hours of service of the Freezing Order. The respondent also contends that the Unless Order, therefore, specifically identifies the breach by the appellants of the Freezing Order and by implication provides the appellants with 48 hours from service of the Receivership Order to remedy the breach by providing to the respondent's solicitors the information requested at subparagraphs 16.1 to 16.5 of the Receivership Order.

[40] The respondent submits that the appellants' counsel, in acknowledging receipt of the Receivership Order, stated in an email that, "[w]e note that the deadlines for compliance with the order are triggered upon receipt of the sealed order and we therefore look forward to receiving service of same".¹⁰ The respondent also submits that even if no specified date for compliance was expressly stated in the Unless Order, the court could still find that the Unless Order was valid because the period for compliance would be within a reasonable time. However, the respondent contends that, for the avoidance of doubt, this is not the situation with the Receivership Order because a time for compliance was referenced in the Unless Order through paragraph 21 of the Freezing Order.

[41] The respondent contends that the Receivership Application was accompanied by an affidavit – Malik 1. The respondent further contends that Malik 1 sets out in detail the Freezing Order which had not been complied with by the appellants and the nature of the breach was also summarised and later particularised. The respondent submits that the jurat at the end of Malik 1 is the written certification by an officer who administers an oath to the affiant by which the officer certifies that the affiant made an oath before that officer regarding the truth of the contents of the affidavit. The respondent further submits that since Malik 1 was certified as being true by a notary, and the contents detail both the order which was not complied with and the nature of the appellants' breaches, Malik 1, therefore, contains a certificate that the other party is in default, thereby satisfying the requirements of CPR 26.4(2). The respondent contends that if Malik 1 is deemed insufficient to satisfy that requirement, CPR

¹⁰ Respondent's Core Bundle, at page 405.

26.4(2) was nonetheless satisfied by the respondent filing a certificate of urgency as part of the Receivership Application in which the respondent expressly identifies the default of the appellants.

Discussion and Analysis

- [42] It has been stated that “unless” orders have a long history dating back well into the 19th century and it was recognised at an early stage that once the condition on which it depended had been satisfied the sanction became effective without the need for any further order.¹¹ The court’s general power to strike out is found in CPR 26.3 and one of the bases on which a court may strike out a statement of case or part of a statement of case is if it appears to the court that there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings.¹² CPR 26.4 provides some amelioration of CPR 26.3(1)(a) in that it is meant to give the defaulting party one last chance to remedy the default before the power to strike out can be meted upon them. An unless order, therefore, directs the defaulting party to remedy the default and specifies the consequences of the failure to do so. An unless order is meant to provide the defaulting party with the opportunity to put things right while at the same time recognizing that the other party is entitled to its remedy to strike out that is expressly set out in CPR 26.3, but only if the defaulting party fails to cure the default.

- [43] The power granted to the court to strike out for failing to comply with an unless order is found in CPR 26.4. Given its central importance in this appeal, it is necessary to set it out in full:

“Court’s general power to strike out statement of case

26.4 (1) If a party has failed to comply with any of these rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an “unless order”.

(2) Such an application may be made without notice but must be supported by evidence on affidavit which –

(a) contains a certificate that the other party is in default;

¹¹ *Marcan Shipping (London) Ltd v Kefalas and another* [2007] 1 WLR 1864, 1868.

¹² CPR 26.3(1)(a).

- (b) identifies the rule or order which has not been complied with;
and
 - (c) states the nature of the breach.
- (3) The court office must refer any such application immediately to a judge, master or registrar who may –
- (a) grant the application;
 - (b) direct that an appointment be fixed to consider the application and that the court office give to all parties notice of the date, time and place for such appointment; or
 - (c) seek the views of the other party.
- (4) If an appointment is fixed the court must give 7 days notice of the date, time and place of the appointment to all parties.
- (5) An “unless order” must identify the breach and require the party in default to remedy the default by a specified date.
- (6) The general rule is that the respondent should be ordered to pay the assessed costs of such an application.
- (7) If the defaulting party fails to comply with the terms of any “unless order” made by the court that party’s statement of case shall be struck out.
- (8) Rule 26.9 (general power of the court to rectify matters where there has been a procedural error) shall not apply.
- Rule 11.16 deals with applications to set aside any order made on an application made without notice.”

[44] A summary of CPR 26.4 is necessary. Where a party has failed to comply with any court order which does not contain a sanction for non-compliance any other party may apply to the court for an “unless order”. The application may be made without notice but must be supported by evidence on affidavit which: (a) contains a certificate that the other party is in default; (b) identifies the rule or order which has not been complied with; and (c) states the nature of the breach. The court office must immediately refer any such application to a judge, master or registrar. If an appointment is fixed to consider the application, the court must give 7 days’ notice of the date, time and place of the appointment to all parties. An unless order, if granted by the court, must identify the breach and require the party in default to remedy the default by a specified date. Where the defaulting party fails to comply with the terms

of any “unless order” made by the court that party’s statement of case shall be struck out.

- [45] Paragraph 16 of the Receivership Order contains the obligation on the appellants to comply with paragraph 21 of the Freezing Order and paragraph 17 of the Receivership Order contains the Unless Order, both of which are set out below:

“Compliance with disclosure requirements

16. The Second and Third Defendants shall comply with paragraph 21 of the Freezing Injunction and provide and confirm to the Claimant’s solicitors:
- 16.1. the name of the exchange (or exchanges if more than one) at which the Bitcoin is held;
 - 16.2. the name of the exchange (or exchanges if more than one) at which the Ethereum is held;
 - 16.3. the number and current value of rewards that have accrued to the staked Ethereum;
 - 16.4. the name of the exchange (or exchanges if more than one) at which any Ethereum rewards are held;
 - 16.5. the blockchain address (or addresses if more than one) of the Ethereum (the 42-character hexadecimal address).

Unless Order and further relief

17. Unless the Second and Third Defendants comply with paragraph 16 above:
- 17.1. the Amended Defence is struck out and judgment entered for the Claimant and it is declared that Mr. Svirsky and/or Mr. Donin are liable to account to Tensigma for the Bitcoin and/or Ethereum to the sum of US\$ 22,715,000 or such other sum as the Court thinks fit on the ground of their respective breaches of fiduciary and/or equitable duties and/or breaches of trust, alternatively as constructive trustees on the ground of their dishonest assistance in the same and;
 - 17.2. It is further declared that the Claimant owns 16,500 shares out of a total of 50,000 shares issued in Tensigma.”

- [46] The obligation in paragraph 16 of the Receivership Order is to, first, comply with paragraph 21 of the Freezing Order and, second, to provide specific information identified in subparagraphs 16.1 to 16.5. Paragraph 21 of the Freezing Order is as follows:

“Provision of Information

21. Unless paragraph 22 applies, the Respondents must within 48 hours of receiving notice of this Order and to the best of their ability inform the Applicant's solicitors of the current location of the transferred Bitcoin and Ethereum, whether in their own name or not and whether solely or jointly held, giving the value, location, and names and physical addresses of any natural person or company holding the aforementioned Bitcoin and Ethereum."

CPR 26.4(4) - The Notice Period

- [47] As stated earlier, CPR 26.4(4) requires the court office to give 7 days' notice of the date, time and place of the appointment to consider the unless order application to all parties. It is not disputed that there was less than 7 days' notice as required by CPR 26.4(4). I have already examined the lack of that notice period in relation to the Receivership Order. However, in relation to the Unless Order the requirement for 7 days' notice is not found in CPR 11.11(1) but in CPR 26.4 that deals with the court's general power to strike out a statement of case. Given the draconian effect of such orders, the procedural requirements of CPR 26.4 must be strictly observed. In my view, while it may not be the respondent's fault that less than 7 days' notice was provided, it is not always fatal to the making of the Unless Order that less notice than what was required under CPR 26.4(4) was provided.

CPR 26.4(2) – Affidavit in Support of Application for the Unless Order

- [48] The appellants submit that the Unless Order does not specify the breach by the appellants of the Freezing Order. The evidence in support of the application for the Unless Order is found in Malik 1 which was relied upon by the learned judge in making the Unless Order. At paragraph 15.2 of Malik 1, it is stated that one of the breaches of the Freezing Order committed by the appellants was their failure to provide information pursuant to paragraph 21 of the Freezing Order to the respondent's solicitors. This satisfies the requirement found in CPR 26.4(2)(b) that the affidavit evidence must identify the rule or order which has not been complied with. The requirement in CPR 26.4(2)(c) that the affidavit evidence must state the nature of the breach is satisfied in paragraph 22 of Malik 1 which states that:

- "22. As at the date of this affidavit, Mr. Svirsy and Mr. Donin have failed to confirm the Cryptocurrency's (i) location; (ii) in whose name it is

held; or (iii) the name or physical address of any person or company that holds it. All that has been provided is a table in an email sent by Mr. Svirsky (and reproduced in Mr. Svirsky's Second Witness Statement), which purports to discharge their obligations. It does not."

[49] At paragraphs 25 to 28, Malik 1 sets out in detail why the information provided by the appellants does not discharge the appellants' disclosure obligations under paragraph 21 of the Freezing Order.

[50] The appellants, as mentioned above, submit that there was no certificate found in the evidence of the respondent that the appellants were in default as required by CPR 26.4(2)(a). I agree with the respondent's submission that the jurat at the end of Malik 1 is the written certification of the truth of the contents of the affidavit. There is no need for a separate document since all that CPR 26.4(2)(a) requires is that the supporting affidavit contain a certificate that the other party is in default. No specific form is prescribed, and there does not appear to be a cogent reason why the sworn averment set out in the supporting affidavit should not suffice. Certainly, none has been advanced before this Court. Consequently, I also agree with the respondent's submission that Malik 1 contains a certificate that the appellants were in default, thereby satisfying the requirements of CPR 26.4(2)(a).

CPR 26.4(5) – Identification of Breach and Remedy Date
Identification of breach

[51] CPR 26.4(5) states that an "unless order" must identify the breach and require the party in default to remedy the default by a specified date. In the preamble to the Receivership Order, the learned judge specifically states that paragraph 21 of the Freezing Order required the provision of information by the appellants to the respondent's solicitors within 48 hours of receiving notice of the Freezing Order and that the appellants have not provided that information. There can be no doubt that the learned judge identified the breach by the appellants of paragraph 21 of the Freezing Order. The appellants submit that the Unless Order does not specify the date by which the breach is to be remedied. As stated earlier, paragraph 16 of the

Receivership Order requires the appellants to, first, comply with paragraph 21 of the Freezing Order **and**, second, to provide the information identified in subparagraphs 16.1 to 16.5 of the Receivership Order.

Specified date to remedy default

- [52] The focus of CPR 26.4(5) is the “unless order”. It is the “unless order” that must require the party in default to remedy the default by a specified date. Compliance with CPR 26.4(5) can be achieved by: (1) including a specific time period by which the party in default must remedy the default; or (2) reference to some other document or order but the specified date by which the party in default must remedy the default must be easily ascertainable. The rationale for requiring the “unless order” to specify the date by which the defaulting party is to remedy the default is to ensure that there is no ambiguity concerning the date by which the defaulting party is to cure the default. Any uncertainty about that date compromises the effectiveness of the automatic consequence arising from a failure by the defaulting party to remedy the default.
- [53] One authority was cited to this Court to the effect that where an unless order does not contain a date for compliance, the court may imply that the defaulting party must in any event remedy the default within a reasonable time.¹³ That, however, does not render ineffective the requirement for the “unless order” to contain a specified date by which the defaulting party must remedy the default. This is a specific requirement in CPR 26.4(5), and it must be complied with. The decision in **Khan and another v Burke**¹⁴ does not decide that the court will **always** imply a reasonable time requirement; only that the court **may** imply that requirement. The wording of CPR 26.4(5) does not, it seems to me, leave any room for implying a reasonable time requirement because this would run a coach and horses through the specific requirement in CPR 26.4(5) for the unless order to contain a specified date. The importance of the purpose of specifying a date for compliance in the unless order or

¹³ See *Khan and another v Burke* [2023] EWHC 534 (Ch) at [20].

¹⁴ *Supra* n. 13.

which date can be ascertained with reasonable certainty by reference to some other document would be undermined if the reasonable time requirement were to be accepted as a principle of general application applicable to CPR 26.4(5). In any event, Leech J in **Burke** accepted the need for a specified date, explaining, correctly in my view, (at [2]) that:

“Moreover, in my judgment if it is to be effective, an unless order must make it clear to the party to whom it is directed and whom it requires to carry out a particular action or provide a particular document, exactly what action they have to take to comply with the Order and **when they have to take it.**”
(Emphasis added)

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

[55] I do not agree with the respondent’s submission that a combined reading of paragraph 16 of the Receivership Order and paragraph 21 of the Freezing Order by implication provides 48 hours from service of the Receivership Order for the appellants to remedy the breach by providing the information identified at paragraphs 16.1 to 16.5 of the Receivership Order. Paragraph 16 of the Receivership Order requires compliance with paragraph 21 of the Freezing Order, which itself contains a requirement for the appellants first to provide certain information within a specific

period. Paragraph 16 of the Receivership Order also contains another requirement for the appellants also to provide the information identified at paragraphs 16.1 to 16.5 of the Receivership Order. I do not see how the reference to paragraph 21 of the Freezing Order in paragraph 16 of the Receivership Order by implication requires the provision of the information identified at paragraphs 16.1 to 16.5 of the Receivership Order within 48 hours of service of the Receivership Order. That implication requires the reader to suspend logic and make an assumption that paragraph 16 of the Receivership Order could not have meant a time period that had already expired. The actual wording of paragraph 21 of the Freezing Order to which reference is made in paragraph 16 of the Receivership Order does not provide that clarity that is necessary when the specified date is ascertained by reference to some other document or order.

[56] In my view, the Unless Order fails to comply with the CPR 26.4(5) in that it does not contain a requirement that the appellants remedy their noncompliance with paragraph 21 of the Freezing Order by a specified date. The Unless Order seemingly requires the appellants to perform an act that was impossible because the time specified in paragraph 21 of the Freezing Order had already lapsed. Even if one can read into paragraph 16 of the Receivership Order a requirement to comply with the 48 hour period as stated in paragraph 21 of the Freezing Order from receiving notice of the Receivership Order, this would not cure the failure to adhere to the requirement in CPR 26.4(5) for the “unless order” to require the party in default to remedy the default by a specified date. In my view, the reference in paragraph 16 of the Receivership Order to paragraph 21 of the Freezing Order would not also satisfy the requirement that any such specified date should be reasonably ascertainable if contained in any other document or order.

[57] The respondent submits that subsequent events have shed some light on this issue and raises some doubt as whether the appellants were operating under any misunderstanding as to the operation of paragraph 16 of the Receivership Order. The fact that counsel for the appellants replied to counsel for the respondent via email

indicating that they note the deadlines for compliance with the Receivership Order are triggered on receipt of the sealed order does not of itself indicate that there was compliance with CPR 26.4(5). The purpose for requiring a specified date in an unless order pursuant to CPR 26.4(5) is useful in interpreting this evidence. The requirement to specify the date in the unless order to remedy the default is for the benefit of the defaulting party to prevent any ambiguity about the date by which they need to comply to avoid their statement of case being struck out. The defaulting party must be able to ascertain on the face of the unless order or with relative ease by reference to some other document or order the specified date by which compliance is required.

- [58] The appellants purportedly complied with the 48 hours' time period that the respondent submits is to be implied in paragraph 16 of the Receivership Order when read in conjunction with paragraph 21 of the Freezing Order. While, in my view, the requirement found in CPR 26.4(5) was not complied with in paragraph 16 of the Receivership Order, the appellants understood and operated on the basis that compliance was required within 48 hours of receipt of notice of the Receivership Order. However, the purported compliance by the appellants based on their interpretation and understanding of paragraph 16 of the Receivership order does not in my view eliminate the requirement for the Unless Order to contain a specified date pursuant to CPR 26.4(5). The appellants, therefore, succeed on this ground of appeal.

Miscellaneous Grounds of Appeal

- [59] The appellants raised other matters in their grounds of appeal which were not expanded upon in their written submissions filed in support of the appeal. First, the statement that the learned judge "encouraged" the respondent's counsel to advance arguments and positions which the respondent had not himself put forward is an issue that was raised by the appellants in an earlier appeal. Nothing in the October Hearing warrants even remotely any objection on this ground. Second, the learned judge was correct in disregarding information that was emailed to his clerk on the day of the October Hearing because that information was not properly before the court.

Third, at the hearing of the appeal, Counsel for the appellants resiled from the ground of appeal that stated that the October Hearing ought to have been an *ex parte* hearing because of the lack of proper notice and the time between service and the October Hearing. Given that concession, nothing more need be said on that issue.

- [60] Fourth, the appellants' statements about the alleged worthless undertaking and fortification were not expanded upon in the submissions filed in support of the appeal. the learned judge was satisfied that an undertaking as to damages was necessary not only to protect Tensigma but also to protect the appellants from any loss they might also suffer because of the Receivership Order. Similarly in relation to the Freezing Order, the learned judge exercised his discretion to not order fortification of the cross undertaking as to damages given by the respondent in the Receivership Order. The learned judge accepted that it would not be appropriate to order fortification and that the main asset of the respondent (his shareholding in Tensigma) is already under the control of Ms. Silver, the liquidator, and that the asset will continue to be under her control as receiver. The learned judge was also of the opinion that there would be no prejudice to the appellants in making the Receivership Order when compared to the great harm to the respondent if the Receivership Order was not immediately made. The appellants have failed to show that the learned judge erred in the exercise of his discretion in not making an order for fortification. All four of these additional grounds of appeal also have no merit.

Disposal of Appeal

- [61] For the reasons given above, I would allow the appellants' appeal against the Receivership Order and the Unless the Order, set aside the Receivership Order and the Unless Order and remit the Receivership Application to be heard before a different judge of the Commercial Court. I would also order the respondent to pay all costs of the appellants on appeal and in the court below to be assessed by a judge of the Commercial Court if not agreed within 21 days.

[62] I am grateful for the assistance provided by all counsel for the parties.

I concur.

Vicki Ann Ellis
Justice of Appeal

I concur.

Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar