THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0040
BVIHCMAP2021/0046
BVIHCMAP2022/0005

BETWEEN

[1] JULIAN SVIRSKY
[2] DENNIS DONIN

Appellants

and

ARMAN OYEKENOV

Respondent

TENSIGMA LIMITED

First Defendant

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Eddy Ventose	Justice of Appeal [Ag.]

Appearances:

Ms. Dancia Penn, K.C., with her Ms. Astra Penn for the Appellants
Mr. Stephen Ryan for the Respondent
Mr. Andre McKenzie appearing on a watching brief for the receiver of Tensigma Limited

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2023: May 22;
November 8.

Interlocutory appeal – Appeal against trial judge's discretion - Interim injunction – Test for granting of freezing orders – Good arguable case - Risk of dissipation – Whether learned judge considered the correct principles for granting freezing injunction – Whether learned judge erred in granting freezing injunction - Jurisdiction to grant freezing injunction – Whether learned judge erred in accepting undertaking of respondent - Fortification – Duty of applicant for interim injunctions to make full and fair disclosure - Effect of restoration of company to register of companies – Failure to give reasons – Apparent bias

In or about May 2017, the Respondent, Mr. Arman Oyekenov discussed the idea of an online platform with Mr. Julian Svirsky, the First Appellant, that would allow retail investors to acquire small stakes in real estate projects using tokens and enable platform users to rent real estate to each other ("the project"). The Respondent states that he was later introduced to Mr. Dennis Donin, the Second Appellant, and all three individuals agreed to work together on the project, eventually incorporating Tensigma Limited ("Tensigma"), which was traded through Atlant, as the corporate vehicle in which the project would run, in the Territory of the Virgin Islands ("BVI") on 31st July 2017. According to the Respondent, the Appellants were registered as the legal shareholders of Tensigma, with each holding approximately one third of their shares for the sole benefit of the Respondent.

The main assets of Tensigma were held in the form of cryptocurrency- Bitcoin and Ethereum and the Respondent contends that in or about November 2017, the Respondent and the Appellants verbally agreed on certain processes relating to the holding and signatories of these assets.

The Respondent claims that between 29th November 2020 and the end of March 2021, the Appellants among other things, transferred 85% of Tensigma's assets to persons unknown and transferred the entire business of Tensigma, to a third party, Digital Asset Exchange Limited ("DAE"). The Respondent filed a claim form and statement of claim on 19th April 2021 stating that the actions taken by the Appellants amounted to unfairly prejudicial conduct contrary to section 184I of the Territory of the Virgin Islands Business Companies Act (the "BCA"), the ("Unfair Prejudice Claim"), and constituted breaches of fiduciary and/or equitable duties and/or breaches of trust. The Respondent also filed an application dated 19th April 2021 for permission to bring a derivative claim, pursuant to section 184C of the BCA, on behalf and in the name of Tensigma against the Appellants. The Respondent also sought declaratory relief and an order that the Respondent be permitted to purchase the Appellants' shareholding in Tensigma on a fair value basis adjusted to reflect the unfairly prejudicial conduct of the Appellants.

In their defence and counterclaim filed on 6th August 2021, the Appellants allege that they are the founders of, and equal shareholders in, Tensigma and that the Respondent became an employee of Tensigma in or around 22nd September 2017 with his duties being principally administrative in nature. They assert that there was never a requirement for the consent or agreement of the Respondent in respect of Atlant's operations, or the actions and decisions of the Appellants. On 4th February 2021, Mr. Svirksy, as sole director of Tensigma, passed a resolution and resolved to put Tensigma into liquidation under the provisions of the BCA. On 2nd March 2021, Tensigma was struck off the register of companies and dissolved following the completion of its liquidation.

On 19th April 2021, the Respondent made an *ex parte* application for a freezing order against the Appellants restraining them from disposing of, dealing with or diminishing the value of the assets owned by Tensigma. The Respondent submitted that he had a good arguable case in respect of the substantive claim against the Appellants, that there was a real risk of the Appellants dissipating assets other than in the ordinary course of business, to frustrate any judgment that might be obtained against the Appellants in due course and the freezing order is just and convenient. At the *ex parte* hearing on 23rd April 2021, Wallbank J granted a 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. The Return Date was originally stated for 13th May 2021. The Respondent applied on 12th May 2021 to continue the Freezing Order and on 21st June 2021 to vary the Freezing Order. The Appellants applied on 12th August 2021 to discharge the Freezing Order.

At a hearing on 10th November 2021 (the "November Hearing") to consider the three applications, Wallbank J noted that the Respondent did not have a good arguable case on the claim as pleaded at the time the Freezing Order was made and that the Freezing Order ought not to have been made and continued on those grounds; and that the Respondent might have a good arguable case on grounds that he has not yet pleaded (the "Potential Good Arguable Case"). He determined that it would be just and convenient for the Freezing Order to continue for a 30 day period to enable the Respondent to amend the claim to reflect the Potential Good Arguable Case and to apply for a new freezing order on new grounds. Wallbank J considered among other things, that the assets referred to in the Freezing Order include all assets that were purportedly transferred from Tensigma to DAE prior to its liquidation. Wallbank J consequently ordered (the "November Order") that the Freezing Order continue until 4:00 p.m. on 10th December 2021 (the "Discharge Date"). The Respondent was given liberty, on or before the Discharge Date to amend his pleaded case in compliance with the Civil Procedure Rules 2000 (the "CPR") and to apply for a new Freezing Order on notice to all the parties. The parties were given liberty to apply to extend the Discharge Date in the event that the hearing of the new application for the new freezing order cannot be listed before 10th December 2021.

At a further hearing held on 9th December 2021 Wallbank J varied the November Order to the effect that the Freezing Order shall continue until final determination of an application to restore Tensigma into liquidation, which application was part heard on 8th December 2021 (the "Restoration Application") pursuant to sections 218 and 218A of the BCA at which point it shall be automatically discharged unless a new freezing order has been ordered by the court (the "December Order").

The Appellants also filed an application on 17th December 2021 seeking an order that Wallbank J recuses himself from hearing the Unfair Prejudice Claim and the Restoration Application and any other related proceedings between the parties (the "Recusal Application") which was dismissed by Wallbank J. The hearing of the Restoration Application continued before Wallbank J on 22nd December 2021, and on the same day, Wallbank J granted an order restoring Tensigma to the register of companies with Ms. Anna Silver being appointed as voluntary liquidator or Tensigma (the "Restoration Order"). Wallbank J also directed that the Freezing Order continues until when the written minute of the order on judgment following the hearing on 22nd December 2021 was “settled”. The Respondent applied *ex parte* on 23rd December 2021 for an order to vary the November Order to continue the Freezing Order until determination of the Respondent’s application for a new freezing order. This application was granted on 24th December 2021.

Dissatisfied with the decisions of Wallbank J, the Appellants appealed against the November Order and the December Order on several grounds and also appealed against the Recusal Order. The issues arising for the Court’s consideration are outlined in paragraph 27 of the judgment.

Held: dismissing the appeal against the November Order, the December Order and the Recusal Order, and ordering that the Appellants pay all the costs of the Respondent 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. An applicant for a freezing injunction must prove that: (1) he has a good arguable claim in the amount sought to be frozen; (2) there is a real risk that the respondent will dispose of his assets in such a manner that a judgment against him will go unsatisfied; and (3) it is just and convenient to make the order sought. All three conditions must be satisfied before a court can grant the freezing order. A good arguable case is one that is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50% chance of success. Further, in establishing a good arguable case, there is no requirement that proceedings in which the judgment is sought should yet have been commenced nor that a right to bring such proceedings should yet have arisen. It is sufficient, if the court is satisfied, with a sufficient degree of certainty, that the right to bring proceedings will arise and that proceedings will be brought. In relation to the risk of dissipation of assets, there must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. Each case must be decided on its own facts, and it is the function of the court to decide whether the defendant should be restrained from dealing with his assets unjustifiably. This is an evaluative exercise by the court and it is not enough to prove that the defendant has the ability to dissipate his assets but there must be cogent evidence of a propensity to dissipate, from which the court can infer a serious risk of dissipation.

   Convoy Collateral Ltd v Broad Idea International Ltd [2021] UKPC 24 applied; **Multibank FX International Corporation v Von Der Heydt Invest SA** BVIHCVAP2021/0009 (delivered 21st February 2023, unreported) applied; Section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act** Cap 80 of the Laws of the Virgin Islands applied.

2. The American Cyanamid principles have no application to this type of freezing order, which is in fact a freezing injunction. At the November Hearing, Wallbank J properly considered the applicable principles relating to the grant of a freezing order. Wallbank J examined the various reliefs sought by the Respondent in his statement of claim and concluded that there was no arguable case based on the statement of claim, concluding that there was currently no shareholding in Tensigma, because Tensigma does not exist anymore. However, since there is no requirement that proceedings should have commenced or that the right to bring proceedings should

have arisen, the fact that Tensigma was dissolved should not have been decisive in determining whether there existed no good arguable case, if there existed a realistic prospect that Tensigma would be restored to the register of companies. What is important is that the claim must have a plausible evidential basis. In his ruling relating to the November Order, Wallbank J identified the evidential bases on which he noted the Respondent could potentially claim against the Appellants and this was therefore sufficient for him to have accepted that the Respondent had satisfied the requirement for a good arguable case for the potential claims that he had not yet specifically pleaded. However, it was still open to Wallbank J to require the Respondent to amend the pleadings to allow him to properly analyse them to determine whether the claims that were mentioned at the November Hearing satisfied the test of a good arguable case. Thus, although not required, it cannot be said that Wallbank J's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

American Cyanamid Co v Ethicon Ltd [1975] AC 396 explained; **Convoy Collateral Ltd v Broad Idea International Ltd** [2021] UKPC 24 applied; **Multibank FX International Corporation v Von Der Heydt Invest SA** [BVIHCVAP2021/0009 (delivered 21st February 2023, unreported) applied.

3. The issue of double recovery, where it properly arises, is a matter for the trial judge who is seized with the proceedings when and if they arise for consideration during proceedings before or at the trial. It is not an issue that properly arises in the context of determining whether the respondent has a good arguable case. It would not have been proper for Wallbank J to entertain all these intricate arguments on issues concerning the "supposed" principle of "reflective loss.

Marex Financial Ltd v Sevilleja (All Party Parliamentary Group on Fair Business Banking intervening) [2021] AC 39 applied; **Prudential Assurance Co. Ltd. v. Newman Industries Ltd (No 2)** [1982] 1 Ch 204 considered.

4. Before a court can exercise the statutory discretion to make a freezing order pursuant to section 24(1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act and in accordance with rule 17.2 of the CPR, the court must first have jurisdiction to do so, particularly where the respondent resides out of the jurisdiction. Where a person resides outside the Territory of the Virgin Islands, the applicant must first seek leave of the court to serve the proceedings outside of the jurisdiction in accordance with CPR 7.3(7). In interpreting CPR 7.3(7), a purposive approach is needed. Although CPR 7.3(7) relates only to "a company incorporated within the jurisdiction" which means a company on the register of companies, matters such as the constitution, administration, management or conduct of the affairs or the ownership or control of a company incorporated in the jurisdiction could also apply to a dissolved company. The intentions of the drafters of CPR 7.3(7) would be frustrated if this were not the case as any such claims in respect of a dissolved company would be beyond the reach of a claimant wishing to serve a defendant who is outside the jurisdiction. In any event, in this case, any perceived issues concerning the applicability of CPR 7.3(7) to Tensigma now moot as Tensigma is

now restored to the register of companies and the effect of such restoration is that Tensigma is deemed to have continued in existence as if it had not been dissolved or struck off the register.

Section 24(1) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act** Cap 80 of the Laws of the Virgin Islands applied; **Mitsuji Konoshita et al v JTrust Asia PTE Ltd** BVIHCMAP2020/0017 (delivered 24th March 2021, unreported) applied; **Nilon Ltd and another v Royal Westminster Investments SA and others** (2015) 86 WIR 285 applied; **Westburg Anstalt v Profitstar Anstalt** BVIHCMAP2013/0020 (delivered 5th December 2013, unreported) applied; Rules 7.3(7) and 7.14 of the **Civil Procedure Rules 2000** applied.

5. Where the court accepts that there is a good arguable case that a respondent engaged in wrongdoing against the applicant which is relevant to the issue of dissipation, that holding will point powerfully in favour of a risk of dissipation. In such circumstances, it may not be necessary to adduce any significant further evidence in support of a real risk of dissipation but each case will depend upon its own particular facts and evidence. On evidence before him, Wallbank J accepted that there was a good arguable case that the liquidation and dissolution of Tensigma, including the asset transfers that lead to it, were all part and parcel of a dissipatory scheme intended to place value away from the reach and knowledge of the Respondent. This alleged wrongdoing accepted by Wallbank J was relevant to the issue of dissipation and consequently it points powerfully in favour of the risk of dissipation. In these circumstances, it was not necessary for the Respondent to adduce any significant further evidence in support of a real risk of dissipation. Wallbank J properly considered the evidence and all the circumstances, and it cannot be said that Wallbank J considered irrelevant factors when deciding whether there was a real risk of dissipation. Further, the Appellants have not pointed to any irrelevant consideration that Wallbank J considered in finding that it was just and convenient to continue the Freezing Order and consequently the Appellants could not show that Wallbank J erred in principle in the exercise of his judicial discretion in deciding that it was just and convenient to continue the Freezing Order.

   Fundo Soberano De Angola and others v Santos and others [2018] EWHC 2199 (Comm) applied; **Lakatamia Shipping Company Ltd v Morimoto** [2019] EWCA Civ 2203 applied.

6. A party applying for an interim order must undertake to abide by any order as to damages caused by the granting or extension of the order, unless the court otherwise directs. Undertakings as to damages are now the norm in freezing orders and in all the circumstances, it cannot be said that Wallbank J erred in the exercise of his discretion to allow the Respondent to give an undertaking. Where a respondent believes that an undertaking given to the court by an applicant for an interim order might be worthless, the respondent may apply to the court for an order for fortification. In determining whether to exercise its discretion to make an order for fortification, there are three cumulative criteria which should be satisfied. Firstly, whether the applicant for fortification can show a sufficient level of risk of loss to require (further) fortification, which involves showing a good arguable case to that

effect. Secondly, whether the applicant can show, to the standard of a good arguable case, that the loss has been or is likely to be caused by the granting of the injunction. Thirdly, whether there is sufficient evidence to allow an intelligent estimate of the quantum of the losses to be made. In this case, the reasoning of Wallbank J in refusing to order fortification shows that he had in mind these three criteria but found that there was insufficient evidence to allow him to make an intelligent estimate of the quantum of losses. In circumstances where the three requirements needed to be satisfied, Wallbank J committed no error in principle in not making an order for fortification because there was insufficient information to enable him to make an intelligent estimate of the quantum of any potential losses.

Von Der Heydt Invest SA v Multibank FX International Corporation BVIHCVAP2022/0008 (delivered 21st February 2023, unreported) applied; **Energy Venture Partners Ltd v Malabu Oil and Gas Ltd** [2015] 1 WLR 2309 applied.

7. In granting a freezing injunction, the court will not restrain all conduct which could prejudice a defendant's ability to satisfy a judgment. The court is concerned with unjustified dissipation and accordingly a freezing order made against a trading company should normally include a provision stating that it does not prohibit dealing with or disposing of assets in the ordinary and proper course of business. In this case, a clear reading of paragraph 3 of the Freezing Order reveals that provision was made for any or any proper ordinary course of business exception and even if the course of business exception was not included in the Freezing Order, no attempts were made by the Appellants to vary paragraph 3.

Organic Grape Spirit Ltd v Nueva IQT SL [2020] EWCA Civ 999 applied.

8. An applicant for a freezing order made without notice is under a duty to make full and frank disclosure to the court. Tensigma did not exist when the Respondent applied for a freezing order and when the Freezing Order was made and the Respondent could hardly be expected to disclose a fact about which he was unaware. In any event, Wallbank J was aware that Tensigma was dissolved on the date of the November Hearing, and this formed the basis of his finding that the Respondent had no good arguable case on his pleadings. Even if this Court were to exercise its discretion afresh, there is nothing on the facts or the alleged instances of non-disclosure as outlined by the Appellants that would cause this Court to discharge the Freezing Order. Considering all the circumstances, the interest of justice demands that the Freezing Order be continued and not discharged.

Multibank FX International Corporation v Von Der Heydt Invest SA [BVIHCVAP2021/0009 (delivered 21st February 2023, unreported) applied; **PJSC Commercial Bank Privatbank v Kolomoisky and others** [2020] Ch 783 applied.

9. In his ruling after the December Hearing, Wallbank J was satisfied that there existed a statutory basis for restoring Tensigma to the register and that the court had jurisdiction to make a freezing order in support of such an application to prevent the dissipation of Tensigma's assets once these assets have been returned to the it

after restoration. Wallbank J did not decide to make the December Order based on the Yuzu Hair decision.

Yuzu Hair & Beauty Ltd (dissolved) v Selvathiraviam [2019] EWHC 772 considered.

10. In delivering a judgment, a trial judge is not obliged to refer to all the evidence in the trial and all the submissions of counsel but should deliver a clear and well-reasoned decision by which the parties can be certain why they won or lost, and which will enable an appellate court to decide whether the judgment is sustainable. Wallbank J was required to deal with the issues which are vital to the determination of the matters and give reasons for his decision and was not therefore required to rule on every single submission made by counsel for the parties. In relation to both the November Order and the December Order, Wallbank J gave succinct and detailed reasons why he arrived at his decisions. In the November Order, Wallbank J explained the basis for the order was that the Respondent may have a good arguable case on grounds that he has not yet pleaded and that it would be just and convenient for the Freezing Order to continue for a 30 day period to enable the Respondent to amend the claim to reflect the potential good arguable case and to apply for a new freezing order on new grounds. Similarly, in the preamble to the December Order, Wallbank explained the bases on which the made the December Order as follows: (1) that he had jurisdiction to make a freezing order in support of the Restoration Application; (2) the restoration of Tensigma into liquidation is an indelible part of the wider proceedings; and (3) there is a real risk of dissipation.

Emmerson International Corporation v Renova Industries Ltd et al BVIHCMAP2016/0029 (delivered 23rd March 2017, unreported) applied**; Jhawnie Gage et al v Attorney General of the Commonwealth of Dominica** DOMHCVAP2020/0005 (delivered 15th June 2021, unreported) applied.

11. Section 218 of the BCA gives the court power to restore a company to the register of companies and a company that is restored to the Register is deemed to have continued in existence as if it had not been dissolved or struck off the Register. The sole basis for finding that the Respondent did not have a good arguable case based on the pleadings was because Tensigma was dissolved a few weeks before the Freezing Order. In accordance with section 218B(6) of the BCA, the effect of the Restoration Order is to deem that Tensigma to have continued in existence as if it had not been dissolved or struck off the register. Consequently, the Restoration Order undermines the finding of Wallbank J that the Respondent did not have a good arguable case because Tensigma, since its restoration, is deemed to have continued in existence as if it had not been dissolved. On this reasoning, the Respondent would have a good arguable case based on the pleaded grounds and on the alternative grounds. The Restoration Order does not materially affect the November Order, but it provides another basis in fact to find that the Respondent's had a good arguable case on the date of both the Freezing Order and the November Order.

Joddrell v Peaktone Ltd [2013] 1 WLR 784 considered; Sections 218B of the **Business Companies Act** No. 16 of 2004 amended by 26/2005 of the Laws of the Virgin Islands applied.

12. The question to be asked when establishing apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Such a finding will depend on the cumulative circumstances of an individual case. The fair-minded and informed observer will appreciate that the context forms an important part of the material which she must consider before passing judgment. While Wallbank J was entitled and required to make preliminary findings on the evidence to determine whether the Freezing Order should be continued or discharged, he was not entitled to use intemperate or unjudicial language during any hearing or express himself in ways that show that the findings are final rather than preliminary for the purpose of the interlocutory application such as to give rise to a valid complaint of the appearance of bias. Having reviewed the complaints made by the Appellants and the passages complained about in the context of the ruling of Wallbank J and his explanations on the Recusal Application and considering that Wallbank J expressed himself in tentative terms when evaluating the Appellants' evidence and made clear on several occasions that he was not making final or binding findings of fact, a fair minded and informed observer is unlikely to come to the conclusion that there was a real possibility that Wallbank J was biased. Further, it is clear from the exchanges that the Respondent already had in mind amending his claim form and statement of claim long before Wallbank J specifically asked counsel for the respondent exactly what types of amendments he contemplated making. A fair minded and informed observer having considered all the facts and circumstances of this case is unlikely to conclude that there was a real possibility that Wallbank J was biased based on the issues raised by the Appellants either singularly or collectively.

    JSC BTA Bank v Ablyazov and others (No 9) considered; **Porter v Magill** [2002] 2 AC 357 applied; **Bilzerian et al v Byron et al** SKBHCVAP2019/0044 (delivered 22nd October 2021, unreported) applied; **Locabail (UK) Ltd v Bayfeld Properties Ltd** [2000] QB 451 applied; **Helow v Secretary of State for the Home Department and another** [2008] 1 WLR 2416 applied.

JUDGMENT

[1] **VENTOSE JA [AG]:** This is an appeal by the Appellants, Mr. Julian Svirsky and Mr. Dennis Donin, against three interlocutory judgments and orders of the learned judge, Wallbank J, by which he: first, continued on 10th November 2021 for 30 days a freezing order that he previously granted *ex parte* on 23rd April 2021 in favour of the Respondent, Mr. Arman Oyekenov; second, continued on 9th December 2021 the *ex parte* freezing order until the final determination of the application by the Respondent

to restore Tensigma Limited ("**Tensigma**"), the First Defendant in the court below, to the register of companies; and, third, dismissed on 22nd December 2021 an application for him to recuse himself from hearing the Respondent's unfair prejudice claim and the Respondent's application to restore Tensigma to the register of companies and any other related proceedings between the parties.

Background – The Respondent's Allegations

[2] The Respondent alleges that in or about May 2017 he discussed the idea of an online platform with Mr. Svirsky that would: (1) allow retail investors to acquire small stakes in real estate projects using tokens, which involves using blockchain tokens that represent the tradeable part of the asset (eventually becoming uvas.com); and (2) enable platform users to rent real estate to each other (eventually becoming karta.com). The Respondent also alleges that Mr. Svirsky then introduced him to Mr. Donin and they all agreed to work on the project and incorporated Tensigma on 31st July 2017 in the Territory of the Virgin Islands as the corporate vehicle through which the project would run. The Respondent alleges that from the start he and the Appellants were equal partners and owners of Tensigma which is a quasi-partnership company whose business is the operation of an electronic platform enabling property owners to tokenise property transactions.

[3] The Respondent alleges that his work history might potentially have identified him as a politically exposed person if he was registered as a shareholder of Tensigma, and in turn caused problems in opening a bank account for Tensigma. Consequently, the Respondent further alleges, he agreed with the Appellants that they would be registered as the legal shareholders of Tensigma, with each holding approximately one third of their shares for the sole benefit of the Respondent. The Respondent states that since 22nd September 2020 the issued share capital in Tensigma was held as follows: (1) the Respondent - 16,500 shares; (2) Mr. Svirsky - 17,000 shares; and (3) Mr. Donin - 16,500 shares.

[4] The main assets of Tensigma were held in the form of Cryptocurrency – Bitcoin and Ethereum. The Respondent also alleges that Tensigma traded as "Atlant", primarily through Atlant's website (Atlant.io) which enabled users to access the two online platforms comprising Tensigma's business (uvas.com and karta.com). The Respondent alleges that the platforms were developed using funds raised by Tensigma in an initial coin offering which raised what was then worth US$8 million in Bitcoin and Ethereum. The Respondent states that Bitcoin and Ethereum would only be transferred from the virtual multi-signature wallets (and, if necessary, converted into fiat currencies) for the purposes of paying various expenses.

[5] The Respondent states that in or about November 2017 the Respondent and the Appellants verbally agreed and in any event mutually understood that: (1) after the Bitcoin was placed into a multi-signature virtual Bitcoin wallet (the "**Bitcoin Wallet**"), the approval of only two of the signatories would be required to effect any transactions out of the Bitcoin Wallet; (2) the Ethereum would be divided into three equal parts and placed into three individual virtual wallets, each separately controlled by each of the Respondent and the Appellants; and (3) no transactions of Bitcoin or Ethereum out of the respective virtual wallets would be effected by either the Respondent or the Appellants (either individually or acting together) unless and until all of them agreed to the transaction. The Respondent also states that, on 6th September 2020, Mr. Donin created a multi-signature virtual Ethereum wallet (the "**Ethereum Wallet**"), which the Respondent and the Appellants verbally agreed, and in any event mutually understood, would be operated, and administered in the same way as the multi-signature virtual Bitcoin wallet. The Respondent submits that, based on mutual trust and confidence existing between himself and the Appellants, all of the Ethereum owned by Tensigma (and then held separately by himself and the Appellants) was transferred into the Ethereum Wallet.

[6] The Respondent alleges that between 29th December 2020 and the end of March 2021, the Appellants:

(1) unlawfully transferred 85% in value of Tensigma's assets, namely all of Tensigma's Bitcoin and Ethereum out of Tensigma's possession and/or control and into wallets controlled by persons unknown;

(2) cut the Respondent out of Tensigma's business by revoking his corporate system access, removing him from Tensigma's Telegram chat groups and informing staff that the Respondent has been sacked due to allegedly stealing from Tensigma;

(3) failed to respond to the Respondent's attempts to contact them;

(4) sought to create a false paper trail by causing Atlant to acquire a company, Redot.com, from an Estonian company named DAE Europe OU, a company whose shares were held on trust for Tensigma by Tomas Drobny, a consultant for Tensigma; and

(5) transferred the entire business of Tensigma, Atlant, to a third party, Digital Asset Exchange Limited ("**DAE**"), a company registered in Gibraltar, which is wholly owned by the Appellants.

[7] The Respondent states that by a letter dated 2nd February 2021 he wrote to the Appellants making an open offer to sell his entire shareholding in Tensigma for US$2,800,000.00 but the Appellants did not respond to his offer to sell his shares in Tensigma.

[8] On 19th April 2021, the Respondent, filed a claim form and statement of claim, stating that the above-mentioned actions taken by the Appellants amounted to unfairly prejudicial conduct contrary to section 184I of the BVI Business Companies Act 2004[1] ("**BCA**"); (the "**Unfair Prejudice Claim**") and constituted breaches of fiduciary and/or equitable duties and/or breaches of trust. The Respondent also filed an application notice dated 19th April 2021 for permission to bring a derivative claim,

[1] No. 16 of 2004 amended by 26/2005 of the Laws of the Virgin Islands.

pursuant to section 184C of the BCA, on behalf of and in the name of Tensigma (the "**Derivative Claim**") against the Appellants. The Respondent also sought, among others, the following orders: (1) an order that the Respondent be permitted to purchase the Appellants' shareholding in Tensigma on a fair value basis adjusted to reflect the unfairly prejudicial conduct of the Appellants; (2) a declaration that the Appellants are liable to account to Tensigma for the Bitcoin and/or Ethereum to the sum of US$22,715,000.00 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 (3) a declaration that the transfer to DAE was void, alternatively voidable and avoided; and, further or alternatively, an order that the Appellants procure the transfer of Atlant and/or Atlant.io from DAE to Tensigma.

Background – The Appellants' Allegations

[9] The Appellants filed a defence and counterclaim on 6th August 2021 in which they allege that they are the founders of, and equal shareholders in, Tensigma. The Appellants also allege that the incorporation of Tensigma followed an intense period of discussions, planning, preparation, software development and investment of personal funds by the Appellants. The Appellants also state that 'Atlant' platform and the group of companies now holding and operating the business was ultimately created from the discussions between the Appellants and was their 'brainchild'. The Appellants state that the Respondent became an employee of Tensigma in or around 22nd September 2017 and that his duties were principally administrative in nature, and he assumed the de-facto responsibilities as Treasurer.

[10] The Appellants stated that there was never a requirement for the consent or agreement of the Respondent in respect of Atlant's operations, or the actions and decisions of the Appellants. The Appellants also state that: first, in his role as Treasurer, the Respondent held one of the keys to the multi-signature Bitcoin wallets and accordingly he would be called upon periodically to approve a Bitcoin transaction alongside either of the Appellants; and, second, due to a lack of reliable 'multi-

signature' smart contract accounts offered at that time, and in order to protect Atlant's operations and avoid all of the Ethereum being held in a single wallet, for a period of time the Respondent had sole control over one of three single signature wallets, from which numerous transactions were made by the Respondent to appropriate Atlant's funds without 14uthorization or approval from either or both of the Appellants.

[11] As mentioned above, the Appellants allege that because of a lack of reliable 'multi-signature' smart contract accounts offered at that time for Ethereum, to provide protection to Atlant's operations the Appellants decided to split investor funds into three single signature wallets to each of the Appellants and the Respondent. The Appellants state that on 6th August 2018, on instructions from Mr. Donin, the Ethereum funds in Mr. Donin's single signature wallet was divided and transferred in equal parts to the single signature wallets of Mr. Svirsky and the Respondent to safeguard those funds. The Appellants state that the relationship between the Appellants and the Respondent began to deteriorate gradually after this point but escalated in May or June 2020 when the Appellants were unable to reach the Respondent for prolonged periods of time following repeated requests of the Respondent to return possession of the single signature wallet, and/or transfer its contents into a multi-signature wallet.

[12] The Appellants also state that they indicated to the Respondent their willingness to issue legal proceedings against him and that, in response, the Respondent demanded that he be issued one third of the registered shares of Tensigma in exchange for the return of the single signature wallet, failing which he made it clear that he was liable to abscond – with the result that the contents of the single signature wallet (which the Appellants allege held Ethereum to the value of approximately US$1.1 million at the time) would be impossible to recover without the cooperation the Respondent. The Appellants allege that given the Respondent's exclusive and unlawful control of Atlant's assets in the single signature wallet, the Appellants had no practical alternative but to accede to the Respondent's demand to transfer one third of the registered shares of Tensigma to the Respondent.

[13] The Appellants also state that on 22nd September 2020 Mr. Svirsky (the sole registered shareholder of Tensigma) transferred one third of the shares to each of the Respondent and Mr. Donin. The Appellants allege that no consideration was paid for the 16,500 shares received by each of them and that the transfer to the Respondent is voidable and liable to be rescinded. The Appellants also allege that the Respondent subsequently relinquished his de-facto possession and control over the single signature wallet by proceeding to transfer its contents into the multi-signature wallet over which the Appellants had control.

[14] The Appellants state that DAE is a Gibraltarian company that was jointly registered by the Appellants and that they have at all material times been equal shareholders of DAE. The Appellants also state that on 15th July 2020 they took steps to restructure Atlant with the first step being the execution of the asset purchase agreement ("**APA**"), effecting the transfer of all the assets of Tensigma to DAE. The Appellants allege that these actions were taken: (1) with the consent of the board of directors of Tensigma; (2) with the unanimous consent of the holder of all of the shares then in issue by Tensigma, and therefore in full compliance with section 175 of the BCA; (3) before any shares were transferred or allotted to the Respondent; and (4) for the protection of Tensigma's assets, including the assets within the single signature wallet controlled by the Respondent.

[15] The Appellants state that on 4th February 2021, Mr. Svirsky, the sole director of Tensigma, passed a resolution and resolved to put Tensigma into liquidation under the provisions of the BCA, the assets and liabilities of Tensigma then being nil; and that, on the same date, a voluntary liquidator of Tensigma was appointed pursuant to a resolution passed by a majority of Tensigma's members. The Appellants also state that on 2nd March 2021 Tensigma was struck off the register of companies and dissolved following the completion of its liquidation.

The Freezing Order

[16] The Respondent applied *ex parte* on 19th April 2021 for a freezing order against the Appellants restraining them from disposing of, dealing with or diminishing the value of the assets owned by Tensigma which the Respondent and the Appellants are members or quasi partners. The Respondent alleged that the Appellants, without his consent or authority or that of the Tensigma, have: (1) transferred US$22,715,000.00 in value of Tensigma's Bitcoin and Ethereum assets (the "**Cryptocurrency**") out of Tensigma's possession and or control; and (2) taken steps to transfer the entire business of Tensigma to a third party within the control of the Appellants. These actions, the Respondent alleged, caused unfair prejudice to him in his capacity as a member of Tensigma. The Respondent submitted that: (a) he had a good arguable case in respect of the substantive claim against the Appellants; (b) there is a real risk of the Appellants dissipating assets other than in the ordinary course of business, to frustrate any judgment that might be obtained against the Appellants in due course; and (c) the freezing order is just and convenient.

[17] After an *ex parte* hearing held on 23rd April 2021, Wallbank J granted a freezing order (the "**Freezing Order**") in the following terms:

> "…
> 3. Save for $100,000, until the Return Date, or further order, to be used for the ordinary business purposes of [Tensigma] the Second and Third Respondents and persons unknown must not in any way dispose of, deal with or diminish the value of any worldwide assets of Tensigma up to the value of US$22,850,000.
>
> 4. Paragraph 3 above applies to all Tensigma's worldwide assets whether or not they are in its own name and whether they are solely or jointly owned. For the purpose of this order Tensigma's assets include any asset which it has the power, directly or indirectly, to dispose of or deal with as if it were its own. Tensigma is to be regarded as having such power if a third party holds or controls the asset in accordance with its direct or indirect instructions."

[18] In paragraph 5, it is expressly stated that Tensigma's worldwide assets include but are not limited to cryptocurrency held at specified addresses, wallets and contracts listed in that paragraph. The return date as stated in paragraph 2 was originally stated

for 13th May 2021. The Respondent applied on 12th May 2021 to continue the Freezing Order and on 21st June 2021 to vary the Freezing Order. The Appellants applied on 12th August 2021 to discharge the Freezing Order.

The November Order

[19] At a hearing on 10th November 2021 (the "**November Hearing**") to consider the three (3) applications, Wallbank J noted that: (1) the Respondent did not have a good arguable case on the claim as pleaded at the time the Freezing Order was made and determining that the Freezing Order ought not to have been made and should not continue on those grounds; and (2) the Respondent might have a good arguable case on grounds that he has not yet pleaded (the **"Potential Good Arguable Case**"), and determining that it would be just and convenient for the Freezing Order to continue for a 30 day period to enable the Respondent to amend the Claim to reflect the Potential Good Arguable Case and to apply for a new Freezing Order on new grounds. Wallbank J also considered: (1) the urgency of: (i) making any amendment to the Respondent's pleadings (if so advised); (ii) applying for a new Freezing Order (if so advised); and (iii) seeking to have any such application for a new Freezing Order listed on or before 10th December 2021; and (2) recognizing: (i) the Respondent intends to (a) amend the Claim to plead the Potential Good Arguable Case pursuant to Rule 20.1(1) of the Civil Procedures Rules 2000 (the "**CPR 2000**" or "**CPR**"); and (b) make an application to restore Tensigma into liquidation; and (ii) the assets referred to in paragraphs 3-5 of the Freezing Order include all assets that were purportedly transferred from Tensigma to DAE prior to its liquidation.

[20] Wallbank J consequently ordered (the "**November Order**") that the Freezing Order continue until 4:00 p.m. on 10th December 2021 (Discharge Date) at which point it shall be automatically discharged until a new freezing order has been ordered by the court (Paragraph 1). The Respondent was given liberty, on or before the Discharge Date to amend his pleaded case in compliance with the CPR 2000 and to apply for a new Freezing Order on notice to all the parties (Paragraph 2). Paragraph 3 stated that all parties shall have liberty to apply to extend the Discharge Date in the event

the hearing of the application for the new freezing order cannot be listed before 10th December 2021.

The December Order

[21] At a further hearing held on 9th December 2021 (the "**December Hearing**"), Wallbank J had to consider an application to vary the November Order and to extend the Discharge Date stated in the November Order. Wallbank J in the preamble to the order noted that the Appellants had filed: (1) an application seeking an urgent hearing on or before 10th December 2021; (2) an application to restore the Tensigma into liquidation, which application was part heard on 8th December 2021 (the "**Restoration Application**"); and (3) an amended statement of claim. Wallbank J further noted that: (1) he had jurisdiction to make a freezing order in support of the Restoration Application; (2) the restoration of the Tensigma into liquidation is an indelible part of the wider proceedings; and (3) there is a real risk of dissipation. Consequently, Wallbank J varied Paragraph 1 of the November Order to the effect that the Freezing Order shall continue until final determination of the Restoration Application pursuant to sections 218 and 218A of the BCA at which point it shall be automatically discharged unless a new freezing order has been ordered by the court (the "**December Order**").

The Recusal Order

[22] The Appellants filed an application dated 17th December 2021 seeking an order that Wallbank J recuses himself from hearing the Unfair Prejudice Claim and the Restoration Application and any other related proceedings between the parties (the "**Recusal Application**"). The Restoration Application was listed to be heard by Wallbank J on 22nd December 2021, but that application could not be heard because the Appellants had by then filed the Recusal Application. Also scheduled to be heard on the same day was the Respondent's application for a new freezing order. Wallbank J heard first the Recusal Application and dismissed it on the same day (the "**Recusal Order**") and then proceeded to hear the Restoration Application. The application for the new freezing order is yet to be heard.

The Restoration Order

[23] On 25th November 2021 Wallbank J extended the Freezing Order until the final determination of the Restoration Application. The Respondent's application to restore Tensigma to the register of companies was part heard by Wallbank J on 8th December 2021. The hearing of the Restoration Application continued before Wallbank J on 22nd December 2021, and, on the same day, Wallbank J granted an order restoring Tensigma to the register of companies with Ms. Anna Silver of FFP (BVI) Limited appointed as voluntary liquidator of Tensigma (the "**Restoration Order**"). Wallbank J also directed that the Freezing Order continues until when the written minute of the order on judgment following the hearing on 22nd December 2021 was "settled". The Respondent applied *ex parte* on 23rd December 2021 for an order to vary the November Order to continue the Freezing Order until determination of the Respondent's application for a new freezing order. On 24th December 2021, Wallbank J varied *ex parte* the November Order to continue the Freezing Order until the determination of the Respondent's application for a new freezing order.

The Grounds of Appeal

[24] The Appellants appeal the November Order on many grounds, in summary, that: (1) Wallbank J, having held that the Freezing Order was wrongly granted and should not continue at the time (when the Freezing Order was made) and that the Respondent did not have a good arguable case on the claim as pleaded, ought to have discharged the Freezing Order and refused to grant any further relief; (2) Wallbank J erred in law and in fact in holding that the Freezing Order be continued notwithstanding that no good arguable case had been established but because of the mere potential of a good arguable case at some time in the future which was not pleaded or particularised and which had not been advanced between the date of the Freezing Order and the November Order; (3) Wallbank J erred in law and in fact in finding that there was any legal basis on which to grant such relief and in holding that he had jurisdiction to make the November Order when: (a) such was made without any jurisdiction existing to so order; and (b) Tensigma had been dissolved and therefore did not own any property which was purported to be the subject of the Freezing Order;

(4) Wallbank J did not apply the correct test when deciding whether or not to make the November Order and he confused, and failed to distinguish between, principles relating to the granting of a freezing order and relief pursuant to **Cyanamid** principles; (5) Wallbank J erred in law and fact in finding, in so far as he did, that there was a real risk of dissipation to justify the November Order in favour of the Respondent and failed to apply the correct test as to what constituted "real risk dissipation"; (6) Wallbank J erred in law by accepting the limited and worthless undertaking as to damages offered on behalf of the Respondent and/or wrongly exercised his discretion when so accepting the same and exercised any discretion in a manner which no reasonable judge would have so exercised his discretion and erred in law and fact by failing to require fortification in respect of such undertaking as a condition of making the November Order and extending such in its effect to third parties; and (7) Wallbank J failed to take into account the interests of the Appellants and third parties adequately or at all and failed to include necessary and proper exceptions to the Freezing Order and in particular in respect of transactions in the ordinary course of business.

[25] The Appellants also appealed the December Order on essentially the same grounds as the November Order but adding the following: (1) Wallbank J erred in law in wrongly considering that the authority of **Yuzu Hair & Beauty Ltd (dissolved) v Selvathiraviam**[2] ("**Yuzu Hair**") applied and was authority for concluding that jurisdiction to make the order existed and that the December Order should be made; (2) Wallbank J failed to take into account adequately or at all the fact that Tensigma had been struck off and dissolved on 2nd March 2021 and had not been restored and erred in fact and in law by holding that the existence of an application for restoration was determinative of the matter; and (3) Wallbank J placed undue and improper weight and emphasis on the mere existence of an application to restore which might at some stage/date in the future be heard and which is opposed.

[2] [2019] EWHC 772.

[26] The Appellants appealed the Recusal Order on the grounds that: (1) Wallbank J failed to distinguish between actual bias and apparent bias and wrongly sought to justify his decision not to recuse himself by stating that he was not biased; (2) Wallbank J failed to apply the correct test or, having applied the correct test, failed to reach the correct conclusion. A fair-minded and informed observer with knowledge of all the relevant circumstances would have reached the view that there was a real possibility of bias or, alternatively, a sufficient level of doubt as to such to lead to the conclusion that Wallbank J ought to recuse himself; and (3) the Restoration Order was only made because Wallbank J did not recuse himself and that if Wallbank J had done so, the Restoration Application would have been re-listed to be heard on another date by another judge.

Issues for Consideration

[27] The following issues arise for consideration: (1) whether Wallbank J applied the correct test in deciding whether to make the November Order; (2) whether on the date of the Freezing Order the Respondent had a good arguable case on the grounds as pleaded; (3) whether Wallbank J, having found that there was no arguable case on the date of the Freezing Order, was correct in making the November Order which continued the Freezing Order based on the existence of a potential good arguable case at some future date which was neither pleaded nor particularised; (4) whether the "supposed" principle of reflective loss was relevant to the issue of whether the Respondent had a good arguable case (5) whether the decision in **Re Posgate & Denby**[3] is applicable such that the Freezing Order should not have been made; (6) whether Wallbank J had jurisdiction to make the November Order because Tensigma has been dissolved before the Freezing Order was made; (7) whether Wallbank J made the Freezing Order without any legal basis and without jurisdiction over the Appellants; (8) whether Wallbank J was correct in deciding that there was a real risk of dissipation and whether he applied the correct test in so deciding; (9) whether Wallbank J was correct in deciding that it was just and convenient to make the November Order; (10) whether Wallbank J exercised his discretion properly in

[3] [1987] BCLC 8.

accepting the undertaking as to damages offered on behalf of the Respondent; (11) whether Wallbank J was correct in not requiring fortification of that undertaking by the Respondent as a condition for making the November Order; (12) whether Wallbank J failed adequately to take into account the interest of the Appellants and third parties and whether he failed to make proper and necessary exceptions to the Freezing Order, in particular, in respect of transactions in the ordinary course of business; (13) whether Wallbank J failed to inform the parties that he would make the November Order before making it; (14) whether the Freezing Order is unclear and ambiguous; (15) whether the Respondent failed in its duty of full and frank disclosure when the Freezing Order was made and whether Wallbank J failed to take this into account at the date of the Freezing Order and when the November Order was made; (16) whether Wallbank J was correct in considering and applying the decision of **Yuzu Hair** in making the December Order; (17) whether Wallbank J placed undue and improper weight and emphasis on the mere existence of the Restoration Application which might at some date in the future be heard; (18) whether Wallbank J failed to give reasons for making the November Order; (19) what effect if any does the restoration of Tensigma have on the November Order and/or the December Order; and (20) whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that Wallbank J was biased.

Freezing Injunctions: Applicable Principles

[28] Before considering the issues that arise for consideration, it is important to distill the legal principles applicable to freezing injunctions. This Court recently considered the scope of those principles in **Multibank FX International Corporation v Von Der Heydt Invest SA**[4] ("**Multibank**") where it noted (at [42]) as follows. First, a freezing injunction is an interlocutory order of the court granted in aid of enforcement of a present or future judgment. Second, it restrains the person enjoined from dealing with or disposing of its own assets. Third, the injunction does not restrain the person from dealing with its assets in the normal course of its business and it is not designed to

[4] BVIHCVAP2021/0009 (delivered 21st February 2023, unreported).

provide security for the enforcement of the claimant's judgment. Fourth, its purpose is to preserve the assets of the defendant in circumstances where the court thinks that such preservation is necessary so that the assets can be available, if necessary, to satisfy a money judgment obtained by the claimant.

[29] The Court in **Multibank** explained (at [43]) that the test for the grant of a freezing injunction is in three stages – the applicant must prove that: (1) it has a good arguable claim in the amount sought to be frozen; (2) there is a real risk that the respondent will dispose of his assets in such a manner that a judgment against him will go unsatisfied; and (3) it is just and convenient to make the order sought. The Court also explained that all three conditions must be satisfied before a court can grant the freezing order.

[30] In relation to the first criterion, a good arguable case, the Court explained (at [44]) that the threshold for establishing a good arguable case is not a high one and that a good arguable case is one that "is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success". The principles relating to the grant of freezing injunctions were recently considered by the Privy Council in **Convoy Collateral Ltd v Broad Idea International Ltd**[5] where it summarized the principles as follows:

> "Summary of current practice
>
> 101. In summary, a court with equitable and/or statutory jurisdiction to grant injunctions where it is just and convenient to do so has power - and it accords with principle and good practice - to grant a freezing injunction against a party (the respondent) over whom the court has personal jurisdiction provided that:
>
> > i) the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;
> > ii) the respondent holds assets (or, as discussed below, is liable to take steps other than in the ordinary course of business which will

[5] [2021] UKPC 24.

reduce the value of assets) against which such a judgment could be enforced; and

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

102. Although other factors are potentially relevant to the exercise of the discretion whether to grant a freezing injunction, there are no other relevant restrictions on the availability in principle of the remedy. In particular:

i) There is no requirement that the judgment should be a judgment of the domestic court - the principle applies equally to a foreign judgment or other award capable of enforcement in the same way as a judgment of the domestic court using the court's enforcement powers.

ii) Although it is the usual situation, there is no requirement that the judgment should be a judgment against the respondent.

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

[31] This Court in **Multibank** examined these paragraphs from **Broad Idea** and explained as follows:

"[73] Item (iii) of paragraph 102 in **Broad Idea** is particularly relevant to this appeal. It shows that the substantive proceedings against the person to be enjoined does not have to be commenced when the application for the [worldwide freezing order] is made, nor must the right to bring proceedings have arisen. It is sufficient if the court is satisfied, with a sufficient degree of certainty, that the right to bring proceedings will arise and that proceedings will be brought.

[74] My summary of **Broad Idea** is that the case did not take away the need for an applicant for a freezing injunction to establish that he has a good arguable case – what the case does is to emphasise the true nature of a freezing injunction. It is a way of facilitating the enforcement of a judgment by freezing assets in the name of the enjoined person against which a judgment against the true owner of the assets (the cause of action defendant) may be enforced. In doing this, the court does not require the applicant to have an existing cause of action. He only has to satisfy the court to a sufficient degree of certainty that he will bring proceedings, in the

> BVI or elsewhere, against the owner of the asset sought to be frozen. If the court is not satisfied that such proceedings will be brought within a reasonable time, it will not grant the injunction. The person sought to be enjoined does not have to be the person against whom a cause of action is alleged (as in **Broad Idea** itself). The court's jurisdiction will be engaged once it is satisfied that it is an appropriate case to freeze the assets held by the [non cause of action defendant] for possible satisfaction of a judgment against the cause of action defendant in existing or future proceedings."

[32] In relation to the second criterion, a real risk of dissipation of assets, this Court in **Multibank** repeated the applicable principles noted in its previous decision of **Green Elite Limited (in liquidation) v Mr. Fang Ankong et al**[6] as follows:

> "[56] In Broad Idea International Limited v Convoy Collateral Limited, this Court approved the test as stated by Gloster LJ in Holyoake v Candy, as follows:
>
> > '...the threshold in relation to conventional freezing orders is well established. There must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. But it is not every risk of a judgment being unsatisfied which can justify freezing order relief. Solid evidence will be required to support a conclusion that relief is justified, although precisely what that entails in any given case will necessarily vary according to the individual circumstances.'
>
> [57] On assessing whether there was a real risk of dissipation, Males J, at paras 69 to 70 in National Bank Trust v Yurov had this to say:
>
> > 'As has been said many times, the purpose of a freezing order is not to provide the claimant with security but to restrain a defendant from evading justice by disposing of assets otherwise than in the ordinary course of business in a way which will have the effect of making itself judgment proof. It is that concept which is referred to by the label 'risk of dissipation'...
> >
> > Based on these authorities, the defendants advance seven propositions which the bank does not dispute and which I accept. They were as follows:
> >
> > (a) The claimant must demonstrate a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant's assets.

[6] BVIHCMAP2019/0030 (delivered 11th June 2021, unreported).

(b) That risk can only be demonstrated with solid evidence; mere inference or generalised assertion is not sufficient

(c) It is not enough to rely solely on allegations that a defendant has been dishonest; rather it is necessary to scrutinise the evidence to see whether the dishonesty in question does justify a conclusion that assets are likely to be dissipated.

(d) The relevant inquiry is whether there is a current risk of dissipation; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held.

(e) The nature, location and liquidity of the defendant's assets are important considerations.

(f) Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant

(g) So too is the defendant's behaviour in response to the claim or anticipated claim.'"

[33] This Court in **Multibank** noted (at [85]) that the factors listed in the preceding paragraph from the authorities constitute a comprehensive but not necessarily exhaustive list of the matters that the court will consider in an application for a freezing injunction. It emphasized that, first, each case must be decided on its own facts, and it is the function of the court to decide whether the defendant should be restrained from dealing with his assets unjustifiably; and second, this is an evaluative exercise by the court and an appellate court will be guided in its review of the judge's decision by the principles for appellate interference. This Court further explained (at [86]) that cogent evidence of the risk of dissipation must go to the defendant's propensity to dissipate his assets unjustifiably – it is not enough to prove that he has the ability to dissipate his assets. In this Court's view, there must be evidence, whether in the alleged fraud itself or by other evidence, of a propensity to dissipate, from which the court can infer a serious risk of dissipation.

[34] In relation to the third criterion, whether it is just and convenient to make the order, this Court in **Multibank** stated as follows:

> "[94] The third part of the test for a freezing injunction is that the court must be satisfied that it is just and convenient to make the order. This requirement, which applies to all interim injunctions, is derived from section 24 of the **Supreme Court Act** (section 37 of the UK Supreme Court Act 1981) which uses the same wording except that the expression in section 24 is 'just or convenient'. The section has been interpreted in practice as requiring the applicant to prove to the required standard that granting the freezing injunction, which has been described as a nuclear weapon, will be just <u>and</u> convenient. Like Mr. Malek KC, I will use the statement of Lord Kerr in **Niedersachsen** to describe what just and convenient means in the context of a freezing injunction:
>
>> 'The ultimate test for the exercise of the jurisdiction is whether, in all the circumstances, the case is one in which it appears to the court "to be just and convenient" to grant the injunction: see section 37 of the Supreme Court Act 1981 which we have already set out. Thus, the conduct of the plaintiff may be material, and the rights of any third parties who may be affected by the grant of an injunction may often also have to be borne in mind: see Galaxia Maritime SA v Mineralimportexport, The Eleftherios p1981] 1 All ER 796, [1982] 1 WLR 539. Further, it must always be remembered that if, or to the extent that, the grant of a Mareva injunction inflicts hardship on the defendant, his legitimate interests must prevail over those of the plaintiff, who seeks to obtain security for a claim which may appear to be well founded but which still remains to be established at the trial.'"

Judicial Discretion and Appeals

[35] Before the issues in this case can be addressed, it is important to be reminded of the principles that guide the exercise by this Court when considering an appeal against the exercise of discretion by a trial judge. There can be no doubt that two (2) of the appeals relate to the exercise by the trial judge of his discretion to continue the Freezing Order in both the November Order and the December Order. This Court has on numerous occasions explicated the applicable principles that must guide this Court when considering such an appeal. The leading authority of this Court is **Dufour and Others v Helenair Corporation Ltd and Others**[7] in which the Chief Justice Sir Vincent Floissac gave (at pp 190-191) the following guidance:

[7] (1996) 52 WIR 188.

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[36] The Court in **Multibank** after citing this paragraph explained (at [37]) that the test is in two stages: first, the judge must have made an error in principle; and, second, as a result, his decision is outside the generous ambit of reasonable disagreement and is blatantly wrong.

[37] Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and another**[8] expressed that:

> "An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently."

[38] The Court in **Multibank** stated (at [39]) that, first, a further consideration is that it was an appeal from an interlocutory order and there was no oral evidence and, second, the Judge had to assess the printed evidence and make findings of fact and law, such as whether the evidence established a good arguable case. In this regard, the Court in **Multibank** then quoted the following from Haddon-Cave LJ in **Lakatamia Shipping Company Ltd v Morimoto**[9] (at [78]):

> "The Court [of Appeal] will only interfere with a finding as to whether a good arguable case exists where it is plain that the judge below was wrong. As

[8] [1983] 1 A.C. 191.
[9] [2019] EWCA Civ 2203.

Longmore LJ said in Lakatamia Shipping Co Ltd v Su [2012] EWCA Civ 1195 at [27] (Lord Neuberger MR and Sullivan LJ concurring):

> '[I]t must be remembered that applications for freezing injunctions made on the basis of a good arguable case come before the commercial judges all the time. Derived from their time in practice they have developed what is perhaps best described as an instinct as to what is well arguable and what is not. That instinct should be respected by those in this court without the everyday experience of granting and refusing freezing injunctions unless it is plain that the judge is wrong.'"

Issue 1 – Correct Test to be Applied.
The Appellants' Submissions

[39] The Appellants submit that, first, neither the Respondent nor Wallbank J appeared to have appreciated what order was sought and made at the *ex parte* hearing; second, both the Respondent and Wallbank J described the Freezing Order as a worldwide freezing order when in fact the Freezing Order does not restrain Tensigma from dealing with its assets; and, third, Tensigma in any event has no assets. The Appellants further submit that the Freezing Order is not a worldwide freezing order against Tensigma – it is an order against the Appellants (foreign nationals) not to deal with the assets of Tensigma in a particular way.

[40] The Appellants submit that although the arguments advanced for the Respondent appear to mix up the concepts applicable to the relief sought, the basic approach of the Respondent and Wallbank J was to consider a good arguable case, the risk of dissipation and whether it was just and convenient to grant relief. The Appellants also submit that this was the incorrect test but, in any event, Wallbank J failed to apply this test correctly. The Appellants contend that given the relief sought and the "Injunction Order" made, the following principles of **American Cyanamid Co v Ethicon Ltd**[10] are more relevant: a serious question to be tried, the adequacy of damages, and the balance of convenience.

[10] [1975] AC 396.

[41] The Appellants submit that this is a basis on which this Court, if it is felt such stage was reached, can exercise a discretion afresh and that doing so should lead to the discharge of the November Order. The Appellants also submit that the November Order was not justified as the Respondent did not satisfy the principles for the grant of freezing orders and that the Freezing Order should not have been made. The Appellants submit that Wallbank J failed to consider the **American Cyanamid** principles and that, if he had, Wallbank J would not have made the Freezing Order because: (a) there was no question to be tried, let alone any serious question to be tried; (b) damages would clearly not be an adequate remedy for the Appellants or any third party, whereas damages would be for the Respondent (his personal claim is for a share purchase order and **Re Posgate & Denby** is applicable); and (c) the balance of convenience clearly favoured refusing to make any order.

The Respondent's Submissions

[42] The Respondent submits that the Appellants' assertion that Wallbank J should have applied **American Cyanamid** principles when deciding whether to make the November Order is wrong. The Respondent also submits that the correct test was that applied by Wallbank J pursuant to section 24 of the Eastern Caribbean **Supreme Court (Virgin Islands) Act**[11], namely: a good arguable case, a real risk of dissipation, and that it is just and convenient to grant relief. The Respondent contends that the Appellants are seeking to criticise Wallbank J for failing to apply a test that he was (correctly) never invited to apply.

Discussion

[43] It is important to bear in mind the following statements, as mentioned above, concerning freezing orders made above by this Court in **Multibank**: First, a freezing injunction is an interlocutory order of the court granted in aid of enforcement of a present or future judgment. Second, it restrains the person enjoined from dealing with or disposing of its own assets. Third, the injunction does not restrain the person from dealing with its assets in the normal course of its business and it is not designed to

[11] Cap 80 of the Laws of the Virgin Islands.

provide security for the enforcement of the claimant's judgment. Fourth, its purpose is to preserve the assets of the defendant in circumstances where the court thinks that such preservation is necessary so that the assets can be available, if necessary, to satisfy a money judgment obtained by the claimant.

[44] The Freezing Order is in fact a freezing injunction. First, it prevents the Appellants and other persons unknown from disposing of the worldwide assets of Tensigma up to the value of US$22,850,000.00 (Paragraph 3). Second, it provides for an ordinary course of business exception (Paragraph 3). Third, it is in aid of any future judgment that the Respondent may obtain against the Appellants. Fourth, its purpose is to preserve the assets of Tensigma because Wallbank J believed such preservation was necessary so that these assets can be available, if necessary, to satisfy any money judgment that may be obtained by the Respondent against the Appellants. Wallbank J applied the test applicable to freezing orders, namely, first, whether there was a good arguable case; second, whether there was a risk of dissipation; and, third, whether it was just and convenient to grant relief. The **American Cyanamid** principles therefore have no application to this type of freezing order. This ground of appeal has no merit.

Issues 2 and 3 – A Good Arguable Case
The Appellants' Submissions

[45] The Appellants submit that the Freezing Order was made when Tensigma did not exist because it had been dissolved after having been placed into voluntary liquidation. The Appellants further submit that had the Respondent carried out a company search beforehand he would have been made aware of the dissolution of Tensigma, and that the Respondent would also have known that all and any assets of Tensigma would have vested in the Crown following dissolution pursuant to section 220 of the **BCA**. The Appellants stated that when the November Order was made Tensigma was still dissolved and any assets which it had owned were still vested in the Crown. The Appellants further state that none of the reliefs claimed by the Respondent were possible because the dissolution of Tensigma meant that there are

no shares to buy or sell; and there is no company on whose behalf the Respondent can purport to seek relief or property to be returned.

[46] The Appellants submit that on the date of the November Order there was no claim before Wallbank J which established a good arguable case sufficient to justify any freezing injunction and this was Wallbank J's own finding and is reflected in the November Order. The Appellants also submit that the non-existence of Tensigma meant that the jurisdictional gateway under CPR 7.3(7) simply did not exist. The Appellants state that Wallbank J dismissed the arguments on this issue by saying that these should not prevent the granting of a freezing injunction, but that Wallbank J failed to explain how jurisdiction existed to make such an order against foreign nationals in respect of a non-existent company.

[47] The Appellants submit that Wallbank J determined that the Respondent did not have a good arguable case either on the date of the *ex parte* hearing or the November Hearing and that Wallbank J determined that the Freezing Order should not have been made at the time. The Appellants also submit that, by the November Order, Wallbank J was prepared to speculate and accept that the Respondent might in the future be able to persuade Wallbank J that he did have a good arguable case. The Appellants state that, because of that speculation, Wallbank J was prepared temporarily to continue the Freezing Order and that this unprecedented action was not a proper or legitimate basis on which to grant a freezing injunction. The Appellants also submit that it was only during final oral submissions in reply from Counsel for the Respondent that Wallbank J asked if the Respondent might consider amending his case; and that some vague exchanges took place, but no clear or particularized proposals were made by the Respondent as to what arguable claims could be brought.

[48] The Appellants state that Wallbank J appears to have justified the grant of the November Order based on paragraph 102(iii) in **Broad Idea**. The Appellants also state that paragraph 102(iii) provides no justification for the November Order because

that paragraph is part of a "summary of current practice" set out in paragraphs 101 and 102 of **Broad Idea**. The Appellants submit that paragraph 101 in **Broad Idea** begins with the premise that the court has "jurisdiction to grant injunctions where it is just and correct to do so" and that paragraph summarises the requirements for a freezing order, namely, a good arguable case, the holding of assets and the real risk of dissipation. The Appellants also submit that paragraph 102 merely states that certain matters are not restrictions to the principles set out in paragraph 101 such as: (1) that it does not matter that the judgment is of a foreign court (paragraph 102 (i)); (2) that it does not matter that the judgment is against someone other than the Respondent (paragraph 102 (ii)); and (3) paragraph 102 (iii) that provides as follows:

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

[49] The Appellants state that the requirements of paragraph 101 remain applicable when the consideration is being made to justify a freezing injunction and that paragraph 102(iii) is not a basis to reject the application of paragraph 101 and to grant an injunction without regard to those requirements. The Appellants also state that Wallbank J, when granting the November Order, did not consider and did not find, and provided no relevant reasoning, that at the time: (1) he had jurisdiction over the Appellants; (2) that the Respondent at that time had a good arguable case; or (3) that the Respondent might secure a judgment which ultimately could not be enforced because of dissipation. The Appellants submit that there was simply no legal basis on which the November Order can be justified, and that Wallbank J appears to have proceeded merely to give the Respondent time to see if he could come up with better claims against the Appellants that fell within the jurisdiction of the Commercial Court of the Territory of the Virgin Islands.

[50] The Appellants contend that Wallbank J was wrong to exercise any discretion, which did not exist in any event, in favour of the Respondent. The Appellants further

contend that in the exercise of such a discretion Wallbank J: (a) failed to have regard to any of the requirements to justify a freezing injunction; (b) took into account irrelevant considerations; and (c) wrongly used paragraph 102(iii) of **Broad Idea** as if it was a self-standing justification and basis to make the November Order when it is simply a paragraph stating what are not requirements if those basic requirements in paragraph 101 are otherwise met.

The Respondent's Submissions

[51] The Respondent submits that both the liquidation and dissolution of Tensigma took place without his knowledge or consent. The Respondent further submits that as a third shareholder in Tensigma he was not aware of the members' resolution dated 4th February 2021 which was signed by the Appellants. The Respondent claimed that the resolution wrongly stated that in accordance with Article 10.2 of Tensigma's Articles of Association that proper notice of the meeting, and appropriate documentation, was given to all members and that the chairman (Mr. Svirsky) declared the meeting properly constituted.

[52] The Respondent submits that the Appellants are incorrect to state that Wallbank J did not have the jurisdiction to grant the Freezing Order and that Wallbank J had the power to grant the Freezing Order following **Broad Idea**, which makes clear that the court has the jurisdiction to grant a freezing order notwithstanding there is no substantive pleaded cause of action. The Respondent further submits that all that is required is the right to bring an action. The Respondent contends that the November Order is consistent with both **Broad Idea** and **Yuzu Hair**, continuing that the fact that Tensigma had been dissolved was not a bar to injunctive relief; all that is necessary is that the court had to be satisfied to a sufficient degree of certainty that the right to bring proceedings will arise.

Discussion

[53] It will be remembered that the November Hearing was to consider the Respondent's applications for the continuation and variation of the Freezing Order and the

Appellants' application to discharge that order or, in the alternative, the provision of fortification. At that hearing, Wallbank J properly considered the applicable principles relating to the grant of a freezing order. Wallbank J explained them as follows: the claimant must firstly have a good arguable case against the defendant. Secondly, there must be a real risk of the defendant dissipating its assets other than in the ordinary course of business to frustrate any judgment that might be obtained against it in due course. Thirdly, it must be just and convenient in all the circumstances to freeze the defendant's assets or at least a proper portion of them.

[54] In relation to the first criterion, whether the Respondent had a good arguable case against the Appellants, Wallbank J, after quoting from paragraph 103(iii) in **Broad Idea**, explained that "what the court needs to be certain of to a sufficient degree of certainty, satisfied to a sufficient degree of certainty, is that a right to bring proceedings will arise."[12] He then proceeded to examine the various reliefs sought by the Respondent in his statement of claim, concluding that there was currently in existence no shareholding in Tensigma, because Tensigma does not exist anymore. This meant that there was no good arguable case in relation to paragraphs 1-3 of the reliefs claimed by the Respondent in the statement of claim.[13] Wallbank J continued that reliefs found in paragraphs 4-7 and 9 are really claims that should be brought by Tensigma and that paragraph 8 can be ignored because it was not an enforceable money judgment.[14]

[55] Wallbank J, therefore, summarized that what he had before him was either a series of claims which depended upon the existence of a shareholding in Tensigma and that Tensigma does not now exist; or claims that should be brought by the Respondent on a derivative basis by Tensigma or that Tensigma should bring. He therefore concluded that there was no arguable case based on the statement of claim (Ibid). Wallbank J nonetheless proceeded to consider other possible claims that Counsel for the Respondent explained could be brought against the Appellants, for

[12] Page 190 of the transcript of proceedings.
[13] Ibid at 193.
[14] Ibid at 194.

example, equitable damages against the Appellants for breach of trust. Wallbank J noted that this claim was pleaded but solely in the context of the Unfair Prejudice Claim and not as a standalone ground of relief.[15] In response to his own question as to whether this could be a standalone ground of relief, Wallbank J responded that he thought it could, reasoning that there was a good arguable case on the documents that the Respondent was a partner with the Appellants in this business which included the company which is or was known as Tensigma.[16]

[56] Wallbank J accepted that the Respondent does have a good arguable case that the liquidation and dissolution of the company, including the asset transfers which led up to it "were all part and parcel of a dissipatory […] scheme intended to place value away from the reach and knowledge of the [Respondent]."[17] Wallbank J also accepted that:[18]

> "It seems to me that there is a good arguable case that through their conduct, both in the way that [the Appellants] have excluded the [Respondent] from Tensigma and the wider business, that Tensigma is comprised in which one can call the partnership when you look at their conduct there and their conduct in very quickly having the company wound up and dissolved, then you can see that such a claim arises particularly if the documentation is right that they were all three partners.
>
> And what we have in that situation is two of the partners apparently misappropriating partnership property to themselves for them to deal with as they wish to the exclusion of the third partner. And that in principle is not equitable and would ground a cause of action.
>
> So there is certainly, it seems to me, a good arguable case that could be brought."

[57] Wallbank J then explained that the claim form and statement of claim do not support the Freezing Order and on that ground alone the Freezing Order ought to be discharged.[19] but that, on the other hand, there is the prospect of amendments which

[15] Page 195 of the transcript of proceedings.
[16] Ibid at 196.
[17] Ibid at 197.
[18] Ibid at 200-201.
[19] Page 201 of the transcript of proceedings.

would bring feasible claims before the court. It will be remembered that Wallbank J in the November Order stated that, first, the Respondent did not have a good arguable case on the claim as pleaded at the time the Freezing Order was made and determining that the Freezing Order ought not to have been made and should not continue on those grounds; and, second, the Respondent might have a good arguable case on grounds that he has not yet pleaded. Wallbank J concluded and ordered that it would be just and convenient for the Freezing Order to continue for a 30-day period to enable the Respondent to amend the claim to reflect the potential good arguable case and to apply for a new freezing order on these new grounds.

[58] Having read the transcript of the oral ruling given by Wallbank J, I am of the view that his express findings that there was evidence on the pleadings to justify a good arguable case was sufficient to justify the continuation of the Freezing Order. On numerous occasions Wallbank J reiterated that although the reliefs claimed by the Respondent in the claim form and statement of claim meant that there was no good arguable case on the date of the Freezing Order based on reliefs that assumed the existence of Tensigma, there was sufficient evidence of other grounds not yet pleaded to satisfy the requirement for a good arguable case to justify the continuation of the Freezing Order – these were referred to by Wallbank J as the "Potential Good Arguable Case". In **Broad Idea**, the Privy Council stated (at [90]) as follows:

> *No requirement of a cause of action*
>
> "90. Once it is appreciated that the essential purpose of a freezing injunction is to facilitate the enforcement of a judgment or other order to pay a sum of money, it is apparent that there is no reason in principle to link the grant of such an injunction to the existence of a cause of action."

[59] There is therefore no need for the existence of a cause of action when the applicant makes an application for a freezing injunction. The relevance of the cause of action is evidential as stated by the Privy Council in **Broad Idea** as follows:

> "92. In applying for a freezing injunction, the relevance of a cause of action, where there is one, is evidential: **in showing that there is a sufficient basis for anticipating that a judgment will be obtained to justify the exercise of the court's power to freeze assets against which such a judgment, when obtained, can be enforced.** That is the rationale for

> requiring the applicant to show a good arguable case; but there is no reason why the good arguable case need be that the applicant is entitled to substantive relief from the court which is asked to grant a freezing injunction. What in principle matters is that the applicant has a good arguable case for being granted substantive relief in the form of a judgment that will be enforceable by the court from which a freezing injunction is sought." (Emphasis added)

[60] Where the applicant has an existing cause of action against the defendant, its existence will only be evidential – what matters is that the applicant has a good arguable case for being granted substantive relief in the form of a judgment that will be enforceable by the court from which a freezing injunction is sought. At this juncture, it is important to remember the statement made by the Privy Council in **Broad Idea** (at [102](iii)) that:

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

[61] Wallbank J believed the reliefs claimed by the Defendant were either those which depended on the shareholding in Tensigma or were those that only Tensigma should bring and, since Tensigma was dissolved, it meant that there was no good arguable case on any of these grounds. Since there is no requirement that proceedings should have commenced or that the right to bring proceedings should have arisen, the fact that Tensigma was dissolved should not have been decisive in determining whether there existed no good arguable case. Wallbank J had to be satisfied with a sufficient degree of certainty that a right to bring proceedings will arise and that proceedings will be brought – in other words, whether there was a sufficient degree of certainty (or a realistic prospect) that Tensigma was going to be restored to revive the right to bring proceedings which had already been brought. The dissolution of Tensigma should not have been the sole basis on which to hold that there was no good arguable case if there existed a realistic prospect that Tensigma would be restored to the register of companies.

[62] Wallbank J also accepted that the Respondent may have a good arguable case on grounds that he has not yet pleaded – the so-called Potential Good Arguable Case**.** Wallbank J, therefore, continued the Freezing Order for a 30-day period to enable the Respondent to amend the claim to reflect the Potential Good Arguable Case and to apply for a new freezing order on these new grounds. This course of action was unnecessary for two principal reasons. The first was that the claim and statement of claim contained a good arguable case for reasons explored above. The second was that this came very close to requiring the Respondent to have an existing cause of action but dressed up as a good arguable case. This notion has been rejected by the Privy Council in **Broad Idea**. As mentioned above, this Court in **Multibank** had accepted that a good arguable case is one that is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success. What is important is that the claim must have "a plausible evidential basis."[20]

[63] In his ruling relating to the November Order, Wallbank J identified those evidential bases on which he noted the Respondent could potentially claim against the Appellants. That was sufficient for Wallbank J to have accepted that the Respondent had also satisfied the requirement for a good arguable case for these potential claims that he had not yet specifically pleaded. There was arguably no further requirement for the statement of claim specifically to be amended before the Freezing Order could continue or for the Freezing Order to continue to allow the claim form and the statement of claim to be amended to reflect those new bases to allow the Respondent to apply for a new freezing order on those new grounds. However, it was open to Wallbank J to require the Respondent to amend the pleadings to allow him to properly analyse them to determine whether the claims that were mentioned at the November Hearing satisfied the test of a good arguable case. That course of action remained within the wide discretion of Wallbank J and even if, in hindsight, it might not have been necessary, Wallbank J cannot be faulted for doing so. It cannot therefore be

[20] Lakatamia Shipping Co Ltd v Morimoto [2019] EWCA Civ 2203.

said that his decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

[64] Based on the forgoing, I am of the view that: first, on the date of the Freezing Order, the Respondent had a good arguable case on the grounds as pleaded. Second, Wallbank J was correct in making the November Order which continued the Freezing Order. Third, Wallbank J had jurisdiction to make the November Order notwithstanding that Tensigma had been dissolved by the date of the Freezing Order.

Issue 4 - Reflective Loss and Derivative Claims
The Appellants' Submissions

[65] The Appellants submit that there were points raised by him at the November Hearing that were not considered by Wallbank J. The Appellants submit that the Respondent has no claim to the Cryptocurrency and that any loss would be that of Tensigma and not the Respondent. The Appellants contend that the Respondent could not as a shareholder pursue a claim for Tensigma's losses and that the draft notice for permission to bring a Derivative Claim stated "to the extent that the losses subject to the dispute are properly the losses of Tensigma rather than the [Respondent] as shareholder." The Appellants also contend that the draft Derivative Claim refers expressly to "Tensigma has suffered loss and damage in the sum of US $22,715,000", but that, by securing the Freezing Order, the Respondent proceeded as if he is entitled to pursue a reflective loss claim, which he is not. The Appellants then cite the following passage (at [39]) from the decision of **Marex Financial Ltd v Sevilleja (All Party Parliamentary Group on Fair Business Banking intervening)**[21] ("**Sevilleja**"):

> "39. In summary, therefore, Prudential decided that a diminution in the value of a shareholding or in distributions to shareholders, which is merely the result of a loss suffered by the company in consequence of wrong done to it by the defendant, is not in the eyes of the law damage which is separate and distinct from the damage suffered by the company, and is therefore not recoverable. Where there is no recoverable loss, it follows that the shareholder cannot bring a claim, whether or not the company's cause of action is pursued. The decision had no application to losses suffered by a

[21] [2021] AC 39.

shareholder which were distinct from the company's loss or to situations where the company had no cause of action."

[66] The Appellants submit that the application for the freezing order was pursued and argued on the wrong basis, namely, that the Respondent, not Tensigma, was entitled to pursue the claim for US$22,850,000.00. The Appellants also submit that it is doubtful whether the Respondent is entitled to pursue the Unfair Prejudice Claim relief on behalf of Tensigma; and that the real complaint in the statement of claim is one of misconduct rather than prejudice, citing the following from **Re Charnley Davies Ltd (No 2)**[22]:

> "… the distinction between misconduct and unfairly prejudicial treatment does not lie in the particular acts or omissions of which complaint is made, but in the nature of the complaint and the remedy necessary to meet it. ... If the whole gist of the complaint lies in the unlawfulness of the acts or omissions complained of, so that it may be adequately redressed by the remedy provided by law for the wrong, the complaint is one of misconduct simpliciter ... It is otherwise if the unlawfulness of the acts or omissions complained of is not the whole gist of the complaint."

[67] The Appellants contend that the claims in the statement of claim, including declarations as to entitlement, rights to trace and an order for an account of profits, surpass what can properly be claimed under section 184I of the BCA. The Appellants submit that these points were relevant to why both the Freezing Order and the November Order should not have been made but Wallbank J failed to deal with these points.

The Respondent's Submissions

[68] The Respondent submits that Wallbank J accepted that there had been a partnership between the Appellants and the Respondent but that it was not for Wallbank J to conduct a mini trial on untested evidence. The Respondent also submits that Wallbank J found the evidence presented by the Respondent as credible for the purposes of making both the Freezing Order and the November Order.

[22] 1990] BCLC 760.

Discussion

[69] The issues raised by the Appellants concerning reflective loss and derivative claims are not to the point. The Appellants' main contention is that, since Tensigma did not exist, the Respondent's statement of claim does not meet the threshold for a good arguable case. This was accepted by Wallbank J in his ruling and in the November Order. In any event, as I mentioned earlier there was a good arguable case based on the Respondent's statement of claim. After explaining the "supposed" principle of "reflective loss", the United Kingdom Supreme Court in **Sevilleja** stated (at [4]) that:

> "4 The principle that double recovery should be avoided does not prevent a claimant from bringing proceedings for the recovery of his loss. But the court will have to consider how to avoid double recovery in situations where the issue is properly before it. Procedurally, that may occur in a number of ways. For example, both claimants may bring proceedings concurrently, or the wrongdoer may raise the issue by way of defence to proceedings brought by one claimant, and join the other potential claimant as a defendant, or the court may itself direct the claimant to notify the other potential claimant so that he has an opportunity to intervene (as explained in **In re Gerald Cooper Chemicals Ltd** [1978] Ch 262, 268—269)."

[70] In **Prudential Assurance Co. Ltd. v. Newman Industries Ltd (No 2)**[23] ("**Prudential Assurance**"), the directors of a company were alleged to have made a fraudulent misrepresentation in a circular distributed to its shareholders to induce them to approve the purchase of assets at an overvalue from another company in which the directors were interested. Prudential Assurance Co. Ltd., which was a minority shareholder in the company, brought a personal and a derivative action against the directors, claiming that they had committed the tort of conspiracy against the company and its members. In relation to the personal claim, the Court of Appeal of England and Wales concluded that, where a company and its shareholders had suffered wrongs which resulted in a loss to the company and a fall in the value of its shares, a shareholder could not bring a personal action against the wrongdoer. On the facts, it was held that Prudential Assurance Co. Ltd did not suffer any personal wrong. The Court of Appeal stated (at pp 222-223) that:

[23] [1982] 1 Ch 204.

> "But what he cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent. shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves. his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company."

[71] However, this passage was subject to criticism by the Supreme Court in **Sevilleja** where it stated (at [26]) that:

> "[26] … As that passage makes clear, the decision was concerned only with a diminution in the value of shares or in distributions, suffered by a shareholder merely because the company had itself suffered actionable damage. It was not concerned with other losses suffered by a shareholder, or with situations where the company had not suffered any actionable loss."

[72] It is clear from this passage that the issue of double recovery, where it properly arises, is a matter for the trial judge who is seized with the proceedings when and if they arise for consideration during proceedings before or at the trial. It is not an issue that properly arises in the context of determining whether the Respondent has a good arguable case. It would not have been proper for Wallbank J to entertain all these intricate arguments on issues concerning the "supposed" principle of "reflective loss".

[73] In any event, issues such as whether the claim is pursued by Tensigma and whether the directors are unable to pursue any such claim would need to be considered. In these circumstances, it still leaves a shareholder the option of bringing either a derivative action or an unfair prejudice claim. All these are matters that would not ordinarily arise on an application for a freezing order (where the court must determine whether the claimant has a good arguable case, whether there is a risk of dissipation and whether it is just and convenient). Issues concerning double recovery should be

determined before the trial judge properly seized with the derivative action or an unfair prejudice claim.

Issue 5 - The Relevance of *Re Posgate & Denby*

[74] Although this point was not specifically one of the grounds of appeal, the Appellants in submissions filed contended that the decision of **Re Posgate & Denby**[24] applies and that, on the basis on that decision, the Freezing Order should not have been granted. I consider this submission only for completeness.

The Appellants' Submissions

[75] The Appellants submit that the Respondent was seeking to restrain the use of Tensigma's assets by third parties, although failing to provide any protection for their interests and that this is similar to the facts in **Re Posgate & Denby**. The Appellants also submit that, in **Re Posgate & Denby**, an injunction was sought to restrain directors from selling company assets pending the hearing of an unfair prejudice petition and Hoffman J balanced the risk of granting an injunction and harm to the company and stated that:

> "If I refuse the injunction and the transaction turns out on the hearing of the petition to have been unfairly prejudicial to the petitioner he can in my judgment be fully compensated by orders which enable him to receive the value his shares would have had if the transaction had taken place."

[76] The Appellants submit that this is exactly the current situation here where the Respondent is seeking purchase orders and for any price in respect of sale or purchase to reflect allegations of misappropriation. The Appellants also submit that there is no justification for an order which would have prevented Tensigma carrying on business, if it had existed, and prevents third parties who make claims to the Cryptocurrency from using it. The Appellants contend that Wallbank J asserted that the Appellants were seeking to use the dissolution of Tensigma as a 'jurisdictional trump card' but that the company in **Re Posgate & Denby** was an active company. The Appellants also contend that if Tensigma was restored that would be irrelevant

[24] [1987] BCLC 8.

to this submission because there would still be no justification, given the substance of the relief sought, to restrain Tensigma (the alleged victim) using its own assets in the ordinary course of its business. The Appellants submit that there is no risk of an order in favour of the Respondent for a share purchase remaining unsatisfied because of any of the matters advanced by the Respondent and that Wallbank J failed to address or consider this point or indicate why it was wrong.

The Respondent's Submissions

[77] The Respondent submits that the decision of **Re Posgate & Denby** is not an analogous case in favour of not granting an injunction. The Respondent further submits that **Re Posgate & Denby** dealt with restraining a company and its directors from disposing part of its business but that the dispute between the Appellants and the Respondent is about fraud. The Respondent contends that he is not attempting to restrain the sale of Tensigma pending approval from equity shareholders but is asking for the court's assistance to prevent the Appellants from dissolving Tensigma to defraud both Tensigma and the Respondent. The Respondent also contends that the Freezing Order could have been made on the basis that Tensigma has a cause of action against the Appellants, and it was on this basis that Wallbank J ultimately made the November Order.

Discussion

[78] In **Re Posgate & Denby**, the directors of a company sought to sell some of the company's assets because the company, a Lloyd's underwriting agency, was advised by its brokers that they could not place the errors and omissions (E&O) policy which, according to the regulations of Lloyd's, the company needed to carry on business after the expiry of its existing policy. The company's business included at that time the management of six (6) syndicates. The board of directors received an offer for the members' agency business but could not get offers for three (3) syndicates. Consequently, the board of directors proposed to sell these syndicates through a series of management buyouts to three (3) companies. Hoffman J noted that, first, the sales gave rise to conflicts of interests because of the eleven members

of the board, eight are interested or propose to acquire interests in one or other of the purchasing companies; second, both the articles of the company and the **United Kingdom Companies Act** 1985 (the "**1985 Act**") contain provisions to deal with such conflicts of interest; and third, the company has therefore complied with the provisions of both the articles and the 1985 Act dealing with conflicts of interest.

[79] The petitioner filed an unfair prejudice petition on the day of an extraordinary general meeting, alleging that the prices offered by the purchasing companies are substantially less than the true market value of the three syndicates. The petitioner sought: (1) an injunction to restrain the sales; and (2) an injunction to restrain the sales "unless and until such an agreement has been approved by a majority of the Equity shareholders". However, the issued share capital of the company consisted of 100 voting shares and 25,000 equity shares each of £1. The petitioner argued that in all the circumstances it was unfairly prejudicial to the interests of the petitioner, as an equity shareholder, for the board of directors to proceed with the sales without the approval of the equity shareholders. The circumstances which made this unfair were that: (1) the equity shareholders were the only persons ultimately interested in the prices at which the syndicates were sold; (2) the majority of the board had conflicts of interest which made it impossible for them to form an objective view of the merits of the transaction; (3) the difficulty in fixing values for the syndicates meant that there was a risk that they were being sold at an undervalue to the prejudice of the equity shareholders. Hoffman J held that the petitioner did not establish that there was an arguable case, but assuming whether he was wrong on that point, considered whether it was just and convenient that he should grant the injunction and stated (at pp 15-16) that:

> "The position is therefore that if I grant an injunction and allow the holders of a majority of the equity shareholders the right to veto the transaction, there is a risk (to put the matter no higher) of thereby causing irreparable harm to the company and its shareholders as a whole. If I refuse the injunction and the transaction turns out on the hearing of the petition to have been unfairly prejudicial to the petitioner, he can in my judgment be fully compensated by orders which enable him to receive the value his shares would have had if the transaction had not taken place. Counsel for the petitioner said that this would be shutting the stable door too late, when it

> might be impossible to quantify the loss, if any, which the sales had caused to the company. But I think that proof of some undervalue must be an essential element in the petitioner's case and the quantification of that undervalue, difficult as it might be, is a familiar problem faced by the courts in many different contexts. It does not prevent financial compensation from being an adequate remedy."

[80] Hoffman J stated (at p. 14) that in the absence of a breach of fiduciary duty, which is not alleged, the equity shareholders plainly have no right under the articles to prevent the directors from exercising the company's power to sell its assets, but that:

> "…the concept of unfair prejudice which forms the basis of the jurisdiction under s 459 enables the court to take into account not only the rights of members under the company's constitution, but also their legitimate expectations arising from the agreements or understandings of the members inter se."

[81] On the facts, Hoffman J held that: first, the petitioner could not be said to have had a legitimate expectation that the board of directors would not dispose of the syndicates without the approval of the holders of a majority of the equity shares; and, second, there is no arguable basis for saying that it would be unfairly prejudicial to the petitioner if the proposed transaction were implemented without the approval of the equity shareholders.

[82] Hoffman J did not grant the injunction because doing so might cause irreparable harm to the company and its shareholders. The decision in **Re Posgate & Denby** is not analogous as the Appellants contend because in that decision the petitioner sought an injunction to prevent the holding of an extraordinary general meeting to prevent the directors and shareholders from selling the company's assets, namely, the three syndicates. In this appeal, the Respondent sought to freeze the assets of Tensigma pending the determination of the Unfair Prejudice Claim and his application to bring the Derivative Claim on behalf of Tensigma. One of the main allegations underpinning both claims is that the Appellants had transferred the entire business and assets of Tensigma to DAE. The similarity between **Re Posgate & Denby** and the instant case is that both relate to an unfair prejudice claim. However, that is where the similarity starts and ends. The decision in **Re Posgate & Denby** does not relate

to or govern the principles applicable to the grant of a freezing order in the circumstances of this appeal. **Re Posgate & Denby** merely establishes that a court may not grant an injunction if the applicant can be compensated financially and in determining the level of compensation the court can take into account any diminution in the value of his shares in a buyout order; and that even in these circumstances the court may still refuse injunctive relief if the applicant cannot be compensated financially where the balance of convenience does not support granting the relief sought.

Issues 6 and 7 - Jurisdiction over Tensigma and the Appellants
The Appellants' Submissions

[83] The Appellants submit that, despite having specifically brought to the attention of Wallbank J the decision of **Belletti and others v Morici and others**[25] ("**Morici**") and the need to establish jurisdiction over the Appellants, Wallbank J proceeded to make the November Order which he had no jurisdiction to make. This submission is related to the Appellants' other submission that, since Tensigma was dissolved and any assets it owned were vested in the Crown, Wallbank J could not exercise any jurisdiction over it by making the Freezing Order.

[84] The Appellants contend that on the date of the *ex parte* hearing, the basis on which the Respondent asserted that the Commercial Court of the Territory of the Virgin Islands had any jurisdiction to deal with the matters before it was because Tensigma was a company incorporated in the Territory of the Virgin Islands and the substantive claim related to its administration, management and the conduct of its affairs. The Appellants also contend that reliance was placed on CPR 7.3(7) to justify service of the substantive proceedings out of the jurisdiction. The Appellants also submit that since Tensigma did not exist and had no assets, there was simply no jurisdictional basis to make any order against the Appellants both of whom are resident in Thailand. The Appellants also submit that the case for jurisdiction over the Appellants was parasitic on the court's jurisdiction over Tensigma. The Appellants contend that

[25] [2009] EWHC 2316; [2010] 1 All ER (Comm).

if Tensigma did not exist the link disappears, and the Respondent was left essentially seeking relief from the Commercial Court in the Territory of the Virgin Islands against two individuals who had (and have) no connection with the Territory of the Virgin Islands.

The Respondent's Submissions

[85] As mentioned above, the Respondent submits that the Appellants are incorrect to state that the court did not have the jurisdiction to make the Freezing Order. The Respondent further submits that Wallbank J had the power to grant the Freezing Order following **Broad Idea**, which makes clear that the court has the jurisdiction to grant a freezing injunction notwithstanding there is no substantive pleaded cause of action – all that is required is the right to bring an action.

Discussion

[86] The Respondent's submission misunderstands the distinction between "jurisdiction" and a "power". The *power* to make a freezing order is found in section 24(1) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**[26] which provides as follows:

> **"Granting of mandamus, etc.**
> 24. (1) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or of a Judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court or Judge thinks just."

[87] This Court in **Mitsuji Konoshita et al v JTrust Asia PTE Ltd**.[27] stated (at [36]) that:

> "[36] The BVI court's jurisdiction to make freezing orders is statutory. It rests in section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act. It is a discretionary remedy which may be granted only where the court determines that it is 'just and convenient' to do so. Part 17 of the Civil Procedures Rules 2000 (the "CPR") sets out procedurally the manner in which this jurisdiction is to be invoked by applicants and exercised by the courts. CPR 17.1(i) and (j) expressly incorporates freezing orders into the

[26] Cap 80 of the Laws of the Virgin Islands.
[27] BVIHCMAP2020/0017 (delivered 24th March 2021, unreported).

family of interim remedies which may be granted by a court. CPR 17.2 provides that the court may grant interim remedies at any time, that is, at any stage of the proceedings. Accordingly, the court may grant a freezing order before commencement of the claim in cases of real urgency or ex parte where the applicant has satisfied the court that there are good reasons for not giving notice or after delivery of judgment on the claim."

[88] However, before the court can exercise that discretion to make a freezing order pursuant to section 24(1) and in accordance with rule 17.2 of the CPR 2000, the court must first have *jurisdiction* to do so, particularly where the respondent resides out of the jurisdiction. The court can only exercise the power in section 24(1) to make a freezing order on a person over whom it has personal jurisdiction. That is exactly what the Privy Council stated in **Broad Idea** as follows (at [101]):

> "…a court with equitable and/or statutory jurisdiction to grant injunctions where it is just and convenient to do so has power - and it accords with principle and good practice - to grant a freezing injunction against a party (the respondent) **over whom the court has personal jurisdiction** provided that …" (emphasis added).

[89] Where the person resides outside the Territory of the Virgin Islands, the applicant must first seek leave of the court to serve the proceedings outside of the jurisdiction. In this regard, CPR 7.3 dealing with service of claim form out of jurisdiction in specified proceedings, governs. CPR 7.3(7) states as follows:

> **"Claims about companies**
> (7) A claim form may be served out of the jurisdiction if the subject matter of the claim relates to –
>> (a) the constitution, administration, management or conduct of the affairs; or
>> (b) the ownership or control of a company incorporated within the jurisdiction."

CPR 7.14 also provides that:

> **"Service of court process other than claim form**
> 7.14 (1) An application, order or notice issued, made or given in any proceedings may be served out of the jurisdiction without the court's permission if it is served in proceedings in which permission has been given to serve the claim form out of the jurisdiction.
> (2)The procedure by which a document specified in paragraph (1) is to be served is the same as that applicable to the service of a claim form and accordingly rules 7.8 to 7.13 apply."

[90] In **Nilon Ltd and another v Royal Westminster Investments SA and others**[28], the Privy Council outlined (at [13]) the principles relating to service out as follows:

> "[13] The applicable principles relating to service out of the jurisdiction were set out, with references to the prior authorities, in AK Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC 7, [2011] 4 All ER 1027, [2012] 1 WLR 1804(at [71]) per Lord Collins. On an application for service out of the jurisdiction, three requirements have to be satisfied. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context 'good arguable case' connotes that one side has a much better argument than the other. Third, the claimant must satisfy the court that in all the circumstances the forum which is being seised (here the BVI) is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."

[91] The facts of **Morici** have been helpfully summarized in the headnote: the claimants applied for and obtained an order *ex parte* restraining the fifth and sixth defendants (the "**Parents**") from dealing with or disposing of: (i) any assets of the first defendant or the second, third and fourth defendants ("**Corporate Defendants**") to the extent that the Parents controlled such assets, and (ii) any assets that the Parents had acquired from the first defendant or the Corporate Defendants since the worldwide freezing order was granted. The order also required delivery up of such assets to receivers appointed by the English court and disclosure of information concerning such assets. The judge also granted permission to serve the claim form out of the jurisdiction on the Parents pursuant to para 3.1(5)b of United Kingdom CPR PD 6B. The Parents applied to set aside that order on the basis, inter alia, that the English courts had no jurisdiction over them. The Parents made no attempt to comply with the order and made it clear that even if the court were to conclude that it had jurisdiction over them, they had no intention of complying with the order. The High Court of England and Wales noted:

[28] (2015) 86 WIR 285.

> **"The distinction between substantive jurisdiction and territorial jurisdiction**
>
> [15] Mr. Samek on behalf of the parents accepts the existence of the so-called Chabra jurisdiction under s 37 of the 1981 Act to make a freezing order against a third party which is necessary ancillary relief in support of a freezing injunction against the defendant, for example (as in the present sort of case) where there is reason to suppose that assets which are ostensibly those of the third party are in truth those of the defendant or where the third party holds assets on behalf of the defendant or controls them on his behalf.
>
> [16] However, as Mr. Chambers recognises, even in a case where it would otherwise be appropriate to exercise the Chabra jurisdiction against a third party alleged to be holding assets on behalf of the defendant, the court cannot exercise that jurisdiction unless it can establish territorial jurisdiction over the third party. Where the third party is present within the jurisdiction so that the court has in personam jurisdiction over the third party, there is no problem. However, where the third party is outside the jurisdiction, the court cannot exercise territorial jurisdiction over him or it unless there is some basis upon which the third party can be served with the relevant claim form or application notice out of the jurisdiction. There is no inherent jurisdiction of the English court to serve a foreign party out of the jurisdiction. Service out of the jurisdiction requires express authorisation by statute or pursuant to the Civil Procedure Rules: see Masri v Consolidated Contractors International Co SAL [2009] UKHL 43 at [32], [2010] 1 All ER (Comm) 220, [2010] AC 90 per Lord Mance."

[92] The Appellants have not applied to set aside service pursuant to CPR 7.7. The essential question that arises is whether the court lacks jurisdiction because Tensigma was no longer on the register of companies. The Appellants are of the view that the jurisdictional gateway in CPR 7.3(7), relating as it does to "a company incorporated within the jurisdiction", no longer applies since Tensigma was dissolved in March 2021 before the Freezing Order was made in April 2021. Do the words "a company incorporated within the jurisdiction" also apply to a company that was removed from the register of companies following a voluntary liquidation? It is correct that a dissolved company is excluded from the definition of "company" under section 3(1)(iii) of the BCA, but this does not affect the CPR 2000 since that definition is for the purposes of the BCA and does not apply generally. The question is critically

important because CPR 7.3(7) is the basis on which the Appellants were served out of the jurisdiction.

[93] If the Appellant's submission on this point is correct, it would mean that a majority of shareholders could act in ways that prejudice the minority shareholders and use their majority shareholding to put the company into voluntary liquidation, thereby preventing any proceedings that might be taken on behalf of that company. The very instrument of fraud – the dissolution – could then be used as a shield to prevent the courts from having jurisdiction to hear any claim. This is what Wallbank J meant when he stated, after noting that the dissolution of Tensigma was part of the dissipatory scheme of the Appellants, that:[29]

> "In those circumstances it rather lies ill in the mouth of Mr. Svirsky and Mr. Donin to raise as a defence that the company no longer exists, and to treat that as some kind of jurisdictional trump card."

[94] CPR 7.3(7) relates only to "a company incorporated within the jurisdiction" which literally means a company that is on the register of companies. However, matters such as: (1) the constitution, administration, management or conduct of the affairs; or (2) the ownership or control of a company incorporated in the jurisdiction could also apply to a dissolved company. The intentions of the drafters of the CPR 7.3(7), which was inserted in CPR 2000 by virtue of Eastern Caribbean Supreme Court Civil Procedure (Amendment) Rules 2011 and came into effect from 1st October 2011, would be frustrated because any such claims in respect of a dissolved company would be beyond the reach of a claimant wishing to serve a defendant who is outside the jurisdiction. The drafters of CPR 7.3(7) could not have intended that the rule would not apply to a dissolved company. Any other interpretation would mean that dissolution would be used as a jurisdictional shield for wrongdoing done to a company or minority shareholders. A purposive construction to CPR 7.3(7) is needed to avoid that result.

[29] Page 197 of the transcript of proceedings.

[95] This Court in **Westburg Anstalt v Profitstar Anstalt**[30] (had to determine the proper interpretation that should be given to CPR 7.3(5)(a), which provides as follows:

> *"Enforcement*
> (5) A claim form may be served out of the jurisdiction if a claim is made to enforce any judgment or arbitral award which was made
> -
> (a) within the jurisdiction;
> (b) by a foreign court or tribunal and registered in the High Court pursuant to Part 72."

[96] The appellants argued that, in relation to CPR 7.3(5)(b), Part 72 (relating to reciprocal enforcement of judgments) sets out the procedure to be followed for the registration of a foreign judgment without any need for a claim form at all. Only registration is required under CPR 72.62. Consequently, there was no need for CPR 7.3 to be applied to enforcement of a foreign judgment under Part 72. The appellants also argued that since the pre-amended CPR 7.3(5) was identical to the present CPR 7.3(5)(a), sub-rule (b) was clearly added to expand the circumstances in which the court might give permission for a claim to be served out of the jurisdiction for enforcement purposes. The appellant submitted that the purpose of the addition was to be able to grant an applicant permission to serve out of the jurisdiction where the claim form is issued to enforce a judgment made by a foreign court or tribunal. The appellant also submitted CPR 7.3(5)(a) concerns domestic judgments and awards and CPR 7.3(5)(b) concerns foreign judgments and awards. The Court of Appeal accepted those submissions and stated (at [17] and [20]) that:

> "[17] The Court is of the view that this is where the learned judge fell into error. The appellant submitted that it is wholly unlikely that the legislators of the Eastern Caribbean decided to add enforcement of a foreign judgment or arbitral award as one of the "gateways" for the service out of the claim form, with the intention that this "gateway" be limited to circumstances in which it could never be needed and thus could never be utilised (i.e. where a foreign judgment is registered under Part 72 of CPR 2000). Rather, the intention of the legislators must have been to allow service out of a claim form where it is issued in order to enforce a foreign judgment locally, this being the classic reason in common law countries for enforcing a judgment by way of claim form. The Court agrees with this submission. CPR 7.3(5)(b) must have been added to serve this purpose. The learned judge ought to

[30] BVIHCMAP2013/0020 (delivered 5th December 2013, unreported).

have applied a purposive construction and found, as a matter of law that the words 'and registered in the High Court pursuant to Part 72' which appear in CPR 7.3(5)(b) should be ignored as 'mere surplusage'. These words have clearly been added to the sub-rule in error, and in order to give effect to the intention of the legislators, the rule should be construed so as to ignore these words. This was a draftsman's error.

…

[20] Westburg finally submitted, further or alternatively, that the learned judge erred in law by not properly applying the mischief rule to his construction of CPR 7.3(5)(b). He ought to have considered that the "mischief" that the rule was designed to correct must have been that without the rule, it would not have been possible using the service out provisions in operation to enforce a foreign judgment within the BVI since CPR 7.3(5) was limited to judgments or awards made within the jurisdiction. The learned judge ought therefore to have interpreted the recently inserted sub-rule (b) in such a way as to ensure that the said "mischief" was redressed. The Court accepts these submissions of the appellant."

[97] The Court in **Anstalt** accepted that a purposive construction was needed, that the intention of the drafters was important in carrying out that exercise and that the intention of the drafters of CPR 7.3(5)(b) was to allow service out of a claim form where it is issued to enforce a foreign judgment locally. The addition of the words "and registered in the High Court pursuant to Part 72" in CPR 7.3(5)(b) served to defeat the intention of the drafters, which meant that these words should be ignored in construing CPR 7.3(5)(b). The Court explained (at [17]) that "in order to give effect to the intention of the legislators, the rule should be construed so as to ignore these words". The Court also accepted that CPR 7.3(5)(b) should be interpreted in such a way as to ensure that the "mischief" was redressed. CPR 7.3(5) was later amended to remove the surplusage.

[98] What therefore is the intention of the drafters of CPR 7.3(7)? It seems to be that the drafters intended that leave to serve out would be permitted where it related to specific disputes related to a company incorporated within the jurisdiction. These matters are wide ranging and cover the: (1) constitution, (2) administration, (3) management; (4) conduct of the affairs; (5) ownership, or (6) control, of a company incorporated within the jurisdiction. These issues can and do arise not only in relation to a company incorporated and registered within the jurisdiction but also a dissolved

company. The drafters would not have wished to prevent a person from bringing proceedings relating to the six above-mentioned matters on the basis that the service out gateway in CPR 7.3(7) is not applicable to a dissolved company. A person intending to bring proceedings on behalf of a dissolved company must first apply to have the company restored to the register of companies. If an application to serve a freezing order is filed at the same time or soon after the filing of the claim form, the court may make an order to serve the application for a freezing order (or any other application) out of the jurisdiction pursuant to CPR 7.14 if it is also satisfied that the claimant/applicant has taken active steps to restore the company to the register of companies or gives an undertaking to do so within a period of time. An important consideration is that there should be a realistic prospect that the company will successfully be restored to the register of companies. This interpretation allows the court to determine on a case-by-case basis whether to permit the application to serve a freezing order out of the jurisdiction if the conditions in CPR 7.3(7) are met for a dissolved company where there is a realistic prospect of it being successfully restored to the register of companies.

[99] Whatever the intentions of the drafters of CPR 7.3(7) and CPR 7.14 may be, any interpretation of this rule cannot be inconsistent with substantive law relating to dissolved companies. Section 215 of the BCA provides that:

> **"Effect of striking off**
> 215. (1) Where a company has been struck off the Register, the company and the directors, members and any liquidator or receiver thereof, may not—
>
> > (a) commence legal proceedings, carry on any business or in any way deal with the assets of the company;
> > (b) defend any legal proceedings, make any claim or claim any right for, or in the name of, the company; or
> > (c) act in any way with respect to the affairs of the company.
>
> (2) Notwithstanding subsection (1), where a company has been struck off the Register, the company, or a director, member, liquidator or receiver thereof, may—
>
> > (a) make application for restoration of the company to the Register;
> > (b) continue to defend proceedings that were commenced against the company prior to the date of the striking-off; and

> (c) continue to carry on legal proceedings that were instituted on behalf of the company prior to the date of striking-off.
>
> (3) The fact that a company is struck off the Register does not prevent—
>
> (a) the company from incurring liabilities; or
>
> (b) any creditor from making a claim against the company and pursuing the claim through to judgement or execution; and does not affect the liability of any of its members, directors, officers or agents.
>
> (4) In this section and section 217, "liquidator" means a voluntary liquidator and an Insolvency Act liquidator."

[100] The effect of section 215(1)(a) and (b) of the BCA is to prevent any director, member receiver or liquidator from: (1) commencing legal proceedings in the name of the company; and (2) defend any legal proceedings, make any claim or claim any right for, or in the name of, the company. The BCA does not define "legal proceedings" but it is not necessary for present purposes to define "legal proceedings" because the application for a freezing injunction that ultimately led to the making of the Freezing Order in the instant appeal was not commenced in the name of Tensigma. Additionally, the same reasoning applies to the claim form filed by the Respondent excluding the Derivative Claim which is a claim brought by the Respondent on behalf of Tensigma. This would hardly matter at this stage because leave of the court is required to bring a derivative claim under section 184C of the BCA.

[101] However, it is not necessary to come to a firm view on the effect of section 215 of the BCA on CPR 7.3(7) and CPR 7.14 in the context of the discussion above, because the range of factors that would inform service out under CPR 7.3(7), particularly in the context of a freezing order which does not require at the time it is made that any proceedings to have been made, are much wider and include consideration of any possible application under section 218 of the BCA to restore a dissolved company to the register of companies. In this appeal, the issue is now moot because Tensigma has been restored to the register of companies and the effect of this is that Tensigma is deemed to have continued in existence as if it had not been dissolved or struck off the register: section 218(6) of the BCA. Any perceived issue concerning the

application of CPR 7.3(7) to Tensigma, a previously dissolved company, no longer applies. Therefore, the Appellants' submissions concerning jurisdiction over Tensigma, and the jurisdiction over the Appellants based on the dissolution of Tensigma, cannot now be maintained considering the restoration of Tensigma to the register of companies. These two grounds of appeal therefore fail.

Issue 8 – Risk of Dissipation
The Appellants' Submissions

[102] The Appellants submit that it is unclear whether Wallbank J fully addressed the issue of risk of dissipation and that, so far as he did, he did so incorrectly. The Appellants submit that, first, the relief sought by the Respondent, leaving aside the relief claimed on behalf of Tensigma, is for a share purchase order with valuations to reflect alleged wrongs. Second, there was no evidence and no argument advanced to establish any risk of dissipation. Third, the Respondent and Wallbank J simply asserted a risk of dissipation in general terms pointing to several Cryptocurrency transactions (the circumstances of which are disputed in the pleadings and evidence) but without properly applying the real meaning and requirement of that ground. Fourth, the relief sought by the Respondent has nothing to do with restraining the use of Tensigma's assets assuming it had any.

The Respondent's Submissions

[103] The Respondent submits that the ground of appeal relating to risk of dissipation does not get off the ground for two (2) principal reasons. First, Wallbank J, having considered the evidence of the Respondent, accepted that there was a partnership between the Appellants and the Respondent and that the liquidation and dissolution of Tensigma (including the asset transfers) were part of a dissipatory scheme. Second, the dissolution of Tensigma, which Wallbank J accepted was part of the fraud, could not be a "jurisdictional trump card" which allowed the Appellants to dissipate the assets of Tensigma. The Respondent concluded that Wallbank J was abundantly clear in relation to risk of dissipation: the Appellants would not be permitted to use procedure and arguments about jurisdiction to perpetrate fraud.

Discussion

[104] In his ruling relating to the November Order, Wallbank J accepted that:

> "So in all those circumstances I also think that there is a, that there is a risk of dissipation and that there is a real risk of the [Appellants] dissipating their assets other than in the ordinary course of their business so as to frustrate any judgment that might be obtained against them in due course."

[105] The circumstances that Wallbank J referred to related to his acceptance on the evidence presented that: (1) the Respondent was not aware of the liquidation and dissolution of Tensigma as he was shut out of information concerning Tensigma;[31] (2) there was a good arguable case that the liquidation and dissolution of Tensigma, including the asset transfers that lead to it, were all part and parcel of a dissipatory scheme intended to place value away from the reach and knowledge of the Respondent[32]; (3) it was not just and convenient to let alleged wrongdoers get away with their wrongdoing, put their money in the clear or the value of their assets in the clear so that they can dissipate it further[33]; and (4) given the nature of the text/telegram exchanges between the Appellants and the Respondent, he did not think one moment that the Appellants would lose sleep over putting assets a few steps further, maybe using nominees to pretend that they don't have them (Ibid at 199).

[106] Popplewell J in **Fundo Soberano De Angola and others v Santos and others**[34] stated (at [86]) that:

> "86. The relevant principles have been summarised in a number of recent authorities, themselves referring to many earlier authorities, including National Bank Trust v Yurov [2016] EWHC 1913 (Comm) at paragraph [70] per Males J; Holyoake v Candy [2017] 3 WLR 1131at paragraphs [34] and [59] per Gloster LJ; and Petroceltic Resources v Archer [2018] EWHC 671 (Comm) at paragraph [21] per Cockerill J. The following aspects are of particular relevance to the current applications:

[31] Page 197 of the transcript of proceedings.
[32] Ibid.
[33] Ibid at 198-199.
[34] [2018] EWHC 2199 (Comm).

(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.

(2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.

(3) The risk of dissipation must be established separately against each respondent.

(4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets are likely to be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.

(5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.

(6) What must be threatened is unjustified dissipation. The purpose of a freezing order is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A freezing order is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the freezing order jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.

(7) Each case is fact specific and relevant factors must be looked at cumulatively."

[107] In addition, in **Lakatamia Shipping Company Ltd v Morimoto**, the Court of Appeal of England and Wales stated (at [51]) that:

> "[51] In my view, in the light of the authorities which I consider in detail below, the correct approach in law should be formulated in the following two propositions:
>
> (1) Where the court accepts that there is a good arguable case that a respondent engaged in wrongdoing against the applicant *relevant to the issue of dissipation*, that holding will point powerfully in favour of a risk of dissipation.
>
> (2) In such circumstances, it may not be necessary to adduce any significant further evidence in support of a real risk of dissipation; but each case will depend upon its own particular facts and evidence."

[108] On evidence before him, Wallbank J accepted that there was a good arguable case that the liquidation and dissolution of Tensigma, including the asset transfers that lead to it, were all part and parcel of a dissipatory scheme intended to place value away from the reach and knowledge of the Respondent. This alleged wrongdoing accepted by Wallbank J was relevant to the issue of dissipation and consequently it points powerfully in favour of the risk of dissipation. In these circumstances, it was not necessary for the Respondent to adduce any significant further evidence in support of a real risk of dissipation. Wallbank J properly considered the evidence and all the circumstances, and it cannot be said that Wallbank J considered irrelevant factors when deciding whether there was a real risk of dissipation. This ground of appeal therefore fails.

Issue 9 – Just and Convenient
The Appellants' Submissions

[109] The Appellants submit that it was not just and convenient in all of the circumstances to make the November Order and Wallbank J failed to take into account the following submissions: (1) the Respondent is a shareholder of Tensigma; (2) the Respondent's remedy, if he has one, is for share purchase orders with the price to be fixed to reflect the alleged wrongs if he establishes his case. That remedy does not require the

assets of Tensigma to be frozen; (3) the Respondent has no claim to any of the Cryptocurrency; (4) the Respondent has no justification to seek an order which would, if Tensigma had existed, have stopped Tensigma from carrying on its business; (5) the Respondent cannot provide any meaningful undertaking in damages; (6) if it proves to be wrong to have granted the Freezing Order, uncompensable loss would have been suffered by Tensigma, if it had existed, the Appellants and third parties; and (7) the "merits" of the Respondent's case as to any claim of his own to the Cryptocurrency are not only weak but non-existent. The Appellants further submit that when the November Order was made and based on Wallbank J's correct conclusion that the Respondent had no pleaded "good arguable case", there was no sensible justification to accept that it was just and convenient to make any order which affected third parties and left them unprotected when it was unknown whether the Respondent could, at some unknown date in the future, persuade a judge that he had a good arguable case on entirely new grounds.

The Respondent's Submissions

[110] The Respondent submits that the November Order was just and convenient in the circumstances and that Wallbank J was clear in his ruling that: "it is not just and convenient to let alleged wrongdoers get away with their wrongdoing". The Respondent also submits that Wallbank J also accepted that it appeared to be true that the Appellants were "ready to lie about the position of the [Respondent] within their business, and basically to try and mislead the Court … if that's right, and on the documents it appears to right"[35]. The Respondent states that Wallbank J also accepted that the dissolution of Tensigma was part of a dissipatory scheme by the Appellants and that, as a result, some form of freezing order should be put in place to ensure that any future judgment is not frustrated. The Respondent also states that the November Order was perfectly within the discretion of Wallbank J and that it is also a reasonable judgment because of the considerable evidence that the Respondent had provided to demonstrate the wrongdoing of the Appellants. The Respondent notes that Wallbank J held that "[the Appellants'] ability to dissipate

[35] Page 199 of the transcript of proceedings.

needs to be curtailed"[36] and that Wallbank J was correct in accepting that it was just and convenient to make the November Order.

Discussion

[111] Wallbank J on at least three (3) occasions in his ruling made it clear that he thought there was an arguable case in relation to the dissipatory scheme of the Appellants' scheme intended to place value away from the reach and knowledge of the Respondent. While Wallbank J was emphatic in the November Order that the Respondent's pleadings did not establish a good arguable case, there was sufficient material in the evidence before him for Wallbank J to have so accepted. In any event, it cannot be said that Wallbank J was wrong in principle in finding there was a potential good arguable case based on the evidence before him, even though it was not pleaded in exact terms. Wallbank J was of the opinion that, when the evidence is looked at in the round noting the intention of the dissipatory scheme, it did not seem right not to continue the Freezing Order.[37] Wallbank J correctly held that "it was not just and convenient to let alleged wrongdoers get away with their wrongdoing, put their money in the clear or the value of their assets in the clear so that they can dissipate it further"[38].

[112] Wallbank J noted the financial sophistication of the Appellants[39] and that it also appeared to him that it was "just and convenient that some form of Freezing Order should apply to prevent them dissipating the asset so as to frustrate a judgment[40]. Additionally, Wallbank J stated that on jurisdictional grounds Tensigma does not exist, and that he could simply discharge the Freezing Order, "[b]ut that risks very much allowing the [Appellants] an unchecked opportunity to dissipate assets. And it would not be just and convenient to do that"[41]. Wallbank J was of the view that he

[36] Ibid at 202.
[37] Page 198 of the transcript of proceedings.
[38]Ibid.
[39] Ibid at 199.
[40] Ibid at 200.
[41] Ibid at 207.

had to craft an injunction that he thought was just and convenient[42] and that the appropriate course was to extend the Freezing Order for 30 days. Wallbank J concluded that: [43]

> "I think it would be entirely wrong, injust and inconvenient to allow the apparently mendacious and dissipatory [phonetic] Second and Third Respondents the liberty to use their financial acumen to make themselves judgment proof.
> So for those reasons I think it is just and convenient for the ex parte injunction to continue for a limited time."

[113] Wallbank J considered all the evidence before him and accepted that there was sufficient evidence before him to allow the Respondent to amend his pleadings to reflect the Potential Good Arguable Case and continued the Freezing Order for 30 days to allow the Respondent time to amend. An important point to note is that the Freezing Order was to end in 30 days unless it was extended by the court on application by the Respondent. The Appellants have not pointed to any irrelevant consideration that Wallbank J considered in finding that it was just and convenient to continue the Freezing Order and consequently the Appellants could not show that Wallbank J erred in principle in the exercise of his judicial discretion in deciding that it was just and convenient to continue the Freezing Order. Consequently, this ground of appeal also fails.

Issues 10 and 11 - Undertaking as to Damages and Fortification
The Appellants' Submissions on Undertaking as to Damages

[114] The Appellants submit that the Freezing Order and the November Order were made even though there is a total absence of any meaningful undertaking by the Respondent. The Appellants contend that although the Respondent suggests that the Tensigma shares are a relevant asset owned by him, these shares are to be entirely disregarded in the context of the undertaking as to damages to meet losses of third parties. The Appellants also contend that the only other asset known to exist

[42] Ibid.
[43] Ibid at 209.

is or was US$40,000.00 and that this amount is so insignificant when considered against the likely quantum of losses as to amount to nothing.

[115] The Appellants submit that the Freezing Order and the November Order therefore had and have no meaningful undertakings as to damages and that the Respondent has no assets against which the undertaking given could be enforced. The Appellants also submit that at the *ex parte* hearing the Respondent appears to have relied entirely on **Allen and others v Jambo Holdings Limited and others**[44] ("**Jambo Holdings**") to the effect that a poor man should not be denied relief but that this is not the test – the undertaking is to provide protection for an innocent party who suffers loss. The Appellants contend that Wallbank J failed to have proper regard to the issue of the lack of undertaking and the absence of merits because on the date of the November Hearing, the Respondent did not have a good arguable case on the pleadings.

[116] The Appellants submit that Wallbank J failed to consider these points and the principles relating to meaningless undertakings when deciding whether to grant the Freezing Order and to continue it in the November Order. The Appellants also submit that Wallbank J granted the November Order at a time when no claim at all existed and any amendment to the claim was speculative. The Appellants contend that, in doing so, Wallbank J left any third party, or indeed Tensigma if it had existed at the time, totally unprotected and these issues are simply not addressed or considered in the ruling of Wallbank J.

The Respondent's Submissions on Undertaking as to Damages

[117] The Respondent submits that the burden of proof falls on the Appellants to demonstrate there will be a general risk of loss which justifies fortification citing **Sinclair Investment Holdings v Cushnie**[45] The Respondent also submits that it is notable that any losses that the Appellants claim may be suffered because of the

[44] [1980] 1 WLR 1252.
[45] [2004] EWHC 218 (Ch).

November Order are losses that would be suffered by DAE rather than the Appellants. The Respondent contends that there is no evidence before this Court suggesting that the Appellants will suffer any loss because of the November Order. The Respondent also contends that vague assertions of potential loss of profits do not demonstrate to the "sufficient standard" that any trading undertaken would have been profitable, citing **Fiona Trust & Holding Corp v Privalov**[46].

[118] The Respondent submits that the court has a wide discretion to consider the Respondent's financial situation when considering whether to grant a freezing injunction, "[b]ut, as Lord Denning MR has pointed out, questions of financial stability ought not to affect the position in regard to what is the essential justice of the case as between the parties", citing (**Allen v Jambo Holdings Ltd**[47] [(per Shaw LJ)). The Respondent also submits that Wallbank J correctly applied the wide discretion afforded to the court, and that when deciding whether or not to grant the Freezing Order and to continue it, the Wallbank J had regard to the course which seemed most likely to produce a just result, or to minimize the risk of an unjust result, citing **Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment (Interim Injunction)**[48].

Appellants' Submissions on Fortification

[119] The Appellants submit that Wallbank J was wrong to refuse to order fortification and that there was clear evidence on which to make an "intelligent estimate" of any potential loss. The Appellants submit that the evidence of Mr. Svirsky shows approximately US$5.8 million in respect of losses and indicates serious levels of business disruption. The Appellants also submit that with any business disruption, it is extremely difficult to determine the exact figure for losses but that they would be substantial. The Appellants contend that, on a very conservative analysis and "intelligent estimate", the figure for fortification should not be less than US$10 million. The Appellants further contend that Wallbank J failed to give any or any proper weight

[46] [2016] EWHC 2163 (Comm).
[47] [1980] 1 W.L.R. 1252, 1257.
[48] [2003] UKPC 63.

to the evidence advanced by the Appellants and failed properly to apply the relevant principles.

The Respondent's Submission on Fortification

[120] The Respondent submits that Wallbank J was correct to decline to order fortification, which he did on the basis that he could not make an intelligent estimate of the likely amount of loss. The Respondent also submits that the Appellants themselves admit in their skeleton submissions that it is "extremely difficult to place any kind of exact figure on the losses". The Respondent contends that Wallbank J accepted that there would be some loss to the Appellants but failed to grant fortification because the Appellants had failed to provide evidence of historical revenue. The Respondent also contends that Wallbank J had no evidence before him that the Appellants were making anything close to the figures suggested by the Appellants; and that Wallbank J correctly asked: "what kind of magical circumstances would suddenly transform their rather more meager fortunes into great wealth"? The Respondent submits that Wallbank J exercised his discretion with the benefit of the evidence before him and that the Appellants cannot criticize Wallbank J for failing to take account evidence that the Appellants failed to place before him.

Discussion

[121] This Court in **Von Der Heydt Invest SA v Multibank FX International Corporation**[49] ("**Multibank II**") recently considered the applicable principles relating to undertakings, stating as follows:

> **"General principles about undertakings and fortification**
>
> [16] The basic rules relating to interim injunctions and cross undertakings in damages are well known but I will refer to them briefly. The applicant for an interim injunction such as a worldwide freezing order is usually required to give the court an undertaking to compensate persons suffering losses as a result of the injunction if the court later finds that the injunction should not have been granted. The undertaking is the price that the applicant pays for being granted interim injunctive relief. The undertaking provides the defendant with a procedure to recover losses suffered as a result of an interim injunction that should not have been granted. The principle has

[49] BVIHCVAP2022/0008 (delivered 21st February 2023, unreported).

statutory force in the Eastern Caribbean in rule 17.4(2) of the [CPR] which provides that '[u]nless the court otherwise directs, a party applying for an interim order under this rule must undertake to abide by any order as to damages caused by the granting or extension of the order'.

[17] Fortification is not automatic. Freezing injunctions are usually granted without fortification if the court accepts a cross undertaking in damages offered by the claimant. But if the claimant does not have sufficient assets within the jurisdiction, and/or for any other sufficient reason, the court may order the claimant to fortify the undertaking by paying into court a sum of money estimated by reference to the likely amount of loss that the applicant will suffer as a result of the injunction, or by providing some other form of security such as a bank guarantee. Conversely, if the claimant has sufficient assets in the jurisdiction the court is not likely to order fortification.

[18] The cases establish that there are three criteria that should be met before the court will order fortification. The criteria are cumulative and the applicant must satisfy all three. Only then will the court be required to consider the discretionary factors and decide whether fortification should be ordered. The three criteria are set out in Energy Venture Partners Ltd v Malabu Oil and Gas Ltd ("Malabu Gas") and repeated by Calver J in PJSC National Bank Trust and another v Boris Mints and others ("Mints"). I will refer in this judgment to the three criteria as "the Malabu/Mints test". Calver J set out the criteria as follows-

> 'In considering whether to exercise its discretion to order fortification, the Court will take the three criteria – which are inextricably linked factors – into account...
>
> (a)Can the applicant show a sufficient level of risk of loss to require (further) fortification, which involves showing a good arguable case to that effect?
>
> (b)Can the applicant show, to the standard of a good arguable case, that the loss has been or is likely to be caused by the granting of the injunction?
>
> (c) Is there sufficient evidence to allow an intelligent estimate of the quantum of the losses to be made?'"

[122] Wallbank J in his ruling noted that, in relation to fortification, the general rule is that set out in **Energy Venture Partners Ltd v Malabu Oil and Gas Ltd**[50] ("**Malabu**") which drew in particular upon the judgment of Briggs J in **Jirehouse Capital v Beller**[51]. Wallbank J then proceeded to quote in essence from paragraph [53] of **Malabu** as follows:

[50] [2015] 1 WLR 2309.

[51] [2008] EWHC 725 (Ch).

> "53 It is completely contrary to principle to require proof on the balance of probabilities on such an application and so to do would encourage wasteful satellite litigation. In my judgment Briggs J was correct in Jirehouse Capital v Beller [2008] EWHC 725 (Ch) to summarise the principles as he did at para 25:
>
> > 'Broadly speaking, they require an intelligent estimate to be made of the likely amount of any loss which may be suffered by the applicant for fortification (here the defendants) by reason of the making of an interim order. They require the court to ascertain whether there is a sufficient level of risk of loss to require fortification. They require that the loss has been or is likely to be caused by the granting of the injunction.'
>
> The three requirements are of course inextricably linked. The principles could equally be summarised, as Hamblen J did at para 31 of his judgment, as a requirement that the applicant for fortification show a good arguable case for it. In this interlocutory context, showing a sufficient level of risk of loss to require fortification is synonymous with showing a good arguable case to that effect. In some cases the assessment of loss may at the interlocutory stage be difficult. It is in such cases that an intelligent estimate is required. An intelligent estimate will be informed and realistic although it may not be entirely scientific."

[123] During the hearing of the *ex parte* application, Wallbank J inquired about undertakings and counsel for the Respondent replied that it would be included in the draft order for Wallbank J's consideration. The following undertaking as to damages was included in Paragraphs 1 and 5 of the schedule to the Freezing Order entitled, "Undertakings Given to the Court by the Applicant":

> (1) If the court later finds that paragraphs 1 – 18 of this Order has caused loss to the [Appellants], and decides that the [Appellants] should be compensated for that loss, the [Respondent] will comply with any order the court may make.
>
> (2) The [Respondent] will pay the reasonable costs of anyone other than the [Appellants] which have been incurred as a result of this order including the costs of finding out whether that person holds any of Tensigma's assets and if the court later finds has caused such person loss, and decides that such person should be compensated for that loss, the [Respondent] will comply with any order the court may make.

[124] It is accepted that the evidence of the Respondent at the *ex parte* hearing and during the November Hearing is that he has US$40,000.00 in cash and the value of his shareholding in Tensigma. Lord Denning MR in **Jambo Holdings** stated (at pp 1256-1257) that:

> "There is one other point that I must mention. It is said that whenever a Mareva injunction is granted the plaintiff has to give the cross-undertaking in damages. Suppose the widow should lose this case altogether. She is legally aided. Her undertaking is worth nothing. I would not assent to that argument. As Shaw L.J. said in the course of the argument, a legally aided plaintiff is by our statutes not to be in any worse position by reason of being legally aided than any other plaintiff would be. I do not see why a poor plaintiff should be denied a Mareva injunction just because he is poor, whereas a rich plaintiff would get it. One has to look at these matters broadly. As a matter of convenience, balancing one side against the other, it seems to me that an injunction should go to restrain the removal of this aircraft."

[125] In **Jambo Holdings**, the claimant was a widow who brought a claim in negligence for personal injury against the defendant company following the death of her husband in an accident involving an aircraft that was owned by the first defendant. Templeman LJ accepted that, given the financial situation of the claimant, to deny an injunction in these circumstances would be to deny a measure of assurance to the claimant which she is entitled to have. The first point that needs to be emphasized is that the undertaking as to damages is *to the court* and not to respondent to the application for a freezing order. The Court of Appeal in England and Wales in **Cheltenham & Gloucester Building Society v Ricketts and others**[52] stated (at pp 1551-1552) that:

> "When granting an injunction of an interlocutory nature it is the usual practice of the court to require the plaintiff to give an undertaking as to damages. The use of the word "damages" is perhaps inappropriate because it might suggest that the grant of the injunction involved a breach of some legal or equitable rights of the defendant. The undertaking is given to the court and is intended to provide a method of compensating the party enjoined if it subsequently appears that the injunction was wrongly granted. In the course of the argument we were helpfully referred to a number of cases relating to the history of cross-undertakings and their method of enforcement and also relating to the circumstances in which enforcement

52 [1993] 1 WLR 1545.

will not be granted. Many of these cases are referred to in the judgment of Peter Gibson L.J. which I have had the advantage of reading in draft.

…

From the authorities the following guidance can be extracted as to the enforcement of a cross-undertaking in damages.

> (1) Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant. The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does. (2) The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted. (3) The undertaking is not given to the enjoined but to the court. (4) In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do so. (5) The time at which the court should determine whether or not the interlocutory injunction should have been granted will vary from case to case. It is important to underline the fact that the question whether the undertaking should be enforced is a separate question from the question whether the injunction should be discharged or continued. (6) In many cases injunctions will remain in being until the trial and in such cases the propriety of its original grant and the question of the enforcement of the undertaking will not be considered before the conclusion of the trial."

[126] Undertakings as to damages are now the norm in freezing orders and is considered the price that the applicant must pay for the grant of the injunction. The court has a discretion as to whether to require an applicant to give such an undertaking and may even dispense with the requirement as happened in **Jambo Holdings**. If the interim injunction is later discharged, the undertaking can be enforced although the court still retains a discretion not to do so. Although the decision of the Court of Appeal was overruled by the House of Lords in **Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd**[53] the following statement of Dillon LJ (at p 243) is instructive:

"The history of the cross-undertaking in damages is conveniently set out by Lord Diplock in his speech in F. Hoffmann-La Roche & Co. A.G. v. Secretary

[53] [1993] AC 227.

of State for Trade and Industry [1975] A.C. 295, 360E-361H. Its importance is further underlined in Lord Diplock's speech in American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396, 407-409. As Lord Diplock stated in the Hoffmann-La Roche case, at p. 360F, by the end of the 19th century, "the insertion of such an undertaking in all orders for interim injunctions granted in litigation between subject and subject had become a matter of course."

Even in Allen v. Jambo Holdings Ltd. [1980] 1 W.L.R. 1252, where an interlocutory injunction had been obtained by a legally aided plaintiff who had very few assets to support the cross-undertaking and the defendants applied, albeit unsuccessfully, for the injunction to be discharged on the ground of the plaintiff's impecuniosity, the cross-undertaking was given for what it was worth. So far as my own experience goes, it was the universal practice, as between subjects, to require the cross-undertaking however overwhelmingly strong the plaintiff's case might appear to be, since it was not the function of the court, hearing an application for an interlocutory injunction, to anticipate the outcome of the trial. A plaintiff who was not willing to give the cross-undertaking could not obtain an interlocutory injunction; he would have to press for a speedy trial without interim relief, or, if circumstances permitted, obtain a judgment under R.S.C., Ord. 14, or a default judgment or judgment on admissions."

[127] Such undertakings are commonplace in the Commercial Court and their inclusion in freezing orders is not usually questioned. It cannot be said that Wallbank J erred in the exercise of his discretion to allow the Respondent to give the undertaking in the circumstances mentioned above.

[128] Where a respondent believes that the undertaking given to the court by an applicant might be worthless, the respondent can apply to the court for an order for fortification which will now be examined. Wallbank J accepted that it was likely that loss has been or is likely to be caused by the Freezing Order and that a lot of money, approximately $22 million, seems to be tied up in bank accounts or wallets or whatever the vehicle in which the Cryptocurrency is held[54]; and that money clearly is restricted from being used and traded and being used to advance and make more money so there is likely the risk of loss by the Freezing Order. The reasoning of Wallbank J in refusing to make an order for fortification is as follows:

[54] Page 203 of the transcript of proceedings.

> "But it doesn't really help me to say that it could be many millions of dollars or a lot of millions of dollars. I have no idea if the various corporate entities which these gentlemen have got have been making that sort of money historically. If not, then why would I expect them to make that sort of money in the future. What kind of magical circumstances would suddenly transform their rather more meager fortunes into great wealth.
>
> So what I take from the material before the Court in relation to the risk of loss is that certainly a scientific estimate cannot be made, and that an intelligent estimate is also difficult. Equally I have to bear in mind that it would appear that, from the other documentation, that those behind making or preparing the evidence, i.e. the Second and Third Respondent, appear to have some history of dishonesty here. I'm making no finding in that regard except I'm just taking their assertions as to what they think the loss might be with a degree of scepticism. A considerable degree of scepticism I might add.
>
> So in the those circumstances I cannot make an intelligent estimate of the likely amount of loss. And since I can't make an intelligent estimate of the likely amount of loss, I decline, I would decline to order fortification."

[129] Wallbank J had in mind the three (3) criteria as outlined in **Malabu**, finding that, although there was sufficient level of risk of loss to require fortification and that it is likely that loss has been or is likely to be caused by continuing the Freezing Order, there was insufficient evidence to allow him to make an intelligent estimate of the quantum of the losses. It must be remembered in accordance with **Malabu** all three criteria must be established before the court can proceed to consider the discretionary factors to decide whether fortification should be ordered. Consequently, Wallbank J committed no error in principle in not making an order for fortification because there was insufficient information to enable him to make an intelligent estimate of the quantum of any potential losses. The Appellants have not shown that Wallbank J erred in the exercise of his discretion in not making an order for fortification. This ground of appeal therefore fails.

Issue 12 - Course of Business Exception
The Appellants' Submissions

[130] The Appellants submit that neither the Freezing Order nor the November Order provides any or any proper ordinary course of business exception in favour of

Tensigma or third parties. The Appellants further submit that a freezing order is not meant to provide security and that there was nothing before Wallbank J at either the *ex parte* hearing or the November Hearing to suggest that the Respondent was even a creditor of Tensigma or had any claims against Tensigma. The Appellants contend that the Respondent has no claim to the Cryptocurrency in the accounts or the wallets whether proprietary or unsecured and that even on his own case the Respondent is only an alleged shareholder. The Appellants further contend that the Respondent had no entitlement to have prevented Tensigma using its assets (if it had owned any) in the ordinary course of business. The Appellants submit that the Freezing Order impacts and prejudices third parties claiming ownership from using their funds. The Appellants further submit that there was a failure by the Respondent to explain to Wallbank J at the *ex parte* hearing the real effect of the Freezing Order and how it departed from what might be described as a typical freezing order.

The Respondent's Submissions

[131] The Respondent submits that the Freezing Order expressly provided for an ordinary course of business exception of US$100,000.00 and that since the Freezing Order was made, the Appellants have made no application to vary the Freezing Order to increase the business exception and have not approached the Respondent to propose a variation of that aspect of the Freezing Order. The Respondent also submits that such conduct is only explicable if the Appellants are (contrary to their protestations in the appeal) unconcerned with the ordinary course of business exception provided for in the Freezing Order.

Discussion

[132] It will be remembered that paragraph 3 of the Freezing Order provides that:

> "3. **Save for $100,000**, until the Return Date, or further order, to be used for the ordinary business purposes of [Tensigma] the Second and Third Respondents and persons unknown must not in any way dispose of, deal with or diminish the value of any worldwide assets of Tensigma up to the value of US$22,850,000." (Emphasis added)

[133] Wallbank J explained[55] the business exception in the following manner:

> "Then you get to the point about that there has to be a course of business exception, and I agree that there should be. And the course of business exception at the ex parte hearing had been rather crudely thought about, and it was thought that the Tensigma could continue to operate, you know, with about a hundred thousand dollars available cash flow for it to do so per month.
> For same reason that didn't end up in the sealed version of the Order. Nonetheless, that was the way it was supposed to be dealt with. And in essence the ex parte injunction order can be read as injuncting the assets of Tensigma itself."

[134] The Court of Appeal of England and Wales in **Organic Grape Spirit Ltd v Nueva IQT SL**[56] stated (at [14]-[17]) that:

> **"Freezing orders and business transactions: some principles**
>
> 14. In the case from which "Mareva" injunctions took their name, Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva) [1980] 1 All ER 213, Lord Denning MR spoke at 215 of the Court having jurisdiction to grant an injunction if "there is a danger that the debtor may dispose of his assets so as to defeat [a debt] before judgment". Such statements tended to suggest that injunctive relief was available only where there was what was termed in one case "nefarious intent". However, in Ninemia Maritime Corp v Trave Schiffahrts GmbH (The Niedersachsen) [1983] 1 WLR 1412, the Court of Appeal held at 1422 that "the test is whether … the court concludes, on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied". As Christopher Clarke J said in TTMI Ltd v ASM Shipping Ltd of India [2005] EWHC 2666 (Comm) at paragraph 25, "it is not necessary to establish that the defendant is likely to act with the object of putting his assets beyond reach".
>
> 15. However, the Court will not restrain all conduct which could prejudice a defendant's ability to satisfy a judgment. Absent a proprietary claim, a defendant's assets belong to him and a freezing order is not even intended to give a claimant security for what he alleges to be due to him. The Court's concern is with unjustified disposals. In Perry v Princess International Sales & Services Ltd [2005] EWHC 2042, Christopher Clarke J said that, to his mind, "[d]issipation implies some use of his assets by the person sought to be enjoined, in a manner which is, in the circumstances, improper or unjustifiable". Likewise, in a passage approved by the Court of Appeal in Lakatamia Shipping Co Ltd v Morimoto [2019] EWCA Civ 2203 at

[55] Pages 205-207 of the transcript of proceedings.
[56] [2020] EWCA Civ 999.

paragraph 34, Popplewell J said in Fundo Soberano de Angola v dos Santos [2018] EWHC 2199 (Comm) at paragraph 86, "What must be threatened is unjustified dissipation".

16. Consistently with that approach, a defendant will not be prevented from spending on ordinary living expenses. The fact that such expenditure will reduce a defendant's assets does not matter. The prospect of a defendant's assets being depleted in this way will not justify the making of a freezing order and, where a freezing order is granted because there is other evidence of a risk of dissipation, the order should expressly exempt payments in respect of living expenses. In Vneshprombank LLC v Bedzhamov [2019] EWCA Civ 1992, [2020] 1 All ER (Comm) 911, Males LJ concluded in paragraph 67 that "[a] defendant should be permitted to spend by way of ordinary living expenses in accordance with his actual past standard of living".

17. Expenditure on business need not be regarded as unjustified, either. A freezing order against a trading company should normally include a provision stating that it does not prohibit dealing with or disposing of assets in the "ordinary and proper course of business". In Halifax plc v Chandler [2001] EWCA Civ 1750, the Court of Appeal approved at paragraphs 19 and 20 a passage from what is now Gee on Commercial Injunctions, 6th ed., in which it is said that "there can be no objection in principle to the defendant's dealing in the ordinary way with his business and with his other creditors, even if the effect of such dealings is to render the injunction of no practical value". Clarke LJ observed in paragraph 18:

> "In cases of what may be called ordinary business expenses the court does not usually consider whether the business venture is reasonable, or indeed whether particular business expenses are reasonable. Nor does it balance the defendant's case that he should be permitted to spend such monies against the strength of the claimant's case, or indeed take into consideration the fact that any monies spent by the defendants will not be available to the claimant if it obtains judgment."

[135] In the November Order, Wallbank J extended the Freezing Order for a period of 30 days and explained in his ruling that the US$100,000.00 "continues to be the course of business exception bearing in mind, of course, that Tensigma isn't doing any business."[57] Wallbank J explained that paragraph 3 of the Freezing Order was intended to be US$100,000.00 per month but that was not reflected in the Freezing Order. The Respondent's notes of the *ex parte* hearing confirms that Wallbank J had

[57] Page 208 of the transcript of proceedings.

intended that the sum to have been US$100,000.00 per month until the return date. Although this was noted by Wallbank J at the November Hearing, Wallbank J did not amend paragraph 3 of the Freezing Order to correct it. Any change was perhaps unnecessary because the Freezing Order was to last a period of 30 days in accordance with paragraph 1 of the November Order.

[136] At the November Hearing, the Appellants did not apply to vary the sum of US$100,000.00 as the ordinary business exception. No evidence was provided to the court to show that this amount was insufficient in any circumstances. That was not surprising since the Appellants' principal argument for the discharge of the Freezing Order was that Tensigma was dissolved and did not exist on the date of the Freezing Order. If Tensigma did not exist, an ordinary business exception was redundant. The Appellants main challenge under this head was that neither the Freezing Order nor the November Order provides any or any proper ordinary course of business exception in favour of Tensigma or third parties potentially affected. A clear reading of paragraph 3 of the Freezing Order reveals this to be incorrect and if in fact no ordinary course of business exception was included in the Freezing Order no attempt was made by the Appellants to vary paragraph 3 before the November Hearing or thereafter. This is sufficient to dispose of this ground of appeal.

Issue 13 – Natural Justice
The Appellants' Submissions

[137] The Appellants submit that at no time during submissions at the November Hearing did Wallbank J indicate that he was contemplating making the November Order. The Appellants also submit that the Respondent did not even request such an order. The Appellants state that it was only during the Respondent's brief final submissions in reply that Wallbank J asked if the Respondent might consider amending the claim and even then Wallbank J did not indicate that he was contemplating making the November Order. The Appellants also state that it was only during his ruling that the intentions of Wallbank J emerged, and he did not invite the Appellants to make any submissions as to whether the November Order should not be made. The Appellants

submits that this was procedurally irregular and is another reason why the November Order should be discharged.

The Respondent's Submissions

[138] The Respondent submits that, first, Wallbank J invited submissions: (i) from counsel for the Respondent regarding amending the pleadings because Tensigma had been dissolved; and (ii) from both parties on the applicability of paragraphs 101 and 102 of **Broad Idea**; and, second, it was perfectly appropriate for Wallbank J to invite counsel to make submissions on issues he thought appropriate. The Respondent further submits that counsel for both the Appellants and the Respondent had the opportunity to make submissions on the form of order to be made by Wallbank J.

Discussion

[139] It bears repeating that the applications before Wallbank J at the November Hearing were as follows: (1) the Respondent's applications *to continue* and to vary the Freezing Order; and (2) the Appellants' application to discharge the Freezing Order. The first paragraph of the November Order expressly stated (at [1]) that:

> (1) The Freezing Order shall continue until 4pm on 10 December 2021 (the "Discharge Date") at which point it shall be automatically discharged unless a new Freezing Order (the "New Freezing Order") has been ordered by the Court subject to paragraph 3.

[140] There can be no debate that Wallbank J had before him an application *to continue* the Freezing Order, and he gave an order *continuing* the freezing Order for a period that differed from that application and for reasons that were different from the ones expressly stated in that application. What, however, is important is that the approach that Wallbank J adopted was foreshadowed in his interventions with counsel for the Respondent whose application to continue the Freezing Order he was there considering. Wallbank J after making the November Order heard counsel for the Appellants at some length on the import of the order and Wallbank J engaged both

counsel for the Appellants and counsel for the Respondent on aspects of the November Order and clarification of aspects of the Freezing Order.

[141] In my view, the November Order was a form of order that fell within the broad discretion allowed to Wallbank J based on the applications that were before him. It cannot plausibly be said that the Appellants were not heard on the Respondent's application to continue the Freezing Order; they merely disagree with not only the decision of Wallbank J to continue the order but also on the bases on which he did so. These submissions cannot ground a natural justice challenge when the Appellants were given an opportunity at the November Hearing to, and did, respond to the Respondent's application to continue the Freezing Order. This ground of appeal therefore has no merit.

Issue 14 – Uncertainty of the Freezing Order
The Appellants' Submissions

[142] The Appellants submit that an order should not be made it its terms are unclear, citing **Lawrence v David Ashton**[58] and **CEF Holdings v Mundey**[59]. The Appellants further submit that the Freezing Order which was continued by the November Order is unclear in respect of the following: (1) the parties restrained; (2) the assets affected; (3) the application of paragraph 4 of the Freezing Order; and (4) the application of the Freezing Order in respect of Tensigma, a company which does not exist.

The Respondent's Submissions

[143] The Respondent submits that neither the Freezing Order nor the November Order are unclear in their scope or application. The Respondent also submits that to the extent that there was any uncertainty, the position was clarified by Wallbank J at the end of the November Hearing. Wallbank J explained that the effect of the Freezing Order is that Tensigma's assets are those listed at paragraph 5, and that "if the [Appellants] have transferred any of those assets into another vehicle or into their

[58] [1989] ICR 123.
[59] [2012] EWHC 1524.

own names or anywhere else, then they are caught assets."[60] The Respondent contends that the Appellants' position gives rise to a fraudster's charter, in that a dishonest shareholder could wrongfully transfer a company's assets to another entity under their control, procure the secret dissolution of the company, and dissipate the assets with impunity, while being safe in the knowledge that nobody could ever freeze those assets. The Respondent also states that the Freezing Order is perfectly clear, and this explains why it has been serving its purpose since its inception.

Discussion

[144] Wallbank J, after he gave his ruling at the November Hearing, heard Counsel for both parties on aspects of the Freezing Order. The following interaction took place between Counsel for the Appellants and Wallbank J:[61]

> "MR. HAQUE: My Lord, just on that point and just to be clear to make sure that Mr. Donin and Mr. Svirsky don't take that answer as being that, well, there are assets in DAE and, therefore, they can disburse them, because I think you said that the previous order actually covers their actions as well so they can't procure the removal of those assets from the DAE.
> …
> Yes, I will say, it's just to be very clear that the effect today is not to allow Mr. Donin or Mr. Svirsky to dissipate those assets which are listed at paragraph 5.
> THE COURT: Absolutely. And, in fact, you get that from paragraph 4. What you have, the scheme of this just to be very clear, is that save for a hundred thousand dollars until further order, then which can be used for the ordinary business of Tensigma --
> MR. CHAISTY: There isn't a Tensigma.
> THE COURT: Okay. So that won't cause anybody any difficulty then.
> "The [Appellants] and persons unknown must not", and that presumably means anybody who's communicated a copy of this Order and who might have assets, "must not in anyway dispose of, deal with or diminish the value of any of the worldwide assets of Tensigma up to the value of 22,850,000." So that's clear.
> Then paragraph 4 says:
> "Paragraph 3 above applies to all of Tensigma's worldwide assets whether or not they are in its own name and whether or not they are solely or jointly owned. For the purpose of this Order, Tensigma's assets include any asset which it has the power directly or indirectly to dispose of or deal with as if it were its own. Tensigma is to be regarded as having such power. The third

[60] Page 217 of the transcript of proceedings.
[61] Ibid at 215-217.

party holds or controls a net of the asset in accordance with its direct or indirect instructions."
Then it goes and says what Tensigma's assets include in paragraph 5. And the way I interpret that is that if the Second and Third Respondents have transferred any of those assets into another vehicle or into their own names or anywhere else, then they are caught assets.
MR. HAQUE: Grateful for the clarification, My Lord."

[145] It seems clear to me that the purpose of the exchange between Counsel for the Appellants and Wallbank J is to clarify aspects of the Freezing Order, in particular, the scope of paragraphs 4 and 5. The very matters about which the Appellants now complain on appeal were addressed by Wallbank J in the exchange quoted above and in the Freezing Order, namely:

(1) unclear as to the parties restrained (Wallbank J: "… *that presumably means anybody who's communicated a copy of this Order and who might have assets [of Tensigma])";*

(2) the assets affected (Wallbank J: "*For the purpose of this Order Tensigma's assets include any asset which it has the power directly or indirectly to dispose of or deal with as if it were its own*");

(3) the application of paragraph 4 of the Freezing Order ("*Paragraph 3 above applies to all of Tensigma's worldwide assets whether or not they are in its own name and whether or not they are solely or jointly owned*"; and

(4) the application of the Freezing Order in respect of Tensigma, a company which does not exist (Wallbank J: "Okay. So that won't cause anybody any difficulty then").

[146] I therefore agree with the Respondent's submission that the Freezing Order is clear and any uncertainty that might have existed was resolved by Wallbank J at the end of the November Hearing. This ground of appeal also fails.

Issue 15 – Duty of Full and Frank Disclosure
The Appellants' Submissions

[147] The Appellants submit that the Freezing Order was obtained in circumstances where there were numerous failures by the Respondent to provide full and frank disclosure of highly material circumstances and quoted the following instances from their written submissions for the November Hearing:

> "75. There have been a number of findings which individually and cumulatively are of sufficient seriousness to justify the discharge of the injunction and its non-continuance - reference is made to:
>
> (1) The failure to address the impact of the Order on [Tensigma] and any third party which was entitled to the assets and in particular the failure to address the effect and impact of paragraph 5 as a deeming provision and the positions of third-parties;
>
> (2) The failure to analyse the position of the Applicant as a shareholder as distinct from [Tensigma] and the case of Posgate;
>
> (3) The failure to analyse and address the Court fully in respect of issues arising from Allan v. Jambo and the failure to carry out any meaningful analysis of the merits;
>
> (4) The failure to address correctly the issue of risk of dissipation in the context of the claim for purchase orders;
>
> (5) The failure to explain how the Applicant is funding this litigation;
>
> (6) The failure to address issues of reflective loss and derivative claims;
>
> (7) The failure to inform the Court that no checks had been made as to the status of [Tensigma];
>
> (8) The failure to raise with the Judge the consequence of accepting that it was not appropriate to grant the derivative application without notice but nonetheless granting in effect the order over assets;
>
> (9) The failure to address adequately the exception of ordinary course of business issues.
>
> …"

[148] The Appellants submit that these failures were serious enough to justify the refusal of any further relief and that Wallbank J failed to consider them. The Appellants also submit that Wallbank J failed to consider that the Respondent knew, at the latest

since August when the Appellants' evidence was filed, that Tensigma had been dissolved since March but did nothing to address the issue. The Appellants also contend that this Court should carry out a balancing exercise if it feels that there has been a breach of duty, deliberate or not, and consider whether to refuse any further relief or make appropriate costs orders.

The Respondent's Submissions

[149] The Respondent submits that he has complied with his duties of full and frank disclosure and that Wallbank J was correct to reject the Appellants' argument that thousands of pages of Telegram messages were fabricated.

Discussion

[150] This Court in **Multibank** summarised the applicable principles relating to nondisclosure in the context of freezing orders as follows:

> **"Material non-disclosure**
>
> [103] The principles relating to the failure by an applicant applying for an injunction without notice to give full and frank disclosure to the party to be enjoined, are well known and have been dealt with by this Court on numerous occasions. The locus classicus is **Brink's Mat Ltd v Elcombe and others** [[1988] 1 WLR 1350] where Ralph Gibson LJ set out the principles which were quoted with approval by Jack J in his judgment at paragraph [99]. Mr. Malek KC set out in paragraph 127 of his submissions a good summary of the basic principles in the following terms:
>
>> "127. The principles relating to full and frank disclosure and fair presentation will again be familiar to the Court. The Judge identified the principles, as follows:
>>
>> (1) The applicant is required to make a full and fair disclosure of all material facts;
>>
>> (2) The material facts are those which it is material for the Judge to know in determining the application, and materiality is to be determined by the Court [not counsel];
>>
>> (3) The applicant must make proper enquiries before making the application;
>>
>> (4) An applicant who has obtained an order on the basis of material non- disclosure will generally be deprived of the

benefit of that order (though not every non-disclosure will result in the discharge of the injunction); and

(5) Whether a non-disclosure is material depends on the importance of the fact to the issues to be decided by the judge on the ex parte application."

[104] Jack J also referred to the observations of Toulson J in **Crown Resources AG v Vinogradsky and others** [[2001] Lexis Citation 08] relating to non-disclosure in the context of applications for freezing injunctions which I find are apposite to this case. Toulson J (as he then was) said:

> "Starting from that basis, issues of non-disclosure or abuse of process in relation to the operation of a freezing order ought to be capable of being dealt with quite concisely. Speaking in general terms, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non- disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself."

To the same effect is the opinion of Balcombe LJ in Brink's Mat Ltd where he said:

> "By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly, in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the Rex v. Kensington Income Tax Commissioners [1917] 1 K.B. 486 principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience." (some internal citations omitted).

[151] Freezing orders are invariably made without notice to the other party. The rationale for this is that the giving of notice may undermine the very purpose of applying for the order in the first place – the respondent may dissipate the asset or assets at issue. Where an application for a freezing order is made without notice, the applicant will be under a duty to make full and frank disclosure to the court. In **PJSC Commercial Bank Privatbank v Kolomoisky and others**[62], the Court of Appeal of England and Wales stated (at [252]-[253]) that:

> "252. More recently, Males J (as he then was) drew attention to the following points in **National Bank Trust v Yurov** [2016] EWHC 1913 (Comm) (at [18]):
>
> > 'a. A fact is material if it is one which the judge would need (or wish) to take into account when deciding whether to make the freezing order.
> > b. Failure to disclose a material fact will sometimes require immediate discharge of the order. This is likely to be the court's starting point, at least when the failure is substantial or deliberate.
> > c. Nevertheless the court has a discretion to continue the injunction (or to impose a fresh injunction) despite a failure of disclosure; although it has been said that this discretion should be exercised sparingly, the overriding consideration will always be the interests of justice.
> > d. In considering where the interests of justice lie, it is necessary to take account of all the circumstances of the case including (without attempting an exhaustive list) (i) the importance of the fact not disclosed to the issues which the judge making the freezing order had to decide; (ii) the need to encourage proper compliance with the need for full and frank disclosure and to deter non-compliance; (iii) whether or to what extent the failure to disclose was culpable; and (iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts.
> > e. The interests of justice may sometimes require that a freezing order be continued, but that a failure of disclosure be marked in some other way, for example by a suitable order as to costs."
>
> 253. Males J further said this (at [84]):
>
> > 'In this context a failure may be regarded as 'innocent' if the fact in question was not known to the applicant or its relevance was not perceived. That was the sense in which the word was used by Ralph Gibson LJ in Brink's Mat at 1357D and the judgments of

62 [2020] Ch 783.

> Balcombe LJ at 1358G and 1360H were to the same effect. Moreover in Behbehani v Salem [1989] 1 WLR 723 Woolf LJ expressly rejected at 728F-G a submission that a failure could not be regarded as innocent if the fact in question was not recognised as material but ought to have been, while Nourse LJ observed at 736F that 'in the Brink's Mat case all three members of the court defined an innocent non-disclosure as one where there was no intention to omit or withhold information which was thought to be material'. This formulation would rightly include as culpable blind eye knowledge, that is to say a decision not to investigate for fear of discovering facts which would have to be disclosed, but that is not this case. I am satisfied that all three failures in this case were innocent in the sense described."

[152] Wallbank J did not directly address the issue of non-disclosure in his ruling. The Appellant cites Gee, **Commercial Injunctions**,[63] for the view that the applicant for a freezing order should make adequate enquiries about the standing of the defendant. As has been already established, when the: (1) Respondent applied for a freezing order; and (2) Freezing Order was made, Tensigma did not exist. The Respondent could hardly be expected to disclose a fact about which he was unaware. In any event, Wallbank J was aware that Tensigma was dissolved on the date of the November Hearing, and this formed the basis of Wallbank J finding that the Respondent had no good arguable case on his pleadings. Even if this Court were to exercise its discretion afresh, there is nothing on the facts or the alleged instances of non-disclosure as outlined by the Appellants that would cause this Court to discharge the Freezing Order. Those instances mentioned by the Appellants are either not relevant to the issue of full and frank disclosure or are facts relevant to the exercise of the discretion by Wallbank J in determining whether to grant the Freezing Order or continue it in the November Order. Considering all the circumstances, the interest of justice demands that the Freezing Order be continued and not discharged. This ground of appeal also fails.

[63] Gee on Commercial Injunctions (7th edition Sweet & Maxwell 2022) 9-008.

Issues 16-17 – The Decision in Yuzu Hair and the Application to Restore Tensigma

The Appellants' Submissions

[153] The Appellants submit that during oral submissions at the December Hearing Wallbank J asked Counsel for the Respondents to respond to the Appellants' submissions on the jurisdiction of the court to make an order concerning a company that did not exist. The Appellants state that the Respondent persuaded Wallbank J that the answer was found in paragraph 102 of **Broad Idea**. The Appellants also state that during submissions Counsel for the Respondent appeared to receive information about a decision of the High Court of England and Wales in **Yuzu Hair**. That decision, the Appellants contend, was neither cited in the Respondent's skeleton argument nor was it provided prior to or during the December Hearing. The Appellants state that **Yuzu Hair** was cited to Wallbank J who was satisfied that he had jurisdiction to grant a freezing order in support of an application to restore a dissolved company. The Appellants submit that they were given no opportunity to review or argue the relevance or otherwise of **Yuzu Hair** and that this amounted to a serious procedural irregularity.

[154] The Appellants submit that **Yuzu Hair** does not support the position adopted by the Respondent and accepted by Wallbank J in the making of the December Order for the following reasons. First, it is a decision of the English High Court and relates to the English Companies Act 2006 and that English case law on issues of restoration have no value in the Territory of the Virgin Islands, citing a decision of the High Court in **Jason Hughes v The Registrar of Corporate Affairs**[64] (at [7]) that: "It is now well established in this Territory that the English authorities on restoration of companies are inapplicable ...".

[155] Second, **Yuzu Hair** can be distinguished as it involved what was in effect an application by a dissolved company for a freezing order against a third party said to have received its assets. The Appellants state that at paragraph 3 the trial judge in

[64] BVIHCOM2020/0078 (delivered 10th September 2020, unreported).

Yuzu Hair noted the difficulties of a non-existent entity making such an application but accepted that could be avoided if the freezing order was made "in the context of the application by the director and shareholder to restore the company" (at [4]). It was held in **Yuzu Hair** that section 37 of the **Senior Courts Act 1982** justified an order "to an applicant in such proceedings in order to freeze assets of someone against whom the company, when it is restored, would have a claim."

[156] The Appellants submit that Tensigma is not, by itself or through the Respondent, applying for a freezing order against anyone and that it is the Respondent who applied for and obtained the Freezing Order against Tensigma and the Appellants. The Appellants further submit that they are only parties in the proceedings because of the gateway arising in respect of the affairs of a Territory of the Virgin Islands company, and if the Territory of the Virgin Islands company does not exist, there is no gateway. The Appellants state that **Yuzu Hair** is not applicable since the Respondent did not seek a freezing order against the assets of any third party, including the Appellants.

The Respondent's Submissions

[157] The Respondent submits that this ground of appeal proceeds on the misconceived basis that Wallbank J, having heard a summary of the **Yuzu Hair** case, relied solely on **Yuzu Hair** in making the December Order. The Respondent further submits that this assumption is wrong because, at the December Hearing, the Appellants argued that Wallbank J had no jurisdiction to make a freezing order in respect of a company that had been dissolved. The Respondent then cites the following exchange between Counsel for the Respondent and Wallbank J at the December Hearing:

> "MR HAQUE QC: No, My Lord, it doesn't because you have jurisdiction over the dissolved company. Why wouldn't you have jurisdiction over a dissolved company? You clearly do. The fact that it's dissolved, My Lord, doesn't affect that and I think – as I say it is difficult to take just readings like this out of context because what you have to see is that here the jurisdiction arises, the technical jurisdiction arises once the Company is restored, but it doesn't stop you having a jurisdiction over a dissolved company. Of course, you do. Because otherwise what would happen is the Company would be dissolved in every case and then the assets will always go despite the Company then being restored.

THE COURT: Would you say that your argument gains strength because, if the Court didn't have jurisdiction over a dissolved company, the Court couldn't restore it?
MR HAQUE QC: Yes, that's quite clear, but it does work that way. There must be something to restore. Clearly you must have the power to do so.
The Court: So even though the Company itself is dissolved and no longer exists, then it could still be dug up and brought back to life.
MR HAQUE QC: That is a restoration.
THE COURT: So some form of jurisdiction, the Court retains some form of jurisdiction over the Company?
MR HAQUE QC: Even when dissolved, it must do.
THE COURT: Now that must be a form of personal jurisdiction.
MR HAQUE QC: Yes. Anything other than that would be very bizarre. I have been through the obvious – Your Lordship must be right, but I think you found a better reason than I was articulating.
THE COURT: All right. And the whole point of this is to stop people who might want to dissipate, go in and dissipating when you say this is a dissipatory scheme and the dissolution was part of a dissipatory scheme. Consequently, it would make a mockery of justice for the Court to stand there with its mouth full of teeth and its hands tied behind its back and unable to move and paralyzed and blocked in the circumstances?
MR HAQUE QC: It's not just what I say, My Lord. It is what you found in your previous judgment."

[158] The Respondent submits that Counsel then addressed Wallbank J once again in relation to the court's jurisdiction to make a freezing order in respect of assets owned by a dissolved company towards the end of the submissions.[65] The Respondent further submits that after Counsel for the Respondent had concluded his submissions, his attention was drawn by his instructing solicitors to the decision of **Yuzu Hair**, which appeared to support the proposition that Counsel had argued for throughout his submissions, and which was summarised for the benefit of Wallbank J. The Respondent states that it was clear, however, from the ruling that the decision of Wallbank J was premised upon the earlier exchanges that Counsel for the Respondent had with Wallbank J and not with brief the summary of the ratio of **Yuzu Hair**. The Respondent then cites the following from the decision of Wallbank J:[66]

"THE COURT: ...Well, first of all, I am not satisfied I have jurisdiction to grant an injunction on an extended basis until trial of the underlying action, but I am satisfied that I have jurisdiction to make an injunction we [sic.] way

[65] Pages 46 and 50 of the transcript of proceedings.
[66] Ibid at 58-60.

> of a freeing [sic.] order in support of an application to restore a company. I am satisfied the Court has statutory jurisdiction to restore a company and, in particular, I am cognizance [sic.] of the fact that when a company is restored to register [sic], it is restored to register [sic] as if it has never been dissolved. It is not to re-create a new company. It is the same company and it is put back on the register as if it has never been dissolved and its assets are returned to it as if it had never been dissolved. Consequently, in some shape or form, the Company continues to exist somewhere. And I'm satisfied that by virtue of the statutory powers vested in the Court, the Court has jurisdiction to restore a company.
>
> I'm also satisfied that the Court has jurisdiction to make freezing orders in support of such an application so that the assets of the Company, such as they might be, once returned to the Company don't find themselves dissipated first.
>
> Mr Haque has put forward an authority for that proposition and I will no doubt, certainly up to that point, I will entirely agree with him.
>
> I see that the application to restore a company not as a stand-alone action, but as an indelible part of the wider intended proceeding. That means that our thinking shouldn't just stop at the restoration or the eventual restoration of the Company. So if it were then to be said, well, I will be thinking of granting an application in respect of an application which you've, granting an application which hasn't actually been made, then that will be wrong because restoring the Company is part and parcel of having this claim brought. At this point I'm not satisfied I can now, without having had the Company restored, grant a longer injunction. Had I had that jurisdiction, I'd be satisfied that it will be in order to do so. I am satisfied though that until such time as the Company, restoration application is determined, I can grant an injunction, and, I think that, as a matter of discretion, being satisfied that I have the jurisdiction, as a matter of discretion, there is a risk of dissipation and I think that it is an appropriate occasion in which to make such an extension injunction."

[159] The Respondent submits that this ground of appeal is fundamentally flawed because Wallbank J did not base his decision on **Yuzu Hair,** but simply agreed with a proposition that Counsel had argued for throughout in his submissions. The Respondent further submits that although Counsel had referred to the **Yuzu Hair** case in support of that proposition, Wallbank J's reference in his ruling to agreeing with Counsel for the Respondent "up to that point" strongly suggests that the Wallbank J disregarded the decision in **Yuzu Hair** in arriving at his decision.

[160] The Respondent submits that Wallbank J would have been entitled to find that the case on appeal falls squarely within the situation contemplated by **Yuzu Hair** for the

following reasons. First, the **Yuzu Hair** case is not "case law on issues of restoration" as suggested by the Appellants; rather, it is a case on the extent of the court's power to grant (or continue) freezing injunctions. Second, Zacaroli J in **Yuzu Hair** considered that he had jurisdiction to make such an order by virtue of section 37(1) of the **United Kingdom Senior Courts Act**. Section 37(1) of the Senior Courts Act 1981 is in substance identical to section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act** from which the court's jurisdiction to grant a freezing injunction derives. The decision of this Court in **Valery Rogalskiy v JSC MCC Eurochem et al**[67] expressly confirmed this point where it was held (at [20]) that:

> "It is now established beyond debate that the courts in England and the British Virgin Islands have a statutory jurisdiction to grant pre-trial freezing injunctions (formerly Mareva injunctions) with ancillary orders relating to disclosure of the defendant's assets. The relevant section in England is section 37(1) of the Supreme Court Act, 1981, subsequently renamed the Senior Courts Act, 1981, ("the 1981 Act"). The equivalent section in the BVI is section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act"

[161] Third, as is acknowledged by the Appellants in their skeleton argument, Zacaroli J in **Yuzu Hair** determined that the English court could order a freezing injunction where an application is made by a director or shareholder of a dissolved company in support of an application to restore the company to the register. The Respondent submits that, first, this is precisely what Wallbank J did in the December Order since the Respondent had already filed the Restoration Application; and, second, the Appellants have failed to put forward any strong argument that the court does not have the jurisdiction to order a freezing injunction in relation to the assets of a dissolved company and have instead sought to argue that the December Order should be set aside on the basis of a determination that Wallbank J did not make.

Discussion

[162] Having read the transcript of the exchange between Counsel for the Respondent and Wallbank J, I am satisfied that Counsel for the Respondent had already outlined to Wallbank J the basis for his submission that the court has jurisdiction to grant a

[67] BVIHCMAP2017/0007 (delivered 14th July 2017, unreported).

freezing order in aid of an application to retore a company to the register before he briefly referred to **Yuzu Hair**. More importantly, there was only but a quick reference to **Yuzu Hair** before Counsel for the Appellants interrupted Counsel for the Respondent, stating "I am sorry we just throwing up authorities and just quoting from somebody's phone? We should have been given this authority."[68]

[163] The ruling of Wallbank J after the December Hearing also supports this view. In his ruling, Wallbank J was satisfied that there existed a statutory basis for restoring Tensigma to the register and that the court had jurisdiction to make a freezing order in support of such an application to prevent the dissipation of Tensigma's assets once these assets have been returned to it after restoration. Wallbank J did not decide to make the December Order based on the **Yuzu Hair** decision. I do not agree with the Appellants' submission that Wallbank J in any way relied on **Yuzu Hair** and did not give the Appellants an opportunity to review or argue the relevance or otherwise of the decision in **Yuzu Hair**. This was unnecessary as Wallbank J relied on his own reasoning and his acceptance of earlier submissions made by Counsel for the Respondent. This ground of appeal also fails.

[164] Since both Counsel for the Appellant and Counsel for the Respondent made submissions on the relevance of the decision in **Yuzu Hair**, I will consider for completeness whether Wallbank J would have been justified in applying that decision in making the December Order. The facts in **Yuzu Hair** have been adequately summarized in the headnote as follows. The respondent had been the accountant of the applicant company, Yuzu Hair & Beauty Ltd. The applicant alleged that the respondent had defrauded the company of more than £300,000.00 and, by his inactions, had caused the company to be struck off the register of companies. The applicant obtained a freezing injunction on an application without notice, on the basis that an application to restore the company to the register under section 1029 of the United Kingdom **Companies Act** 2006 was pending and the effect of restoration, if

[68] Pages 51-52 of the transcript of proceedings.

granted, would be retrospective. The issue on the return date was whether a dissolved company could properly apply for and be granted a freezing injunction.

[165] Zacaroli J was not persuaded that a dissolved company could apply for a freezing order but was satisfied that there was an alternative basis on which the freezing order already granted could be continued as follows:

> "[4] I consider that there is, however, another route to achieving the same end. That is to make a freezing order in the context of the application by the director and shareholder to restore the company to the register. Those are legal proceedings, the purpose of which is to enable the company to pursue a claim to recover money of which it had been defrauded by the defendant. The power under s 37 of the Senior Courts Act 1981 is wide enough, in my judgment, to justify an order being granted to an applicant in such proceedings in order to freeze the assets of someone against whom the company, when it is restored, would have a claim. An injunction would be justified in those circumstances as protecting the interests of the applicant (the director and shareholder) by preserving the assets of the company it is sought to have restored, thus ensuring that the restoration application achieves its objective."

[166] Zacaroli J was satisfied that the court's power under section 37 of the United Kingdom **Senior Courts Act** 1981 was sufficiently wide to justify an order being granted to an applicant in such proceedings to freeze the assets of a person against whom the company, when it is restored, would have a claim. I would also add that the wording is wide enough to justify an order being granted to an applicant to freeze the assets of a person against whom a shareholder or director could bring a claim on behalf of a company when it is restored. The purpose of doing so would be the same: to protect the interests of the applicant (the director and shareholder) by preserving the assets of the company it is sought to have restored. The application to restore the company to the register is therefore a critical part of this wider objective.

[167] I do not agree with the submission of the Appellants that **Yuzu Hair** does not support the December Order. There can be no doubt that the decision in **Yuzu Hair** is directly applicable and that had Wallbank J, after allowing Counsel for both parties to address him on the applicability of **Yuzu Hair**, based his decision to make the December

Order on **Yuzu Hair** would have been correct to do so. This ground of appeal similarly fails.

Issue 18 - Failure to Give Reasons
The Appellants' Submissions

[168] The Appellants submit that in making the November Order Wallbank J failed to provide adequate reasons and address the submissions made in favour of discharging the Freezing Order. The Appellants also submit that a litigant is entitled to know why his arguments have been rejected and why an order has been made.

The Respondent's Submissions

[169] The Respondent's contend that Wallbank J gave sufficient reasons and heard submissions from both Counsel for the parties before giving his ruling. The Respondent also contends that it is abundantly clear why the submissions of the Appellants were rejected because there is insurmountable evidence that shows the Appellants have defrauded their partner and attempted to cover it up.

Discussion

[170] This Court in **Emmerson International Corporation v Renova Industries Ltd et al**[69] ("**Renova Industries**") stated that:

> "[15] We agree with the submissions of Mr. Malek, QC. It is settled law that a court does not have to rule on every submission that is made by counsel. However, a judge is required to deal with those issues which are vital to the determination of the matter and give reasons for his decision. In Peter Andrew English et al v Emery Reimbold & Strick Limited et al [[2002] EWCA Civ 605] on which both counsel relied, the court approved the following statement of this principle by Griffiths LJ in Eagil Trust Co Ltd v Pigott-Brown and another [[1985] 3 All ER 119]:
>
>> "When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented

[69] BVIHCMAP2016/0029 (delivered 23rd March 2017, unreported).

> by counsel in support of his case. It is sufficient if what he says show the parties and, if need be, the Court of Appeal the basis on which he has acted ..."

And at paragraph 19:

> "It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for the process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in [sic] may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

[171] A similar point was made by the Court in **Jhawnie Gage et al v Attorney General of the Commonwealth of Dominica**:[70]

> "[89] The general rule is that in delivering a judgment a trial judge is not obliged to refer to all the evidence in the trial and all the submissions of counsel. What is important is that the judge should deliver a clear and well-reasoned decision by which the parties can be certain why they won or lost and which will enable an appellate court to decide whether the judgment is sustainable."

[172] In relation to both the November Hearing and December Hearing that led ultimately to the making of the November Order and the December Order, respectively, Wallbank J, as this Court made clear in **Renova Industries**, was required to deal with the issues which are vital to the determination of the matters and give reasons for his decisions. Wallbank J was, therefore, not required to rule on every submission that is made by Counsel for the parties.

[173] In relation to both the November and December Orders, Wallbank J gave succinct and detailed reasons why he arrived at his decisions. Moreover, in the preamble to

[70] DOMHCVAP2020/0005 delivered 15th June 2021, unreported).

the November Order Wallbank J explained the basis for the order was that the Respondent may have a good arguable case on grounds that he has not yet pleaded and that it would be just and convenient for the Freezing Order to continue for a 30 day period to enable the Respondent to amend the claim to reflect the potential good arguable case and to apply for a new freezing order on new grounds. The Appellants may disagree with the basis for the November Order but the ruling of Wallbank J and the preamble to the November Order provide the reasons why the November Order was made. Similarly, in the ruling relating to and in the preamble to the December Order, Wallbank explained the bases on which the made the December Order as follows: (1) that he had jurisdiction to make a freezing order in support of the Restoration Application; (2) the restoration of Tensigma into liquidation is an indelible part of the wider proceedings; and (3) there is a real risk of dissipation. I agree with the Respondent's submission that the oral rulings and the preambles in the November and December Orders provide sufficient reasons for the decisions of Wallbank J. This ground of appeal therefore fails.

Issue 19 - The Restoration of Tensigma

[174] As mentioned above, the Restoration Application was heard and on 22nd December 2021 Wallbank J made the Restoration Order restoring Tensigma to the register of companies. However, the effect of the Restoration Order on both the November Order and the December Order needs to be examined. Wallbank J had stated[71] in his ruling in respect of the December Order that:

> "Well, first of all, I am not satisfied I have jurisdiction to grant an injunction on an extended basis until trial of the intended underlying action, but I am satisfied that I have jurisdiction to make an injunction we [sic] way of a freeing [sic] order in support of an application to restore a company. I'm satisfied the Court has statutory jurisdiction to restore a company, and, in particular, **I am cognizance [sic] of the fact that when a company is restored to the register, it is restored to register as if it has never been dissolved. It is not to re-create a new company. It is the same company and it is put back on the register as if it has never been dissolved and its assets are returned to it as if it had never been dissolved.** Consequently, in some shape or form, the Company continues to exist somewhere. And I'm satisfied that by virtue of the statutory powers vested

[71] Pages 58-59 of the transcript of proceedings.

in the Court, the Court has jurisdiction to restore a company." (Emphasis added)

[175] The power of the court to restore a company to the register of companies is governed by section 218 of the BCA which provides as follows:

> **"Declaration that dissolution void and restoration of name to register by court**
>
> 218. (1) Application may be made to the Court to restore a dissolved company to the Register by—
>
> (a) a creditor, former director, former member or former liquidator of the company; or
>
> (b) any person who can establish an interest in having the company restored to the Register.
>
> (2) An application under subsection (1) may not be made more than 10 years after the date that the company was dissolved.
>
> (3) Notice of the application shall be served on—
>
> (a) the Registrar of Companies;
>
> (b) the Financial Secretary; and
>
> (c) the Commission, if at any time prior to its dissolution the company was a regulated person,
>
> each of whom is entitled to appear and be heard on the hearing of the application."

[176] Once a company is restored to the register of companies, section 2018B provides for the effect of that restoration as follows:

> **"Effect of restoration**
>
> 218B. (1) Where the Court makes an order restoring a company to the Register, a sealed copy of the Order shall be filed with the Registrar—
>
> (a) in the case of a company to which section 218(2) applies, by the person appointed to be liquidator of the company under section 218A(4); and
>
> (b) in any other case, by the applicant for the Order.
>
> (2) On receiving a filed copy of a sealed order under subsection (1), the Registrar shall restore the company to the Register with effect from the date and time that the copy of the sealed order was filed and issue a certificate of restoration to the Register. (Amended by Act 19 of 2015)
>
> (3) Where the company was dissolved following the completion or termination of its voluntary liquidation under this Act or its liquidation under the Insolvency Act—
>
> (a) the company is restored as a company in liquidation under this Act or the Insolvency Act; and

(b) the person appointed by the Court as liquidator is constituted liquidator of the company with effect from the time that the company is restored to the Register.

(4) Subject to subsection (5), a company is restored to the Register with the name that it had immediately before it was dissolved.

(5) If the name of a company has been reused in accordance with Regulations made under section 24(c), the company is restored to the Register with its company number name.

(6) A company that is restored to the Register is deemed to have continued in existence as if it had not been dissolved or struck off the Register."

[177] The important effect of a restoration of a company to the register of companies is provided for in section 218B(6): A company that is restored to the Register is deemed to have continued in existence as if it had not been dissolved or struck off the Register. The effect of a restoration on actions taken during the time the company was struck off was considered by the Court of Appeal of England and Wales in **Joddrell v Peaktone Ltd**[72]. On 24th August 2009, the claimant brought proceedings, claiming damages for personal injury, against the defendant company, Peaktone Ltd ("**Peaktone**"). However, Peaktone was struck off the United Kingdom Register of Companies and dissolved pursuant to section 652 of the United Kingdom **Companies Act 1985** on 31st March 2009. The claimant then applied for and was granted on 10th June 2010 an order pursuant to section 1029 of the 2006 Act that Peaktone be restored to the Register of Companies. Section 1032(1) of the United Kingdom Companies Act 1985, in almost identical terms to section 281B of the BCA, provides that:

"(1) The general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register.

[178] The Court of Appeal concluded (at [49]) that the effect of section 1032(1) is retrospectively to validate an action purportedly commenced by or against a company during the period of its dissolution. It accepted that the applicable decision on the interpretation of section 1032(1) is the decision of **Tyman's Ld v Craven**[73]. Section

[72] [2013] 1 WLR 784.
[73] [1952] 2 QB 100.

1032(1) used the same language in section 353 of the Companies Act 1948 and section 653 of the Companies Act 1985. The effect of the decision in **Craven** is that an order of the court made under section 353(6) of the Companies Act 1948, restoring to the register the name of a company previously dissolved under subsection (5) of the same section, and declaring that "the company shall be deemed to have continued in existence as if its name had not been struck off," is effective to validate retrospectively all acts done in the name or on behalf of the company during the period between its dissolution and the restoration of its name to the register.

[179] It will be remembered that in the November Order and in his ruling Wallbank J accepted that the dissolution of Tensigma meant that the Respondent did not have a good arguable case on the claim as pleaded at the time the Freezing Order was made and that the Freezing Order ought not to have been made and should not continue on those grounds. The sole basis for finding that the Respondent did not have a good arguable case based on the pleadings was because Tensigma was dissolved a few weeks before the Freezing Order.

[180] In accordance with section 218B(6) of the BCA, the effect of the Restoration Order is to deem that Tensigma to have continued in existence as if it had not been dissolved or struck off the register. Consequently, the Restoration Order undermines the finding of Wallbank J that the Respondent did not have a good arguable case because Tensigma, since its restoration, is deemed to have continued in existence as if it had not been dissolved. On this reasoning, the Respondent would have a good arguable case based on the pleaded grounds and on the alternative grounds as I have explained above. The Restoration Order does not materially affect the November Order, but it provides another basis in fact to find that the Respondent's had a good arguable case on the date of both the Freezing Order and the November Order.

Issue 20 - Apparent Bias
The Appellants' Submissions

[181] The Appellants submit that: (1) the Recusal Application is made on apparent bias and not actual bias; and (2) the actual state of mind is irrelevant and what matters is the perception of the "fair-minded observer". The Appellant references the following paragraphs from the decision of the Court of Appeal of England and Wales in **AWG Group Ltd and another v Morrison and another**:[74]

> "6 Inconvenience, costs and delay do not, however, count in a case where the principle of judicial impartiality is properly invoked. This is because it is the fundamental principle of justice, both at common law and under article 6 of the Convention for the Protection of Human Rights. If, on an assessment of all the relevant circumstances, the conclusion is that the principle either has been, or will be, breached, the judge is automatically disqualified from hearing the case. It is not a discretionary case management decision reached by weighing various relevant factors in the balance.
> 9. Most of the leading authorities were appeals arising from hearings that had already taken place or were under way and an objection to the judge was based on facts discovered during the course of, or only after the end of, the hearing. Although this is a different case, as the hearing has not yet started, the same principle applies. Where the hearing has not yet begun, there is also scope for the sensible application of the precautionary principle. If, as here, the court has to predict what might happen if the hearing goes ahead before the judge to whom objection is taken and to assess the real possibility of apparent bias arising, prudence naturally leans on the side of being safe rather than sorry.
> 20 As already indicated, however, I do not think that disqualification of a judge for apparent bias is a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him. On the issue of disqualification an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias.
> 29 Sixthly, while I fully understand the judge's concerns (see para 15 of his judgment quoted above) about the prejudicial effect that his withdrawal from the trial would have on the parties and on the administration of justice, those concerns are totally irrelevant to the crucial question of the real possibility of bias and automatic disqualification of the judge. In terms of time, cost and listing it might well be more efficient and convenient to proceed with the trial, but efficiency and convenience are not the determinative legal values:

[74] [2006] 1 WLR 1163.

the paramount concern of the legal system is to administer justice, which must be, and must be seen by the litigants and fair-minded members of the public, to be fair and impartial. Anything less is not worth having."

[182] The Appellants further submit that if Wallbank J had recused himself, the December Order would have continued the Freezing Order, subject to any appeal, and the Restoration Application, and any new application for a freezing injunction, would have been heard by another judge. The Appellants submit the following list of concerns were raised in the Recusal Application:

> "21.1. the views expressed during the course of earlier hearings in respect of [the Appellants] and the force of the Judge's disparaging remarks during the course of interim applications without any reference, or detailed consideration, of the statements of the Appellants and prior to trial and without cross-examination;
> 21.2. the views expressed as to the conduct of the Appellants and the conclusions expressed by the Judge based on apparent moral assessments of their behaviour;
> 21.3. the indulgence granted by the Judge to the [Respondent] both procedurally and in respect of submissions of substance (not least the continuation of the Injunction Order following a finding that [the Respondent] had no good arguable case);
> 21.4. the rejection without detailed reasoning of submissions made on behalf of the Appellants;
> 21.5. the willingness to accept at face value arguments advanced by the [Respondent] without the requirement to see and review authority referred to for the first time during a hearing or to afford the Appellants the opportunity to respond; and
> 21.6. the Judge's encouragement to the [Respondent] to advance arguments and positions which the [Respondent] had not himself put forward - in particular, to consider amending the pleadings to try and assert an arguable case (10th November 2021 hearing) and granting a 30-day order to allow [the Respondent] time to do so and considering and raising the prospect that an application for an injunction could be made in the context of a restoration application (9th December 2021 hearing)."

[183] The Appellants contend that the conduct of the Wallbank J gave an impression of a willingness to enter the forum in favour of the Respondent to the exclusion of the Appellants and of the existence of a closed mind to the arguments and applications advanced on behalf of the Appellants. The Appellants submit that Wallbank J, on two separate occasions, introduced to the Respondent's Counsel arguments which Counsel had not advanced, and that Counsel for the Appellants was not afforded an

opportunity to respond. The Appellants further submit that, despite the applications being for interim relief, Wallbank J used language which gave the impression that he had formed final views about the Appellants and their character. The Appellants contend that the Respondent used the views expressed by Wallbank J to his advantage by citing them in submissions made after the November Hearing.

[184] The Appellants cite the following relevant principles which they submit are derived from the judgment of Lord Hodge in the United Kingdom Supreme Court decision of **Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)** (at [52] and [53]):[75]

> "27.1. The test for apparent bias is "whether the fair-minded and informed observer would conclude that there was a real possibility that the tribunal was biased."
> 27.2. "Fair-minded means that the observer does not reach a judgment on any point before acquiring full understanding of both sides of the argument." The observer's conclusions must be "justified objectively" and be the result of "detached judgment". He is "neither complacent nor unduly sensitive or suspicious."
> 27.3. That the observer is informed means that she "will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen in its overall social, political or geographic context."
> 27.4. That test applies not only to arbitrators, the subject matter of Halliburton, but also Judges.
> 27.5. Where the dispute resolution procedure is essentially private, the importance of full disclosure is paramount."

[185] The Appellants submit that in **Amjad and others v Steadman-Byrne; Practice Note**[76] the trial judge had expressed to Counsel certain views about the state of the evidence before he had heard all the evidence and arguments. The Appellants also cite the following from the decision of the Court of Appeal in **Steadman-Byrne**:

> "10 The test of ostensible bias is not contentious. It is whether a fair-minded observer informed of all the relevant circumstances would have concluded that there was a real possibility that the judge was biased. Bias in the present context has to mean the premature formation of a concluded view

[75] [2021] AC 1083.
[76] [2007] 1 WLR 2484.

adverse to one party. We put it in this way because it is well established not only that a judge may and commonly will begin forming views about the evidence as it goes along, but that he or she may legitimately give assistance to the parties by telling them what is presently in the judge's mind. This may properly include, as it did for example in Jacob J's decision in Hart v Relentless Records Ltd [2002] EWHC 1984 (Ch) at [38], letting the parties know before reaching the defence case that the judge did not think much of the claimant's evidence. What is not acceptable is for the judge to form, or to give the impression of having formed, a firm view in favour of one side's credibility when the other side has not yet called evidence which is intended to impugn it. The defendant says that is what has happened here.
16 Both the common law and the Convention for the Protection of Human Rights and Fundamental Freedoms recognise the fundamentality of every litigant's right to a tribunal free both of bias and of the objective appearance of bias. The appearance of bias includes a clear indication of a prematurely closed mind. In our respectful view the district judge, albeit acting out of the best of motives, gave the parties an inescapable impression that he had formed a view not only favourable to the claimants but such that the defendant was not going to be believed if he contradicted them."

[186] The Appellants contend that these points are even more compelling in the context of interim injunctions. The Appellants further contend that the willingness of Wallbank J to: (1) suggest new lines of argument to the Respondent; and (2) rely on an authority without even requiring it be produced to the court and Appellants and considered fully, are further instances of apparent bias. The Appellants submit that a fair-minded and informed observer would believe that Wallbank J had a fully formed view and intention to favour the Respondents and to find ways to assist him, citing **WX Investments v Begg**[77] where the Court of Appeal of England and Wales stated (at [11]) that "[o]ne of the obvious difficulties about a judge suggesting new lines of argument to the parties at or after a hearing is that he risks being accused of entering the arena on behalf of one side."

[187] The Appellants submit that the language used by Wallbank J was entirely inappropriate in describing the Appellants at an interim stage when their evidence had not been tested. For this submission, the Appellants cite the decision of the Court

[77] [2002] 1 WLR 2849.

of Appeal of England and Wales of **JSC BTA Bank v Ablyazov and others (No 9)**[78] where it was stated (at [65]) that "a case for recusal may always arise, however, where a judge has previously expressed himself in vituperative or intemperate terms." The Appellants note that the following are the facts that the fair-minded and informed observer would consider when determining whether there was a real possibility that Wallbank J was biased: (1) the language used; (2) the expressions of conclusions by Wallbank J in relation to the honesty and character of the Appellants; (3) the willingness of Wallbank J to assist the Respondent on two separate occasions to develop arguments during the hearings; (4) the expression by Wallbank J that he had no doubt that he would agree with the Respondent's Counsel in relation to the decision in **Yuzu Hair**; (5) the determination of Wallbank J to find a way to justify granting an injunction for short periods to allow the Respondent to find alternative approaches; (6) the failure to raise with Counsel for the Appellants what he intended to do so as to allow an opportunity to respond; and (7) reserving costs.

[188] The Appellants contend that if Wallbank J applied the correct test then he failed to reach the correct conclusion and that this Court should consider the question afresh. The Appellants also contend this Court should find in favour of the Appellants that a case of apparent bias is made out, citing the following paragraphs from **AWG Group Ltd** (at [19-[20]:

> "19 What is the position of this court on an appeal from the judge's decision not to recuse himself? If the judge had a discretion whether to recuse himself and had to weigh in the balance all the relevant factors, this court would be reluctant to interfere with his discretion, unless there had been an error of principle or unless his decision was plainly wrong.
> 20 As already indicated, however, I do not think that disqualification of a judge for apparent bias is a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him. On the issue of disqualification an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias."

78 [2013] 1 WLR 1845.

[189] The Appellants also submit that, applying the test and relevant principles from the authorities, there can fairly be only one conclusion that Wallbank J ought to have recused himself.

The Respondent's Submissions

[190] The Respondent submits that the mere fact that a judge has determined issues earlier in proceedings is not enough to give rise to apparent bias, and although practical considerations alone cannot remove the appearance of bias, the fact that a judge has prior knowledge of a case is a relevant factor that may point away from there being any apparent bias in the eyes of the fair-minded and informed observer, citing **Ablyazov** (at [65]) for the view that "… it is relevant to consider, through the eyes of the fair-minded and informed observer, that there is not only convenience but also justice to be found in the efficient conduct of complex civil claims with the help of the designated judge".

[191] The Respondent contends that the real possibility of bias test is an objective one, not to be confused with the opinions of a litigant, citing the following from **Harb v Prince Abdul Aziz bin Fahd bin Abdul Aziz**:[79]

> "69. As we have said, the legal test is not in doubt: see para 54 above. We would, however, emphasise two important points. First, the opinion of the notional informed and fair-minded observer is not to be confused with the opinion of the litigant. The "real possibility" test is an objective test. It ensures that there is a measure of detachment in the assessment of whether there is a real possibility of bias: see Helow v Secretary of State for the Home Department [2008] UKHL 62, [2008] 1 WLR 2416 at para 2 per Lord Hope. As Lord Hope also said in Porter v Magill at para 103, the "real possibility of bias" test "is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias" (emphasis added). We mention this because it demonstrates that the approach urged on the court by Lord Grabiner is incorrect. The court does not ask whether a litigant who is being represented by a member of Blackstone Chambers and knows of the Article would be content to have his case heard by Peter Smith J. We have little doubt that most, if not all, litigants represented by a member of Blackstone Chambers, knowing of the Article, would prefer to have their case heard by another judge. We are prepared to accept that some, indeed

[79] [2016] EWCA Civ 556.

> many, might have very strong feelings on the subject. But the litigant is not the fair- minded observer. He lacks the objectivity which is the hallmark of the fair-minded observer. He is far from dispassionate. Litigation is a stressful and expensive business. Most litigants are likely to oppose anything that they perceive might imperil their prospects of success, even if, when viewed objectively, their perception is not well-founded."

[192] The Respondent further submits that, first, the Appellants' above-mentioned concerns are merely asserted without any examples; second, the passages of the transcripts of the November Hearing and December Hearing cited by the Appellants are without reference to the particular assertions made by them; and, third, the facts outlined by the Appellants that the fair-minded observer would have to have regard to before applying the relevant principles are vague and unparticularized.

[193] The Respondent contends that, at the November Hearing, Wallbank J made preliminary findings of fact for the purposes of deciding whether the Freezing Order should continue, and that having considered the arguments made by Counsel for the parties and the evidence, Wallbank J found that there was a real risk that the Appellants would dissipate their assets other than in the ordinary course of their business so as to frustrate any judgment that might be obtained against them in due course. The Respondent also contends that Wallbank J also had regard to the Appellants' conduct when deciding not to order fortification of the cross-undertaking in damages. The Respondent submits that Wallbank J stated unequivocally that his mind was not made up and that any findings he made were interlocutory.

[194] The Respondent submits that the Appellants have only identified one purported indulgence granted by Wallbank J to the Respondent, namely, that the Freezing Order was continued despite a finding that the Respondent had no good arguable case on the pleadings. The Respondent also submits that Wallbank J reasoned that, although the Respondent did not have a good arguable case on his original pleading, it was sufficient that the Respondent had a good arguable case that could be pleaded and for this approach Wallbank J relied on dicta in **Broad Idea**.

[195] The Respondent contends that far being an indulgence granted to the Respondent, the 30-day extension of the Freezing Order was a large concession to the Appellants, because Wallbank J was only willing to allow the Respondent 30 days in which to amend his pleading and make an application for a new freezing order, failing which the Freezing Order would automatically be discharged. The Respondent also contends that the various passages from the transcript of the December Hearing cited by the Appellants suggest that Wallbank J did not accept any argument advanced by the Respondent at face value; rather, they show clearly that Wallbank J invited the Respondent's view on certain points.

[196] The Respondent submit that the Appellants' suggestion that Wallbank J encouraged the Respondent to advance arguments on at least two occasions is incorrect for the following reasons. First, the earliest mention of the Respondent potentially amending his pleading was in fact made by Counsel for the Appellants at the November Hearing. Second, extending the Freezing Order for a period of 30 days was a concession to the Appellants and was a pragmatic exercise of the court's case management powers by Wallbank J. Third, the jurisdiction of the court to extend the Freezing Order since Tensigma was dissolved was expressly placed in issue by Counsel for the Appellants, and that, although Wallbank J raised his concerns with Counsel for the Respondent, Wallbank J ultimately accepted the Respondent's position after hearing his submissions. The Respondent further submit that the Appellants are suggesting the existence of apparent bias where Wallbank J asked questions and/or considered responses in relation to issues that were either raised first by the Appellants or arose as a natural consequence of the submissions made by the parties. The Respondent contends that no fair-minded and informed observer would conclude that this gives rise to a real possibility of bias.

Discussion

[197] The starting point in any discussion on whether a judicial officer should recuse himself or herself is applicable test accepted by the House of Lords in **Porter v**

Magill[80] (at [103]) that "[t]he question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". This Court has accepted that this is the applicable test on several occasions including in **Bilzerian et al v Byron et al**[81] where the Court summarized the applicable principles as follows:

> **"Bias**
>
> [25] The test for bias is well established. In Vance Amory v Thomas Sharpe, QC et al at paragraphs 8 et seq. and again more recently in Keston Riley v The Attorney General and Director of Public Prosecutions, this Court outlined the relevant legal principles concerning bias. I summarise these as follows:
>
> > (i) Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve.
> > (ii) Actual bias may arise from a variety of causes, such as a desire to decide a case one way or the other regardless of the legal merits.
> > (iii) Pre-determination, which arises when a judge reaches a final conclusion before he or she is in possession of all the relevant evidence and arguments, is sometimes treated as a specie of bias but there are conceptual differences between them.
> > (iv) Because of difficulties of proof, findings of actual bias or pre-determination are rare. Apparent bias or apparent pre-determination is the more common basis for attacking judicial decisions.
> > (v) The test for apparent bias is that stated by Lord Hope in Porter v Magill – 'the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'. The observer is meant to be fair minded, waiting until he/she understands both sides of the argument before reaching a decision and so his/her approach should not be confused with that of the complainant as he/she requires objective justification of the complaint. The observer is also informed meaning that he/she will take a balanced approach to information given to him/her and put it into its overall context appreciating that context forms an important part of the material to be considered before reaching a decision.
> > (vi) The allegation of apparent bias must be decided on the facts and circumstances of the individual case including the nature of the issue to be decided, the relevant circumstances being those apparent to the court upon investigation and not only the circumstances available to the hypothetical observer at the original hearing. The circumstances must be considered cumulatively.

[80] [2002] 2 AC 357.
[81] SKBHCVAP2019/0044 (delivered 22nd October 2021, unreported).

> (vii) The test for apparent bias involved a two-stage process. Firstly, the court must ascertain all the circumstances bearing on the suggestion that the tribunal was biased. Secondly, the court should ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased. It is the appearance that the facts capable of being known to the public gives rise to that matters, and not what is in the mind of the particular judge who is under scrutiny.
> (viii) An appellate court is well able to assume the vantage point of a fair minded and informed observer, a person who is expected to be neither complacent nor unduly sensitive, with knowledge of all the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias.

[26] In Lesage v The Mauritius Commercial Bank Ltd, to which this Court was referred, the Privy Council endorsed at paragraph 49 the statement from Gillies v Secretary of State for Work and Pensions (Scotland) that, 'the fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge...who is under scrutiny'. (citations omitted)

[31] In Keston Riley at paragraphs 12 et seq., this Court considered the law concerning the circumstances in which a judge should recuse himself from a matter. It is clear that not every criticism of a judge should lead to his recusal but where there is doubt about his impartiality, it is appropriate that he be recused. The court has to be astute to guard against manipulation by litigants of the composition of the court hearing the matter by the raising of unreasonable or unsubstantiated recusal demands. Real or apparent bias on the part of the judge will always form a valid basis for recusal even if the motive for making the recusal application is purely tactical, such as forum shopping. In Walsh v Ward, the CCJ held that real or apparent bias against counsel for a party is a sufficient basis for recusal."

[198] In his ruling relating to the Recusal Application, Wallbank J explained that: (1) although he used strong language to describe some of the evidence, this was on an interlocutory basis; (2) he stated repeatedly that his findings were preliminary observations or apparent conclusions: (3) some of the passages cited by the Respondent were taken out of context considering the exchanges he had with Counsel; (4) the language he used was neither intemperate nor extreme, nor injudicious or unjudicial; (5) while he was against the Respondent on some issues, there was solid evidence of risk of dissipation by the Appellants; and (6) the short

periods of time he granted to “hold the ring” suggests neutrality rather than him favouring the Respondent. Wallbank J held that the fair minded and informed observer having considered all the circumstances would not conclude that there was a real possibility that he was biased. The Recusal Application was therefore dismissed.

[199] The Appellants main submission is that a fair-minded and informed observer with knowledge of all the relevant circumstances would have reached the view that there was a real possibility of bias or, alternatively, a sufficient level of doubt as to such to lead to the conclusion that Wallbank J should recuse himself. The Appellants main concerns relates to the following: (1) the language used by Wallbank J to describe the Appellants at the November Hearing; (2) indulgences granted to the Respondents; (3) not providing reasons for rejecting the Appellants’ submissions; (4) willingness to accept at face value the Respondent’s arguments; (5) encouraging the Respondent to advance positions the Respondent had not put forward, namely: (a) amending the pleadings to assert a good arguable case and the 30-day window within which to do so; and (b) considering and raising the prospect that a freezing injunction could be made in the context of the Restoration Application.

Language and Findings

[200] The Appellants submit that the language used by Wallbank J was inappropriate at the interlocutory stage of proceedings when the evidence had not been tested by cross-examination. Wallbank J would have read the applications and evidence in advance of the hearings and heard Counsel for the parties at the November Hearing. Wallbank J would have been expected to form a view on the balance of probabilities as to whether: (a) there is a good arguable case; (b) there is a risk of dissipation; and (c) it is just and convenient to grant the freezing order and in determining whether the Freezing Order should be continued or discharged. In considering each of those matters, Wallbank J had carefully to carefully consider the evidence of the Respondent (at the *ex parte* hearing) and of both parties (at the November Hearing and the December Hearing). Wallbank J was entitled and required to make

preliminary findings on the evidence to determine whether the Freezing Order should be continued or discharged. It was a necessary part of the judicial function to enable Wallbank J to consider the applications before him at the November Hearing. What, however, cannot be done in this context is for any judge to use intemperate or unjudicial language during any hearing or express himself or herself in ways that show that the findings are final rather than preliminary for the purpose of the interlocutory application such as to give rise to a valid complaint of the appearance of bias.

[201] The Appellants have listed the following various passages in the transcripts where they allege that Wallbank J used language to describe the Appellants which gives rise to the appearance of bias:

> "23.7. Page 197: The Judge said "[i]t does look as if Mr Haque is right that Mr Svirsky and Mr Donin are ready to flush out their allegation of forgery and falsity when, in fact, there is no basis of them to make that allegation whatsoever."
> 23.8. Page 198: The Judge said "[i]t lies ill in the mouth of Mr Svirsky and Mr Donin to raise as a defence that the Company no longer exists, and to treat that as some kind of jurisdictional trump card."
> 23.9. Page 198: The Judge said "[i]t sticks in the gullet to deny the continuation of an injunction on the basis that there is no longer a company there."
> 23.10. Page 199: The Judge said "[i]f it is right, **as it appears to be**, that Mr Svirsky and Mr Donin are ready to lie about the position ... and basically to try and mislead the Court ... If that's right, and on the documents **it appears to be right**."
> 23.11. Page 199: The Judge said "[t]hey also have, reading those text messages, what I think can best be called a macho vulgarity in the obscenity of their language that they use between them such that they can be rather crude individuals. I don't think for one moment that they'd lose sleep over putting assets a few steps further maybe using nominees to pretend that they don't have them."
> 23.12. Page 200/23: The Judge said "[w]hat we have in that situation is two of the partners **apparently** misappropriating partnership property to themselves."
> 23.13. Page 201: Having made reference to a restoration application and that it might be complicated, the Judge said "I would probably expect the Second and Third Respondents here to try and make it more complicated."
> 23.14. Page 202: The Judge describes the Appellants as "**apparently** dishonest, adventurous entrepreneurs who appear to have little qualm in transferring assets with excluding their partner on a mendacious basis."

23.15. Page 204: The Judge said of the Appellants that they "**appear to have** some history of dishonesty here", though he said "**I make no finding in that regard**..." This was said in the context of issues of fortification. He rejected such on the basis of the appearance of dishonesty and that he could not accept their evidence." (Emphasis added)

[202] These examples are sufficient to show that the use of adjectives by Wallbank J in describing the conduct of the Appellants shows that Wallbank J was not making final determinations or conclusions. In relation to paragraph: (i) 23.7: Wallbank J was entitled to find that there was no evidence before him in relation to the allegation of forgery; and (ii) 23.8 and 23.9: Wallbank J was not considering evidence; he was noting that the Appellants were using the dissolution of Tensigma as a basis for the discharge of the Freezing Order. In relation to paragraphs 23.10-23.11, the quotations by the Appellants do not represent the entirety of the statement made by Wallbank J and are not put in their proper context. In his ruling, Wallbank J stated as follows:[82]

> "… It' s not just and convenient to let **alleged** wrongdoers get away with their wrongdoing, put their money in the clear or the value of their assets in the clear so that they can dissipate it further.
>
> Now, **if it is right**, **as it appears to be**, that Mr. Svirsky and Mr. Donin are ready to lie about the position of the Claimant within their business, and basically to try and mislead the Court into pretending that the Claimant was a mere employee as opposed to a partner. **If that's right**, and on the documents **it appears to be right.** And when you read some of those messages and the documentation, you see that Mr. Svirsky and Mr. Donin between the two of them, they have quite a significant degree of financial sophistication.
>
> They also have, reading those text messages, what I think can best be called a macho vulgarity in the obscenity of their language that they use between them such that they **seem to be** rather crude individuals. I don't think for one moment that they'd lose sleep over putting assets a few steps further, maybe using nominees to pretend that they don't have them.
>
> So in all those circumstances I also think that there is a, that there is a risk of dissipation and that there is a real risk of the [Appellants] dissipating their assets other than in the ordinary course of their business so as to frustrate any judgment that might be obtained against them in due course.

[82] Pages 199-200 of the transcript of proceedings.

> And it also appears to me just and convenient that some form of Freezing Order should apply to prevent them dissipating the asset so as to frustrate a judgment."

[203] The above puts the statements made by Wallbank J in the proper context of his evaluation of the evidence before him in determining whether there was a risk of dissipation and whether it was just and convenient to continue the Freezing Order. On two (2) occasions Wallbank J states "if that is right" in relation to his preliminary finding rejecting the evidence of the Appellants that the Respondent was a mere employee as opposed to a partner and that based on the evidence the Appellants have a high degree of financial sophistication. Wallbank J also had before him hundreds of pages of text and or telegram exchanges between the Appellants and the Respondents and having read them he formed the preliminary view that dissipating the assets of Tensigma was not beyond the Appellants. Wallbank J then concludes, having considered his preliminary findings and assessments, that there was a real risk of dissipation and that it was just and convenient to continue the Freezing Order. Paragraph 23.12 is one such statement that could have been expressed differently or not stated at all, but it does not reach the level of being considered as intemperate or unjudicial. In relation to paragraphs 23.12, 23.14 and 23.15, Wallbank J as mentioned above was expressing a preliminary finding in determining whether to continue the Freezing Order.

[204] In **Ablyazov**, the Court of Appeal of England and Wales stated (at [65] that "…a case for recusal may always arise, however, where a judge has previously expressed himself in vituperative or intemperate terms". In **Locabail (UK) Ltd v Bayfeld Properties Ltd**[83], a very strong Court of Appeal of England and Wales, comprising Lord Bingham of Cornhill C.J., Lord Woolf M.R. and Sir Richard Scott V.-C., stated (at [65]) that "[t]he mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection". It cannot be said that Wallbank J expressed himself in vituperative or

[83] [2000] QB 451.

intemperate terms that would justify recusal on the grounds of apparent bias. Considering the language used by Wallbank J in the context of the evidence he heard and the findings he had to make, while Wallbank J generally could have expressed himself differently, I do not believe that his language used in the hearings crossed the Rubicon such that recusal would be warranted.

[205] Context is an important consideration and background against which the informed observer decides whether there is a real possibility of bias. As was explained (at [3]) by the House of Lords in **Helow v Secretary of State for the Home Department and another**[84], the informed observer "is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment". The context here is the examination by a trial judge of the evidence to determine whether the Respondent satisfied the three criteria for granting a freezing order. The case under consideration is far from what obtained in **Steadman-Byrne** where the trial judge during a trial, after hearing the claimant's evidence, invited counsel for the parties into his chambers and thereafter proceeded to make statements that the defendant alleged showed that the judge had formed a firm view of the claimant's credibility without hearing the evidence of the defendant. The Court of Appeal of England and Wales explained (at [10]) that it was not acceptable for the judge to form, or to give the impression of having formed, a firm view in favour of one side's credibility when the other side has not yet called evidence which is intended to impugn it. That is not the case here. Wallbank J formed preliminary views on the evidence before him to enable him to determine whether to continue or discharge the Freezing Order.

[206] The question for determination, however, is whether an objective consideration of all the circumstances cumulatively show that the learned judge went too far in the language he used or the way in which he expressed his preliminary findings so that there was a real possibility that he closed his mind to hearing both sides of the argument before making his ruling. Having reviewed the complaints made by the

[84] [2008] 1 WLR 2416.

Appellants and having read the passages complained about in the context of the ruling of Wallbank J and his explanations on the Recusal Application and considering that Wallbank J expressed himself in tentative terms when evaluating the Appellants' evidence and made clear on several occasions that he was not making final or binding findings of fact, I am of the view that that a fair minded and informed observer is unlikely to come to the conclusion that there was a real possibility that Wallbank J was biased.

Reasons and Indulgences

[207] As I explained above, Wallbank J dealt with the issues which are critical to the determination of applications that were before him at the November and December Hearings, and he gave reasons for his decisions but was not required to rule on every submission made by the parties. It cannot be said that a fair minded and informed observer who was aware that Wallbank J provided sufficient reasons for making the November Order and the December Order would conclude that there was a real possibility that Wallbank J was biased. The two other concerns of the Appellants, namely, (1) indulgences Wallbank J granted to the Respondents; (2) the willingness of Wallbank J to accept at face value the Respondent's arguments can be dealt with easily. In **Byron**, this Court explained (at [35]) that:

> "[35] … There is a qualitative distinction between ignoring representations and disregarding them in the sense of refusing to accede to them. A judge is entitled to do the latter as his role is that of an arbiter between the positions advanced by each litigant as well as an impartial determinant of where the proper course of action for the proper administration of justice lies. A judge should give reasons for his decision but the extent of this obligation is commensurate with the nature of the matter before him."

[208] The extent of the judge's obligation is to explain the basis for accepting one argument over another. If the argument seems to the judge to be the stronger one, the judge is entitled to accept it and provide the reasons for doing so. The Appellants submit that one such indulgence is the continuation of the Freezing Order following a finding that the Respondent had no good arguable case. It would be very rare indeed that a submission of a party that is accepted by a judge can justify a finding that that judge should recuse himself or herself because of apparent bias. If this were accepted

conclusions of judges could by themselves justify applications for recusals. The next section will consider the second primary concern of the Appellants, namely, that Wallbank J encouraged the Respondent on two occasions to advance positions and argument that originated from Wallbank J.

New Lines of Argument

[209] As mentioned above, the Appellants submit that Wallbank J encouraged the Respondent to advance positions the Respondent had not put forward, namely: (a) consideration to amending the pleadings to try and assert a good arguable case and the 30-day window to do so; and (b) considering and raising the prospect that an application for an injunction could be made in the context of the Restoration Application. It is necessary first to review the transcript of the November Hearing to determine whether these allegations are made out. During submissions relating to the criterion of full and frank disclosure at the November Hearing, Counsel for the Respondents was questioned by Wallbank J about "[o]ne of the worries that's going through [his] mind at the moment is the jurisdictional point which… revolves around … two questions"[85]. Wallbank J then noted that the dissolution of Tensigma raises questions about whether the Respondent is entitled to relief in the claim. Counsel for the Respondent replied as follows:[86]

> "… So the remedy eventually we're seeking will be a remedy on behalf of Tensigma by way of a derivative action as well as an unfair prejudice position.
> …
>
> We also have another argument that we are a one-third partner anyway in the entire venture. So that also changes things slightly, because they will have direct claims against, direct (unclear) concerning Mr. Svirsky for the return of the money by breach of the partnership anyway. So we'll have a claim for equitable damages.
> **I think Mr. Chaisty is right. It's pleaded at the moment, there isn't a claim for equitable damages in the pleadings,** but that would follow I think from the facts as I've set them out today. So all I need to show you is there is an arguable case to do that, and then we will see in light of Tensigma's dissolution what happens." (Emphasis added)

[85] Pages 70-71 of the transcript of proceedings.
[86] Ibid at 72-73.

[210] Exchanges continued between Wallbank J and Counsel for the Respondent who explained that a freezing order can be granted in contemplation of Tensigma being restored to the register of companies. What is clear from the above passage is that Counsel for the Respondent stated expressly that the Respondent might have other claims against the Appellants concerning the alleged partnership and a claim for equitable damages. At this stage, the Respondent has not expressly stated that he intends or wishes to amend his pleadings, but it could be implied since amendment of the pleadings would be one way to add these new claims. It is Counsel for the Appellants who expressly referred to amendments of the Respondent's pleadings in submissions to the court. After providing Wallbank J with the background to the matter before him, Counsel for the Appellants then stated that:[87]

> "So that's the background of the existing proceedings, and my friend can't just keep saying in this rather wishful way, oh, **we might amend**, we might add something else, we might add some sort of partnership argument."(Emphasis added)

[211] During his submissions in reply, the following exchange[88] took place between Wallbank J and Counsel for the Respondent:

> "THE COURT: All right. Now one point you can help me on. Your claim such as it is at the moment and your Statement of Claim, is your Statement of Claim as it was filed on 19th of April, 2021?
> MR. HAQUE: Yes, I was just checking with -- there hasn't been an amendment. No, there hasn't been an amendment. It' s a -- so for the purposes of an injunction, of course, we don't have to have a final Statement of Claim. What Your Lordship just has to be satisfied is that there would be other causes of action as well as those in the Statement of Claim.
> …
> … And I believe that the claim as formulated contained a proprietary claim for the Bitcoin as well. And that is something I think we can develop further than it was as originally pleaded."

[212] Another exchange then took place as follows:[89]

> "THE COURT: An important question, which think carefully. If -- I know you have the right to amend your Statement of Claim, including to change the prayer relief. What sort of changes might you have in mind? And the reason

[87] Page 84 of the transcript of proceedings.
[88] Ibid at 178- 180.
[89] Pages 184-188 of the transcript of proceedings.

I ask that, and the reason I ask that, and you can think about it while I'm explaining it, is because you gave an undertaking at the ex parte hearing, it's in the ex parte order, to file a Claim Form. And it was a very general undertaking. You didn't say when you would do it, you just gave an undertaking, which you did, and you did file a Claim Form.

Various heads of relief are set out in that Claim Form and the Statement of Claim in particular. I prefer to go to the Statement of Claim because it's usually the more complete document. And what I have to tell myself is that is the claim that you are happy to bring at that point despite the fact that you have a right to amend.

Now, various things all flow from that. We've already touched upon the derivative action and the various wrinkles, if I can call them that, I call them difficulties, but I don't want to jump the gun on that right now, various difficulties that derivative action would bring in. Are there any other types of claim that you have in mind for including in the Amended Statement of Claim if you were to amend?

MR. HAQUE: The first one that immediately springs to mind is a claim in relation to the entire Atlant Group. So it wouldn't be changing anything that there is. It would be enlarging the claim as just a general partner in the venture as opposed to simply a shareholder in Tensigma.

Secondly, My Lord, I think we would consider, and probably bring a claim for equitable damages against Mr. Donin and Mr. Svirsky for breach of trust. I hear what Mr. Chaisty says about that, but breach of trust for procuring the transfer out of the company to a company in which they have only total control. So that would be a damages claim. And I'm thinking as to whether or not there would be any other immediate claims. I'd have to check whether or not we have a proprietary claim over the Bitcoin. I think that's already in there in the derivative claim. And, of course, I couldn't bring that in the unfair, in the petition. I believe that's already there. But that would be something if it isn't there for one to bring. I'm just checking with --

THE COURT: All right. So that's two heads of claim.

MR. HAQUE: … You put me on the spot somehow My Lord, but those two or three immediately spring to mind.

THE COURT: Yes. Now what sort of timeframe would you have in mind for effecting that amendment?

MR. HAQUE: As – given where we are now, I would suggest 14 days would be a sensible amount of time rather than forcing it through, because we'd have to really think about what evidence we have and getting the right evidence. But two weeks.

THE COURT: Okay"

[213] Almost immediately after that exchange Wallbank J gave his ruling in relation to the November Order. What is clear from the above-mentioned exchanges is that the Respondent already had in mind amending his claim form and statement of claim

long before Wallbank J specifically asked Counsel for the Respondent exactly what types of amendments he contemplated making. Indeed, Counsel for the Appellants referred to the Respondent's intention to amend the pleadings to include an argument about partnership long before the exchanges between Counsel for the Respondent and Wallbank J occurred. Having read the ruling and the passages above, Wallbank J did not suggest to the Respondent to amend his pleadings to include additional claims as the Appellant submits.

[214] I accept that, in certain cases, the impartiality of a judge may be called into question if the judge suggests new lines of argument to the parties but this, as all cases where bias is alleged, would invariably be fact specific. The statement by the Court of Appeal of England and Wales in **Begg** that the obvious difficulties about a judge suggesting new lines of argument to the parties at or after a hearing is that he risks being accused of entering the arena on behalf of one side cannot be read as deciding that where a judge suggests new lines of arguments to the parties can by itself justify a finding of apparent bias. I agree with the Respondent's submission that the issue of recusal is inherently fact sensitive and therefore broad statements of fact-specific points from other cases are of limited use to this Court. There is no evidence that Wallbank J either suggested or in any way encouraged the Respondent to amend his pleadings to include any new claims.

[215] The Appellants' second basis for submitting that Wallbank J encouraged the Respondent to advance positions the Respondent had not put forward is his allegation that Wallbank J considered and raised the prospect that an application for an injunction could be made in the context of the Restoration Application. Counsel for the Respondent during his submissions at the November Hearing stated that:[90]

> "MR. HAGUE:
>
> …
>
> The first is simply to carry on regardless, which we could do, and I will do, but, secondly, the easy get out is of course just to simply apply to have the Company restored, and that is something that we are in the

[90] Page 9 of the transcript of proceedings.

> process of doing. I think the documents have been drawn up anyway, and we'd hope to have the application on the stocks if necessary by the end of this week.
>
> I know Mr. Wright has also been in contact with liquidators, and I'm sure that all those details which are in compliance with the provisions of section 220 of the Act will be done fairly shortly. So if we need to, the Company can be, will be restored or an application will be made to restore this week.
>
> THE COURT: You say if you need to. Your primary position is you don't need to?
>
> MR. HAQUE: No. I'm saying, My Lord, our primary position is, for the purposes of the injunction, we don't need to. But, in any event, insofar as there is any technical point outstanding then that will be remedied in a very short period of time. So really what I will be submitting in due course is that if there is a lacuna here, then it's a lacuna which will simply be filled, and **I'll be asking the Court to hold the ring until the Company was restored in case you felt that Mr. Chaisty's points have merit**." (Emphasis added)

[216] The words in bold show that the Respondent contemplated as early as the November Hearing the submission that the Freezing Order should be continued until Tensigma was restored to the register of companies. This is not surprising since the Restoration Application was part heard before Wallbank J on the previous day. The Appellants' contention is that this line of argument was suggested by Wallbank J at the December Hearing is plainly wrong because Counsel for the Respondent foreshadowed that issue as early as the November Hearing when he stated that he will be asking Wallbank J to continue to Freezing Order until the determination of the Restoration Application. The issue, as Wallbank J saw it at the December Hearing, was whether the Freezing Order should continue until the hearing of the Restoration Application. The Appellants' focus at the December Hearing was on the question of the court's jurisdiction over them in circumstances where Tensigma was dissolved before the Freezing Order was made, and that the decision of **Broad Idea** does not jettison the need for personal jurisdiction over the Appellants.

[217] In response to a question from Wallbank J concerning whether the court has jurisdiction over a dissolved company, Tensigma, Counsel for the Respondent replied that:[91]

> "And what Broad Idea does, and it was in the speech, there was, say that if there is a likelihood of that company -- we say an interpretation that **if there is a likelihood of that company being restored, then, of course, you have jurisdiction to make the injunction** and that was the whole point about Broad Idea because it would be ridiculous otherwise." (Emphasis added)

After some further discussion on whether the court has jurisdiction over a dissolved company, the following exchanges took place between Counsel for the Respondent and Wallbank J:

> "THE COURT: Okay. All right. Coming back to this jurisdiction idea --
> MR. HAQUE: Yes.
> THE COURT: The jurisdiction that the Court has over a company that's been dissolved, to be reinstated, is a statutory jurisdiction and that's a specific jurisdiction to reinstate a company. It's the power to reinstate a company and it is in respect of, or over the Company.
> MR. HAQUE: That' s enough, we say, because that is what you need to obtain jurisdiction and then to freeze the assets. It's the act of restoration or the jurisdiction to restore which gives the court the power. It doesn't need anymore.
> THE COURT: So you are saying that the --
> MR. HAQUE: The jurisdiction to restore, which then allows it, after restoration, which then allows the liquidator to then seek to recover the assets which have been taken from the Company.
> then gives the Court the power. anymore.
> THE COURT: You say that's enough?
> MR. HAQUE: Yes, it doesn't need much. But if it wasn't that, then the fraudsters will have got away with that. It doesn't need anymore.
> THE COURT: And what you are saying is that the Court does have jurisdiction not to render its own judgment nugatory and if the point is that the assets will be restored to a company on its restoration, then -- so the injunction that you are seeking, is it an injunction, is it an injunction in support of a restoration application, or is it an injunction in support of an ultimate judgment?
> MR. HAQUE: Yes. It's the latter. It's not the former. It is certainly the latter. Re: Sears, the Company would be restored, and then Ms. Silver if she thought there was a case there, will then bring an action on behalf of the Company for the return of those assets and the injunction is then in support of that, if she's successful, that judgment.

[91] Page 32 of the transcript of proceedings.

> THE COURT: So both?
> MR. HAQUE: Effectively both, I suppose. I mean it wasn't taken, it was in support of the restoration, and, of course, the restoration forms part and parcel of the scheme to get the money back."

[218] The above exchanges show that Wallbank J queried whether the Respondent was seeking the continuation of the Freezing Order in support of a restoration application or in support of an ultimate judgment. Counsel for the Respondent replied that that it was both because the restoration of Tensigma is the route by which the Respondent sought ultimate judgment for which the continuation of the Freezing Order was being sought. In the circumstances, it is not correct to state that Wallbank J suggested to the Respondent the line of argument relating to the restoration of Tensigma.

[219] I am of the view that that a fair minded and informed observer having considered all the facts and circumstances is unlikely to conclude that there was a real possibility that Wallbank J was biased based on the issues raised by the Appellants either singularly or collectively. There is no merit in the appeal against the Recusal Order.

Disposal

[220] For the reasons given above, I am of the view that Wallbank J was correct in making the November Order, December Order and the Recusal Order. In these circumstances, I would dismiss the Appellant's appeal against the November Order, the December Order and the Recusal Order. I would also order that the Appellants pay all costs of the Respondent on appeal and in the court below to be assessed by a judge of the Commercial Court if not agreed within 21 days.

[221] I am grateful for the assistance provided by all Counsel for the parties.

I concur.
Mario Michel
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

SEAL

EASTERN CARIBBEAN SUPREME COURT

COURT OF APPEAL

By the Court

Chief Registrar