THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2022/0008

BETWEEN:

MULTIBANK FX INTERNATIONAL CORPORATION

Applicant/Intended Appellant

and

VON DER HEYDT INVEST S.A.

Respondent

Heard together with:

BVIHCVAP2021/0009
BETWEEN:

MULTIBANK FX INTERNATIONAL CORPORATION

Applicant/Intended Appellant

and

VON DER HEYDT INVEST S.A.

Respondent

Heard together with:
BVIHCMAP2022/0032
BETWEEN:

MEX CLEARING LIMITED

Claimant

and

MEX SECURITIES S.A.R.L.

First Defendant

MULTIBANK FX INTERNATIONAL CORPORATION

Second Defendant/Applicant/Intended Appellant

VON DER HEYDT INVEST S.A.

Third Defendant/Respondent

NASER TAHER

Ancillary Defendant

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Trevor Ward	Justice of Appeal
The Hon. Mr. Gerard St.C Farara	Justice of Appeal [Ag.]

Appearances:

Mr. Hodge Malek KC with him Mr. Caley Wright and Mr. Oliver Clifton for the Applicant/Intended Appellant, Multibank FX International Corporation
Mr. Alex Cook KC, Mr. Alex Hall Taylor KC with them Mr. Simon Hall for the Respondent, Von Der Heydt Invest S.A.

2023: June 7;
July 7.

Motions for conditional leave to appeal to His Majesty in Council - Section 3(2)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 - Whether the questions involved in the proposed appeals by reason of their great general or public importance or otherwise, ought to be submitted to His Majesty in Council – Fortification of cross undertaking in damages – Type of loss – Whether the Court erred in holding that the only type of loss that was relevant to the question of fortification was loss caused by the coercive or preventive effect of the Worldwide Freezing Order ("WFO") - Disentanglement of losses - Whether the Court erred in concluding that it was necessary to 'disentangle' losses caused by the WFO from losses caused by the underlying proceedings at this stage – Intelligent estimate of loss – Whether the Court erred in finding that no intelligent estimate of the loss could be made from the evidence for the purposes of ordering fortification – Discharge of WFO - Standing - Whether the Court erred in determining that the respondent had standing at the ex parte hearing to obtain an injunction on behalf of parties that it did not then represent on the basis that it would in the future be entitled in a representative capacity - Whether the Court took into account irrelevant matters and/or failed to take into account relevant matters in concluding that the elements for the continuation of the WFO had been made out – Risk of dissipation - Whether the Court failed to properly assess the issue of risk of dissipation and that such risk must be established by solid evidence – Just or convenient – Whether the judge having failed to consider whether it was just or convenient to grant the WFO the Court erred in concluding de novo that it was just and convenient at the ex parte stage to grant the WFO – Duty of full and frank disclosure and fair presentation – Whether the Court erred in declining to deal with the question of fair presentation in relation to the issue of fortification and to make reasonable inquiries at the ex parte stage – Representative party – CPR Part 21 – Conflict of interest - Whether the Court erred in adopting too narrow an approach in considering the issue of conflict of interest in VDHI - Whether the court failed to properly consider the potential conflict of interest between the Noteholders and their representative VDHI and the Noteholders and VDH AG, a company closely associated with VDHI – Irrelevant factors - Case management considerations – Whether the Court erred in finding *that the judge did not base his decision to make the Representative Order purely or mainly on case management grounds*

On 14th March 2023, Multibank FX International Corporation ("MBFX") filed three separate applications for conditional leave to appeal to His Majesty in Council against the individual judgments and orders of this Court dated 21st February 2023, made in three separate but related appeals. Each of the three applications was made on the ground that the proposed grounds of appeal to be relied on, if permission to appeal is granted, raise questions or issues which by reason of their great general or public importance or otherwise, ought to be submitted to His Majesty in Council.

MBFX sought conditional leave to appeal against the Fortification Judgment on the grounds that the Court of Appeal erred in holding that the only type of loss that was relevant to the question of fortification was loss caused by the restraining or preventive provisions of the WFO; concluding that it was necessary to 'disentangle' losses caused by the WFO from losses caused by the underlying proceedings generally at this stage; and concluding that on the evidence, the Court could not (even applying a liberal approach) come to an intelligent estimate of loss for the purposes of ordering fortification.

MBFX sought conditional leave to appeal against the WFO Discharge Judgment on the grounds that the Court of Appeal erred in concluding that Von Der Heydt Invest SA ("VDHI") had standing to and was in all the circumstances entitled to obtain a freezing injunction on behalf of parties that it did not represent, on the basis that it would in the future be entitled to pursue claims in a representative capacity; finding that the basis upon which the WFO was granted was that an EGM of Noteholders was to be held to appoint VDHI as representative for the purposes of these proceedings; and in taking into account irrelevant matters and/or failing to take into account relevant matters in respect of the basic elements for granting a WFO.

MBFX also sought conditional leave to appeal against the Representative Judgment on the ground that, the Court of Appeal limited its consideration of the question of conflict of interest to whether there was a conflict of interest within the confines of the proceedings, and in concluding that the judge's approach was correct because, while VDHI and VDH AG may have a conflict of interest with the Noteholders (who VDHI purports to represent), they have the same interest in pursuing this litigation.

VDHI strongly opposed all three of these applications and asserted that none of the proposed grounds of appeal gave rise to issues or questions of great general or public importance or which otherwise ought to be submitted for consideration by the Privy Council. Accordingly, the applications for conditional leave to appeal to His Majesty in Council ought to be dismissed.

Held: dismissing the applications, except to the extent set out at paragraph 154(1) below to which permission to appeal to His Majesty in Council is granted, that:

1. Section 3(2)(a) of The Virgin Islands (Appeals to Privy Council) Order 1967("1967 Order") stipulates that conditional leave to appeal to the Privy Council may be

granted if the matter in issue is one which involves a question or issue of 'great general or public importance'; or if the issue, while not being considered one of great general or public importance, is 'otherwise' of such significance that it ought, nevertheless, to be submitted to the highest appellate body for its guidance and determination. An applicant for conditional leave to appeal to His Majesty in Council is required to establish that the grounds of the proposed appeal satisfy one or the other of the limbs of the section. In seeking to do so, a particular ground advanced need only satisfy one of the two limbs of the section. Alternatively, certain grounds may fail to satisfy either limb while others may satisfy one or both limbs. In such circumstances, leave to appeal should be granted only with respect to the proposed grounds of appeal which satisfy a limb of section 3(2)(a).

The Virgin Islands (Appeals to Privy Council) Order 1967 S.I. No. 234 of 1967 applied; **Renaissance Ventures Ltd et al v Comodo Holdings Ltd** BVIHCMAP2018/0005; BVIHCMAP2018/0008 (delivered 8th October 2018, unreported) followed; **Imran Siddiqui and others v Athene Holding Limited** [2019] CA (Bda) 15, Civ, 22nd November 2019, unreported considered.

2. MBFX's first intended ground of appeal against the Fortification Judgment, that the Court of Appeal erred in holding that the only loss which it could take into account for the purposes of fortification was loss caused by the 'coercive or preventative effect of the freezing injunction', does not raise a difficult or serious question of law, or point to an area of law in dispute, or a legal question the resolution of which poses dire consequences for the public. Likewise, this proposed ground of appeal does not concern a principle of law which is not settled at a level which is authoritative and/or highly persuasive, or with respect to which there are differing views or conflicting dicta either from this Court or the other courts of the region, or in the United Kingdom and the wider Commonwealth. It also does not relate to the interpretation or application of a procedural rule, or the draconian effect of a rule of court, such that it can be said to satisfy the 'or otherwise' requirement under section 3(2)(a). The Court of Appeal relied on settled principles of causation in relation to recoverable loss or likely loss under the cross-undertaking in damages. The principle enunciated by the Court that to be recoverable, the loss must be caused by the 'coercive or preventive effect of the freezing order', is a well-established and accepted criterion of causation, and the Court was simply identifying this criterion before applying it to the facts of the instant matter.

Martinus Francois v The Attorney General of Saint Lucia Civil appeal No. 37 of 2003 (delivered 7th June 2004, unreported) followed; **Renaissance Ventures Ltd et al v Comodo Holdings Ltd** BVIHCMAP2018/0005;BVIHCMAP2018/0008 (delivered 8th October 2018, unreported) followed; **Pacific Wire & Cable Company Limited v Texan Management Limited et al** BVIHCVAP2006/019 (delivered 6th October 2008, unreported) followed; **Harley Street Capital Limited v Tichigirinski** [2005] EWHC 2471 (Ch) applied; **PJSC National Bank Trust v Mints** [2021] EWHC 1089 Comm applied; **Energy Venture Partners Ltd v Malabu Oil and Gas Ltd** [2015] 1 WLR 2309 applied.

3. The onus is on an applicant for fortification to establish, to the standard of a good arguable case, that the loss in respect of which it seeks fortification of the cross-undertaking in damages would not have been suffered, or is not likely to be suffered, 'but for' the coercive or preventive effect of the injunction. However, MBFX, in its second proposed ground of appeal, asserted that the Court of Appeal, despite upholding the judge's finding that the WFO was a likely cause of MBFX's loss, went on to find *de novo* that the underlying proceedings were an additional or concurrent cause of the loss, but did not make any finding on disentanglement of the loss applying the 'but for' test. This issue concerns, arguably, a reasonable doubt as to the correctness in law of part of this Court's decision – that there were two operative causes or concurrent causes for the loss of the Multibank Bond, which finding was not made by the court below, and if so, how should an applicant for fortification, and ultimately the court itself, treat with the evidence before it on the issue of disentanglement of the alleged loss. It also raises questions of great general or public importance as to whether the approach adopted by the Court of Appeal in dealing with the issue of disentanglement, the standard of proof, and whether that approach may or could have the effect of stifling genuine fortification applications or making them too onerous and difficult to dispose of within the fairly narrow confines of interlocutory or interim proceedings, was correct. These issues go to matters of substantive law and procedural law, and to the extent to which a judge ought to require cogent and solid evidence of disentanglement of the causes of the loss at the interlocutory fortification stage, as distinct from proof of damages or loss at a trial caused by the coercive or preventive effect of the injunction in circumstances where the freezing injunction is found to have been wrongly granted and has been discharged, and bearing in mind the inherent difficulties which an applicant is likely to be faced with in producing such cogent evidence of disentanglement at that preliminary stage. Accordingly, ground 2, gives rise to questions of great general or public importance which ought to be referred to His Majesty in Council.

   Renaissance Ventures Ltd et al v Comodo Holdings Ltd BVIHCMAP2018/0005; BVIHCMAP2018/0008 (delivered 8th October 2018, unreported) applied; **Sinclair Investment Holdings SA v Cushine** [2004] EWHC 218 (Ch) applied.

4. MBFX's third proposed ground of appeal against the Fortification Judgment, that the Court erred in not coming to an intelligent estimate of loss for the purposes of ordering fortification, does not give rise to a question of great general or public importance, or which 'otherwise' ought to be referred to the Privy Council. MBFX was found by the judge and also by the Court of Appeal, to have produced no cogent evidence of the quantification of the loss of the Multibank Group Bond, and the reliance on the other losses alleged were either abandoned or simply not pursued with any vigour. Accordingly, ground 3 does not satisfy the requirement of section 3(2)(a) of the 1967 Order.

5. The issues raised by MBFX under the first category of its proposed grounds of appeal against the WFO Discharge Judgment relating to VDHI's standing to obtain a WFO, have not pointed to any area of law which remains unsettled, or which is in dispute. The principles relating to the court's jurisdiction to grant equitable reliefs

such as freezing injunctions before commencement of the claim, are well-established, as are the principles applicable to the exercise of that jurisdiction and power by the court at the Stage 1 *ex parte* stage. It is clear, and not seriously disputed, that in any event, VDHI had standing as the entity managing and controlling the three Noteholder funds, to commence a claim in relation to the setting aside of the Consent Order/Tomlin Order by which or following which the sum of £36.4 million was transferred by MBFX out of the two accounts which they held at Mex Securities as trustees for the Noteholders, to an undisclosed entity in China. This alone clothed VDHI with the necessary standing to apply for the WFO, and was one of the evidential factors taken into account by the judge and by the Court of Appeal in deciding that VDHI had the requisite standing to apply for the WFO on behalf of all the Noteholders. The fact that VDHI was not at Stage 1 appointed, as yet, as a representative party of the wider group of Noteholders, while a matter for consideration, does not detract from or completely undermine VDHI as a person with standing to apply for the WFO at the *ex parte* Stage 1. In any event, VDHI was subsequently appointed by the court as the representative claimant in the underlying proceedings on behalf of all the Noteholders, and MBFX's appeal against the judge's refusal to discharge the Representative Order was dismissed by the Court of Appeal.

Convoy Collateral Ltd v Broad Idea International Ltd [2021] UKPC 24 applied.

6. MBFX's second category of proposed grounds of appeal against the WFO Discharge Judgment, including considerations of 'risk of dissipation' and 'just or convenient', is transparently another attempt by MBFX to reargue its appeal on its application for conditional leave to appeal to His Majesty in Council. This does not demonstrate, to the requisite standard, how each such ground genuinely can be said to give rise to serious issues of law or serious errors by the Court of Appeal in the WFO Discharge Judgment; and whether, taken individually or cumulatively, to questions of great general or public importance within the meaning of that phrase in section 3(2)(a) of the 1967 Order.

   Martinus Francois v The Attorney General of Saint Lucia Civil appeal No. 37 of 2003 (delivered 7th June 2004, unreported) considered; **Renaissance Ventures Ltd et al v Comodo Holdings Ltd** BVIHCMAP2018/0005;BVIHCMAP2018/0008 (delivered 8th October 2018, unreported) considered.

7. In its proposed appeal against the Representative Judgment, MBFX has not raised any issue or question of great general or public importance relating to the issue of conflict of interest or potential conflict of interest, and to the issue of VDHI not being a fit and proper person to be appointed as a representative party in the said proceedings to represent the interest of the Noteholders, which interest is completely aligned, in having the Consent Order/Tomlin Order set aside on the ground of fraud. The law relating to 'conflict of interest' between a representative and those being represented in court proceedings is well-established. The question of where the line of demarcation ought to be drawn, so that if crossed, it would be a disqualifying factor for the appointment of the proposed representative party, is a

matter for the courts to determine in their own discretion taking into account the purposive approach to Part 21 of CPR, the element of intended flexibility in the rule, and applying the overriding objective to its interpretation and application to the particular facts and circumstances of each case. These are not issues of great general or public importance, and the applicant has failed to demonstrate that there are any good reasons why this issue ought to be submitted to His Majesty in Council.

Lloyd v Google LLC [2022] AC 1217 applied; **La Brea Environs Protectors v The Petroleum Company of Trinidad and Tobago (Petrotrin)** [2022] UKPC 22 applied.

JUDGMENT

[1] **FARARA JA [AG.]:** These three interlocutory appeals which were, by consent, heard together, concern separate applications each filed on 14th March 2023 by Multibank FX International Corporation ("MBFX") pursuant to article 3(2)(a) of **The Virgin Islands (Appeals to Privy Council) Order 1967**.[1] In these applications, MBFX seeks conditional leave to appeal to His Majesty in Council against the individual judgments and orders of this Court dated 21st February 2023 made in three separate but related appeals involving (except in No. 32 of 2022) the same parties. Each of the three applications was made on the ground that the proposed grounds of appeal to be relied on if permission to appeal is granted, raise questions or issues which by reason of their great general or public importance or otherwise ought to be submitted to His Majesty in Council.

[2] In brief, this Court in separate written judgments delivered on 21st February 2023: (i) allowed the appeal by Von Der Heydt Invest S.A. ("VDHI") in Commercial Appeal No. 8 of 2022 ("the Fortification Appeal") and discharged the order made by a judge of the Commercial Division dated 15th July 2022, by which VDHI was ordered to pay the sum of US$20 million into court as fortification of the cross-undertaking in damages given by VDHI as part of a worldwide freezing order obtained *ex parte* on 26th April 2021 ("the WFO") in Claim No. 73 of 2022; (ii) dismissed MBFX's appeal in Commercial Appeal No. 32 of 2022 ("the Representative Appeal") against the order made by a

[1] S.I. No. 234 of 1967.

judge of the Commercial Division dated 28th March 2022 dismissing MBFX's application to set aside an order obtained *ex parte* by VDHI on 21st June 2021 appointing VDHI as a representative claimant in the proceedings in the court below ("the Representative Order"); and (3) dismissed MBFX's appeal in Commercial Appeal No. 9 of 2021 ("the WFO Discharge Appeal") against the order of a judge of the Commercial Division dated 4th October 2021 dismissing MBFX's application to discharge the WFO, and continuing the WFO until trial or further order.

[3] Before this Court, leading counsel for both MBFX and VDHI helpfully made their respective oral submissions in relation to each application *seriatim* in the following sequence: First in No. 8 of 2022 (Fortification Appeal), second in No. 9 of 2021 (the WFO Discharge Appeal) and third in No. 32 of 2022 (the Representative Appeal). The same order of treatment will be adopted in this judgment, which shall be dispositive of all three applications.

Section 3(2)(a) of the 1967 Order - *great general or public importance*

[4] Section 3(2)(a) of **The Virgin Islands (Appeals to the Privy Council) Order 1967** provides-

> "Subject to the provisions of this Order, an appeal shall lie from decisions of the Court to [His] Majesty in Council with the leave of the Court in the following cases –
>
> (a) Where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to [His] Majesty in Council, decisions in any civil proceedings;"

[5] Section 3(2)(a) of the 1967 Order stipulates two bases upon which the Court of Appeal may exercise its jurisdiction to grant conditional leave to appeal to the Privy Council. The first is that the matter in issue before the Court is one which involves a question or issue of '*great general or public importance*'. The second is where the question or issue, while not being considered one of great general or public importance, is 'otherwise' of such significance that it ought, nevertheless, to be submitted to the

highest appellate body, their Lordships' Privy Council, for its guidance and determination.

[6] The principles applicable to both limbs of article 3(2)(a) of the 1967 Order are well-settled. The scope and ambit of each of the two limbs were considered in several decisions of this Court and of the Privy Council. The relevant principles were not in dispute during the hearing of these applications. However, the parties differed as to the application of the principles to the various grounds or intended grounds of appeal set out in each of MBFX's notices of application, and whether, by virtue of the stated grounds or any of them, the applicant can be considered to have raised issues or questions of great general or public importance, such that permission to appeal to His Majesty in Council ought to be granted. However, although this limb was not developed by MBFX in its written or oral submissions, it also relied, in each of the applications, on the second 'or otherwise' limb' of article 3(2)(a) of the 1967 Order.

[7] It is settled law that the test of what is of '*great general or public importance*' warranting permission to appeal to the Privy Council is whether the questions or issues in the appeal involve a 'difficult question of law'. In construing the said expression, a court would usually look for matters that involve 'a serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or a legal question the resolution of which poses dire consequences to the public.': **Martinus Francois v The Attorney General of Saint Lucia**.[2] In **Francois**, the Court cited two examples of questions or issues involving a 'difficult question of law' which were found to raise issues of great general or public importance. The first was the decision in **Douglas v Pindling**[3] where the important issue of law concerned the correct test to be applied by a commission of inquiry in deciding whether to issue a summons under the Bankers' Books Evidence Act, and the nature of the Court's supervisory jurisdiction over a decision to issue such a summons. The second is **Etoile Commerciale SA v Owens Bank (No. 2)**.[4] In **Etoile**, conditional leave to appeal was granted by this Court

[2] Civil appeal No. 37 of 2003 (delivered 7th June 2004, unreported) at para 13.
[3] (1996) 3 LRC 460.
[4] (1993) 45 WIR 136.

where there were conflicting *dicta* from the highest courts on the law governing the circumstances under which the enforcement of a foreign judgment might be resisted on the ground that it had been obtained by fraud.

[8] The meaning of the expression '*great general or public importance*' received further and more expansive pronouncements by this Court in **Renaissance Ventures Ltd et al v Comodo Holdings Ltd**.[5] There the applicable principles were summarised in this way-

> "[10]….Where there is no genuine dispute on the applicable principles of law underlying the question which the applicant wishes to pursue on his or her proposed appeal, a question of great general or public importance does not ordinarily arise, especially where the principle of law is settled either by the highest appellate court or by longevity of application. Where the principle is one established by this Court but is either unsettled, in the sense that there are differing views or conflicting dicta, or there is some genuine uncertainty surrounding the principle itself, or it is considered to be far reaching in its effect, or given to harsh consequences, or for some other good reason would benefit from consideration at the final appellate level, this Court would be minded to seek the guidance of their Lordships' Board. Where, however, the real question on the proposed appeal is the way this Court has applied settled and clear law to the particular facts of the case, or whether a judicial discretion was properly exercised, leave will ordinarily not be granted on this ground. In such a case, the question on the proposed appeal may be of great importance to the aggrieved applicant, but it would not for that reason alone be a question of great general or public importance.
>
> [11] It follows as well that the question of law which is said to be of great general or public importance must genuinely arise from the way the case was decided in the Court of Appeal. The question must be 'involved' in the appeal. Such a question cannot arise if it was not raised on the appeal, or if the principle of law which the applicant wishes to have settled by the highest court has not been put in doubt."

[9] In **Pacific Wire & Cable Company Limited v Texan Management Limited et al**[6] this Court considered whether to grant conditional leave to appeal to the Privy Council under article 3(2)(a) of the 1967 Order on the ground that, notwithstanding that the

[5] BVIHCMAP2018/0005; BVIHCMAP2018/0008 (delivered 8th October 2018, unreported).
[6] BVIHCVAP2006/019 (delivered 6th October 2008, unreported).

questions involved was 'eminently procedural', whether it or they were of great general or public importance, or otherwise ought to be referred to the Privy Council for its guidance. The questions raised by the applicants in that case concerned, in relation to the 'Texan Application' - the proper interpretation and application of Part 9.7 of the **Civil Procedure Rules 2000** ("CPR") dealing with disputing the court's jurisdiction. More specifically with regard to the filing and service of evidence contemporaneously with an application challenging the court's jurisdiction on *forum non conveniens* grounds; whether the court's inherent jurisdiction to stay proceedings based on *forum non conveniens* has been abolished; and the interpretation and application of Part 9.7 of the CPR. In relation to the Blinco Application, the question was whether it is mandatory to file an application for a stay on the ground of *forum non conveniens* under the inherent jurisdiction of the court within the time prescribed for applications made under Part 9.7 of CPR and if so, whether the time limit for such applications is referrable to that under Part 10.3 of CPR, without consideration of any extension of time for filing a defence to which such rule refers.

[10] In granting the applications for conditional leave in **Pacific Wire**, this Court concluded that –

> *With respect to the Texan Application*:
>
> "… the particular jurisdiction that is invoked by an application under CPR 2000 Part 9.7 in the Territory [of the Virgin Islands] where such challenges are prevalent takes the interpretation given to Part 9.7 by this court out of the realm of mere procedural niceties. The interpretation in fact gives a draconian effect to any perceived non-compliance with that Part. In those circumstances the guidance of the Privy Council as to the correct interpretation of this Part is desirable especially as the English decisions on their equivalent rules to which we have been referred cannot be easily reconciled with this court's judgment on this application. We therefore hold that the questions on the proposed appeal do give rise to matters that are of great general legal importance for this Territory. We are prepared to hold alternatively that the desirability of some guidance on the interpretation of the rule amounts to good reason why leave should otherwise be granted in the circumstances."

With respect to the Blinco Application:

"We are of the view that the question which these applicants wish to have heard on the proposed appeal which involves a determination of the limits of the inherent jurisdiction of the court is also a matter on which the courts of the jurisdiction can benefit from a definite statement from their highest appellate court. It is admittedly an area where the law has not been clear and the circumstances of its operation are such that we consider it to be of great legal importance to the Territory that the question be determined by the Privy Council…."

[11] In analyzing the conclusions reached by the Court in **Pacific Wire** that the applications for conditional leave to appeal had raised questions of great general or public importance or otherwise ought to be granted, it must be appreciated that this is a 2008 decision, coming at a time when the CPR, though not in its infancy, was still relatively new to the jurisdiction, and issues as to the proper interpretation, ambit, scope, and effect of certain parts or rules had not yet been canvassed before the courts nor had they been the subject of authoritative judicial pronouncements in the BVI and in the wider Eastern Caribbean jurisdiction. Specifically, at that time in the development of the civil procedure in this jurisdiction, the issues raised in the two applications for conditional leave concerning the correct interpretation of aspects of Part 9.7 of CPR and the inherent jurisdiction of the court, had not had the benefit of prior authoritative judicial consideration and pronouncement. Those issues, which were imminently procedural issues usually not warranting the guidance of the highest appellate body, are now well-settled.

[12] Having analysed the *dicta* in several of the relevant regional and Commonwealth authorities, the Court in **Pacific Wire** distilled the three important principles. The first is of general application. It concerns the importance of striving to maintain a level of consistency between the decisions of this Court on conditional leave applications and those of the Privy Council on applications for special leave, recognising that pursuant to its applicable rules, the Privy Council is afforded a much wider discretion to grant special leave to appeal. Pursuant to Privy Council Practice Direction 3, rule 3.3.3(a) the threshold for granting special leave is lower – where there is an '*arguable point of law*'. The second and third important principles from the dicta in **Pacific Wire** are

interrelated. They concern strictly procedural issues or issues of interpretation of applicable rules, and the approach by this Court in determining whether such issues, which are usually matters for the national/regional courts, raise questions of great general or public importance, or otherwise ought to be referred to His Majesty in Council for determination and guidance. These two principles were formulated in this way:-

> "…the authorities show that it is appropriate for leave to be granted to appeal to the Privy Council where the question on the proposed appeal involves a matter of great general or public importance that is procedural rather than substantive in nature if this Court considers that the guidance of the Privy Council would be appropriate in relation to the interpretation or application of the procedural rule and the interpretation or application advanced by the local courts have a draconian effect or that there are some other special circumstances that would render such guidance useful to the local courts. There should be less reluctance to grant leave where the procedural rule has an equivalent in England."

The '*or otherwise*' limb

[13] The 'or otherwise' limb of article 3(2)(a) of the 1967 Order accords to an applicant for conditional leave an additional limb upon which to persuade the Court to grant the application. To satisfy this ground, an applicant must demonstrate that there is some good reason or ground why leave to appeal ought to be granted. Perhaps the most persuasive of such reasons is where there is reasonable doubt as to the correctness of the Court of Appeal's decision as, for example, where the decision was based on a principle which has been overruled by higher and binding authority or where it was based on a statute or statutory provision which has been repealed prior to such decision being rendered. In short, the 'or otherwise' limb may be invoked where an applicant can demonstrate that the decision sought to be further appealed is so flawed or so incorrect that it ought not to be allowed to stand or where there is some other good reason why the guidance of their Lordship's Privy Council is desirable. As stated in **Renaissance v Comodo Holdings Ltd**:

> "[13] But even where an applicant fails to establish that the question he or she wishes to pursue before the Privy Council is of great general or public importance, this Court may yet grant leave if it is satisfied that there are good grounds which would otherwise justify referral to [His] Majesty in

> Council, as for example where there is some reasonable doubt as to the correctness of the decision of [the] court."

[14] The ambit and application of the 'or otherwise' limb was also considered by the Court of Appeal of Bermuda in **Imran Siddiqui and others v Athene Holding Limited**.[7] This case dealt with a contest over whether Bermuda rather than New York was the *forum conveniens* for the trial of claims brought before the Bermuda courts by the respondent, a Bermudian exempt company, against the appellants/applicants. In the judgment (delivered by Smellie JA), the court, having considered the principles applicable to the expression 'great general or public importance' as set out by this Court in **Martinus Francois**, **Pacific Wire,** and **Renaissance Ventures v Comodo Holdings**, turned to a consideration of the 'or otherwise' limb under section 2(c) of the Appeals Act 1911 (1989 Revision) of the laws of Bermuda. This provision is in *pari materia* with section 3(2)(a) of the 1967 Order.

[15] Having commented that the grounds relied on by the applicant will be examined later in the judgment as to whether they meet the 'great general or public importance' requirement, the learned Justice of Appeal opined that, if they are found not to, 'it cannot be right that leave should be given on the basis of the "or otherwise" limb.'[8] The Justice of Appeal also observed[9] that at its core the dispute in that matter is a private dispute about *forum conveniens* between a Bermuda company and other privately interested parties (one of its former directors, and one of its former officers/employees), and a private Bermuda company which those individuals established (Caldera). Also, 'important as it is to the parties themselves and interesting as it may be to the wider business community for all its wider implications, this is at its core a private dispute…' Specifically in relation to the 'or otherwise' limb, the learned Justice of Appeal issued the following cautionary statement:

> "A finding that in these circumstances there are "otherwise" good reasons for the grant of leave to appeal, could readily become a charter for

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7 [2019] CA (Bda) 15, Civ, 22nd November 2019, unreported.
8 Ibid, para 60.
9 Ibid, para 61.

> frustration and delay by way of future *forum* contests, regardless of well-settled principles of governing law."

[16] In summary, an applicant for conditional leave to appeal to His Majesty in Council under section 3(2)(a) of the 1967 Order, is required to establish to the Court that the grounds of the proposed appeal satisfy one or the other of the limbs of the section. In seeking to do so, a particular ground advanced need only satisfy one of the two limbs of the section. Alternatively, certain grounds may fail to satisfy either limb while others may satisfy one limb. In such circumstances, leave to appeal should be granted only with respect to the proposed grounds of appeal which satisfied section 3(2)(a). In the instant matter, each of the three separate applications for conditional eave to appeal to His Majesty in Council have their own proposed grounds of appeal. However, there is a great deal of overlapping especially between the grounds in relation to the Fortification Appeal and the WFO Discharge Appeal. I now turn to consider each application *seriatim* in the order argued and as indicated above.

(1) Application for conditional leave - Fortification Appeal No. 8 of 2022

Summary of grounds of appeal and each party's case

[17] In this application, MBFX seeks conditional leave to appeal from the judgment and order of the Court of Appeal dated 21st February 2023 on the ground that the questions raised in the application by reason of their great general or public importance or otherwise ought to be submitted to His Majesty in Council. MBFX relies on the three grounds or issues set out in the draft grounds of appeal attached to the notice of application. These grounds were helpfully summarised at paragraph 9 of MBFX's written submissions. They are:

(1) ***Types of Loss*** – holding that the only type of loss that was relevant to the question of fortification was loss caused by the restraining provisions of the WFO;

(2) **Disentangling Losses** – concluding that it was necessary to 'disentangle' losses caused by the WFO from losses caused by the underlying proceedings generally at this stage of the proceedings; and

(3) **Intelligent Estimate of Loss** – concluding that, on the evidence, the Court of Appeal could not (even applying a liberal approach) come to an intelligent estimate of loss for the purpose of ordering fortification.

[18] Mr. Malek KC, learned counsel for MBFX, in his oral submissions summarised the points of great general or public importance in relation to this application as follows:

(1) What types of losses may be ordered to be fortified under the cross-undertaking in damages? The Court has limited them to losses flowing from the injunction itself. This is an important ruling with far-reaching implications and one which is not supported by case law or by the textbooks.

(2) How should a court deal with 'concurrent' losses? In the instant matter, there can be two arguable cases, one where the loss is caused solely by the WFO, and the second where it is not. To resolve this issue would require a trial. It cannot be resolved within the limited interlocutory stage of a fortification application. In this regard, it cannot be right to say that at the fortification application stage, an applicant has to show what losses are caused by the injunction and must disentangle such losses from the losses caused by the underlying allegations of fraud in the proceedings. It is only at the stage of the assessment of the losses flowing from an improperly obtained injunction which has been discharged, that the onus should be on the applicant to disentangle the losses one from the other.

[19] In brief, it is VDHI's case that none of the three proposed grounds of appeal relied on by MBFX have any merit, nor do any of them give rise to any issue of great general or public importance. VDHI submits that in order to succeed in its application, MBFX must succeed on all three grounds. Mr. Cook KC, learned counsel for VDHI, submitted at the outset that in relation to ground 1 the law is well-settled, and the Court of Appeal did not get it wrong – it simply applied well-established principles to

the facts of this case. In relation to grounds 2 and 3, the law and principles relating to disentangling losses and arriving at an intelligent estimate of loss, are equally well settled, and the burden of proof in each instant rests with MBFX as the applicant for fortification, which burden the Court of Appeal found it had failed to discharge as it's evidence was unsatisfactory and amounted to bald statements in Kattoura 6 unsubstantiated by any documentary evidence of loss.

G1. Types of Loss

MBFX's Case

[20] MBFX contends that the Court of Appeal, by holding at paragraph 37 of its judgment that 'the applicant must show that it is the coercive or preventive effect of the freezing injunction [WFO] that caused the loss', stated the principle of loss in too narrow or limiting of terms, and in doing so misconstrued what is stated in the authorities cited and relied on, and was plainly wrong. MBFX also argues that while loss caused by the 'coercive or preventive' effect of a freezing injunction might most readily be shown or proven to the requisite standard of a good arguable case by an applicant for fortification, there was no rule that 'only' loss caused by the coercive and preventive effect of the injunction can or should be considered.

[21] MBFX gives context to this primary submission in support of this ground. It underscores that in the Discharge Appeal Judgment, the issues of material non-disclosure by VDHI upon its *ex parte* application for the WFO, concerned the real likelihood that the WFO would cause MBFX substantial loss and the representation that VDHI was in a financial position to honour the undertaking in damages, when it clearly was not. MBFX also posits that in relation to the Representation Appeal, an important issue was whether such an order ought to have been made or continued. This was especially so in circumstances where VDHI is not in a financial position to honour the undertaking in damages or any substantial adverse costs orders, and where the proceedings were ostensibly being brought on behalf of the Noteholders who though they might benefit from the litigation, did not bear the burden or consequences, in financial terms, of the undertaking in damages and adverse costs orders. MBFX also posited that in the first instance and appeal judgments in the

Fortification matter, both courts found that there was a good arguable case that it has suffered or will suffer loss; that the WFO was the likely cause of the loss; and VDHI does not have sufficient funds to meet such loss.

[22] MBFX complains that notwithstanding the 'well-established' principle that the cross-undertaking in damages is the 'price' for the court granting the injunction, and the cross-undertaking must have sufficient means behind it to be worthwhile, the Court of Appeal nevertheless overturned the fortification order made by the first instance judge in the sum of US$20 million. In this regard, it was submitted that the Court of Appeal committed a serious error of principle as it ought to have confirmed the order for fortification in the sum assessed by the judge. Accordingly, MBFX contends that the Court's decision on these issues is fundamentally flawed, and gives rise to serious issues of law and to questions which are of great general or public importance, such that they ought to be considered by His Majesty in Council for final determination and guidance.

[23] In making its case for conditional leave, MBFX takes aim at the two authorities cited and relied on by the Court of Appeal for its formulation of the principle at paragraph 37 of the Fortification Judgment. It is submitted that these cases, when scrutinised, do not go as far as to say that such loss for the purposes of fortification is restricted to losses caused by the coercive or preventive effect of the WFO. Moreover, to the extent that any of the said authorities purport to do so, they are all first instance decisions (one of the English courts and another of the Australian courts) which decisions ought to be considered and overturned by the highest appellate body. These cases are **Harley Street Capital Limited v Tichigirinski**;[10] and **PJSC National Bank Trust v Mints**.[11] MBFX argues that the judgment in **Harley Street** falls way short of being the definitive statement of principle as suggested by the Court of Appeal at paragraph 37. It is not framed in exclusive terms, and the first instance deputy judge (then Michael Briggs QC) goes no further than to say that the *dicta* in

[10] [2005] EWHC 2471 (Ch).
[11] [2021] EWHC 1089 Comm.

Tharros Shipping Co Ltd v Bias Shipping Limited[12] "strongly suggests" that the type of loss that is recoverable is that caused by the preventative or coercive effect of the injunction.

[24] In **Harley Street**, Briggs J (now Lord Briggs) cited approvingly a passage from the judgment of Waller J in **Tharros Shipping** where it is stated, at paragraphs 21 and 22 of the judgment (in material particular) –

> "21. … 'but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an enquiry into damages at which principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the Defendant that the plaintiff would not prevent the Defendant from doing that which he was restrained from doing by the terms of the injunction: see Smith v Day (1882) 21 ChD 421, per Brett LJ at p.427.' (emphasis added)
>
> '22. That analysis strongly suggests to me that it is loss caused by the preventative or, as the case may be, coercive effect of the injunction that is recoverable under the cross-undertaking." (emphasis added)

[25] MBFX also argues that the decision of the Australian court in **Mints** likewise falls short of establishing that there is a hard and fast rule that only losses caused by the coercive and preventive effect of the injunction are recoverable. They pray in aid this passage from the judgment of Calver J (at para. 27(ii)(i)) which deals principally with the issue of reputational damage –

> "Thus, whilst a claim for general damages might in theory be available for reputational damage caused by the granting of a freezing order, it is likely to be a rare case as it will frequently be difficult for the defendant to show that the damage has been suffered as a consequence of the restraint and not as a result of other factors, such as the bringing/existence of the underlying litigation."

[26] MBFX posited that the question of what kind or category of losses can be taken into account by a court when considering an application for fortification of a cross

[12] [1994] 1 Lloyds LR 577.

undertaking in damages, is clearly a matter of (great) general importance which might affect respondents to a WFO. In this vein, the approach taken on this issue by the Court of Appeal, it is contended, was too narrow, and would have the consequence of leaving respondents to a WFO 'without proper protection against losses caused by such orders'.

VDHI's Case

[27] Specifically as to ground 1 (types of loss and causation), VDHI argues that the fundamental principle that the 'applicant must show that it is the coercive or preventive effect of the freezing injunction that caused the loss', accords with well-established principle and is correct as a matter of law. VDHI relies on *dicta* from the judgment of Lord Diplock in **F Hoffmann-La Roche & Co. A.G. and others v Secretary of State for Trade and Industry**,[13] a decision of the House of Lords. Lord Diplock (at 361 E-F) made clear that it is the damages which flow from the restraining provisions of the injunction which fall to be assessed under the cross-undertaking in damages. He opined-

> "… but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction: see Smith v Day (1882) 21 Ch. D 421, per Brett L.J., at p.427." (Emphasis added)

[28] The usual terms of an undertaking in damages are notable. By those terms the claimant undertakes to the court to abide by any order it makes as to any damages which the defendant shall have sustained '*by reason of this order*', that is, by the injunction itself. It is also notable, from the above statement of principle by the House of Lords, that the basis or principle upon which such loss is to be assessed is the same as that applicable to damages for breach of contract, that is, damages flowing

[13] [1975] AC 295.

from or caused by the breach, after applying the usual principles relating to remoteness and the duty to mitigate losses.

[29] Importantly, the *dicta* in **La Roche** emphasises that:

> "…the practice of exacting an undertaking as to damages facilitates the conduct of the business of the courts. It relieves the court of the necessity of embarking at an interlocutory stage upon an inquiry as to the likelihood of the defendant being able to establish facts to destroy the strong prima facie case which *ex hypothesi* will have been made out by the [claimant]. The procedure on motions [applications] is unsuited to inquiries into disputed facts. This is best left to the trial of the action…"

[30] Lord Diplock also noted that where the claimant fails to establish his/her claim at the end of the trial, 'the defendant is compensated [under the undertaking] for any loss which he may have suffered by being temporarily prevented from doing what he was legally entitled to do.' (emphasis added). This again underscored that the principle or the test is that the defendant would be entitled to recover any loss suffered as a result of the coercive or preventive effect of the injunction and would therefore be in further support of the principle being a settled or well-established one.

[31] In further support of the principle stated by the Court of Appeal in the Fortification Judgment at paragraphs 37 (and onwards) being settled law, VDHI cites certain extracts from the judgment of Briggs J in **Harley Street Capital** (at para. 22). This passage and the principles were cited approvingly by the English Court of Appeal in **Energy Venture Partners Ltd v Malabu Oil and Gas Ltd**,[14] and by Calver J in **Mints** (at para. 27(ii)). It is submitted that, contrary to MBFX's contention, these authorities do go so far as to say that the loss is restricted to losses caused by the coercive or preventive effect of the injunction. As to any possible claim for damage to reputation caused by the WFO, VDHI contends that MBFX did not claim this type of damage in its application for fortification. VDHI also relies on extracts from the above cases, in addressing the question of 'reputational damage', it was said that such losses are recoverable in 'theory', and the instances where an applicant may

[14] [2015] 1 WLR 2309.

be entitled to recover loss for reputational damage will be rare. It is also VDHI's submission that these authorities make clear that, in any event, it is only if the reputational losses being claimed are caused by the coercive or preventive effect of the injunction that they will be recoverable. Moreover, it is submitted that the position in law with regard to causation and reputational damage, further supports and underscores the fundamental principle in relation to recoverable loss as being only loss caused by the coercive or preventive effect of the injunction, as stated correctly and applied by the Court of Appeal.

[32] VDHI cites the passage from the judgment of Calver J in **Mints** (referenced above) which speaks to general damages being available 'in theory' for reputational damage and the rarity of being able to prove that such damage had been suffered 'as a consequence of the restraint', as opposed to other factors such as the 'bringing/existence of the underlying litigation'. Moreover, as to damage to reputation VDHI submits that even if such damage was theoretically recoverable by MBFX, its reliance on that principle as a means of concluding that the Court of Appeal formulated too narrow or restrictive a principle of loss, is entirely misplaced, for the simple reason that MBFX did not claim this category of damage or loss before the learned judge. Accordingly, it ought not to lie with MBFX to argue, as they do now, that the judge ought to have considered reputational damage, and the Court of Appeal erred in applying too narrow a principle of causation.

[33] Regarding MBFX's alternative argument that the cases of **Harley Street Capital** and **Mints** are wrongly decided first instance decisions which ought to be overturned, VDHI points out that in **Malabu Oil** in which the key passages from the judgment of Briggs J in **Harley Street Capital** were cited with approval, is a decision of the English Court of Appeal. At paragraph 14 of the judgment of Tomlinson LJ, the relevant passages from the judgment of Briggs J were approved and adopted as correct principles of law. In my considered view, the decision in **Malabu** is most relevant to the issue of law raised in MBFX's first proposed ground of appeal. I say this firstly because the **Malabu** decision is clearly of persuasive authority, albeit not

binding authority on this Court, but equally so because of the extensive quoting of passages from the **Harley Street Capital** and **Mints** decisions. In **Harley Street Capital** the extract from the judgment of Briggs J includes references to other decided cases and to passages in those judgments upon which Briggs J came to his reasoned conclusion as to the test of loss being those caused by the coercive or preventive effect of the injunction. I shall return to these passages later in this judgment.

[34] In support of the correctness of the principle in the Fortification Judgment with regard to losses and causation, VDHI also submits that this principle is consistent with the policy which underpins the requirement for a cross-undertaking in damages, which is to compensate the defendant/applicant for not being able to do the thing that, as a result of the injunction, he was being restrained from doing, where it has been determined subsequently that the injunction ought not to have been granted. The type of loss and measure of that loss, VDHI argues, is 'compensation equivalent to that for breach of contract'.

[35] Accordingly, VDHI submits that the Court of Appeal was doing no more than re-stating a well-established principle of law. There is no genuine dispute over the law and principles in this area, and no question of great general or public importance arises which ought to be referred to His Majesty in Council.

G2. Disentangling Losses

MBFX's Case

[36] In relation to ground 2, MBFX contends that the Court of Appeal erred in finding that it was necessary as a matter of principle to disentangle the losses caused by the WFO from losses caused by the underlying proceedings at this interlocutory stage of an application for fortification. It is submitted that the Court of Appeal, having upheld at paragraph 50 the finding of the judge at first instance that the WFO was a likely cause of the loss of the Bond, and that there was no basis upon which to interfere with the judge's finding that there was sufficient evidence of a risk MBFX could suffer loss because of the WFO, the Court of Appeal erred also when it held

that the burden was on the applicant, MBFX, to 'disentangle' the losses caused by the WFO from losses caused by the underlying fraud proceedings and to ascribe proportions to those losses by demonstrating whether and to what extent the WFO was the substantial or effective cause of the loss, or but for the WFO the loss would not have been suffered.

[37] This approach, MBFX argues, 'places an intolerable burden that cannot possibly be discharged on applicants for fortification which [applications] are meant to be relatively short hearings on the basis of limited evidence, and will turn such applications into trials, rather than short applications which can be dealt with quickly after the grant of a WFO.' MBFX also submits that an applicant for fortification 'cannot sensibly be expected to categorize and apportion expected future losses according to different concurrent causes: it is simply not an exercise that it is reasonable to expect respondents to a WFO to be able to undertake, and will lead to endless, complex arguments about causation.' This issue coupled with the Court's reliance on the two first instance decisions, says MBFX, raises a serious question which would benefit from consideration by the highest appellate authority.

[38] In my judgment, separate and apart from important considerations as to the cogency and quality of the actual evidence of the loss relied on by MBFX, there is some force in these arguments which raise important considerations and issues applicable to the determination of applications for fortification at an interlocutory stage, as distinct from an in depth inquiry into and assessment of actual losses after trial or upon the discharge of the freezing injunction, in the event that the claimant is unsuccessful in the main proceedings and the injunction ought not to have been granted.

[39] MBFX also submits that the Court of Appeal should not have found that the underlying proceedings were an additional or concurrent cause of the loss, or if it did, that such finding meant that MBFX had failed to show, to the requisite standard of a good arguable case, that the WFO was the effective cause of the loss. They argue that, in effect, the Court of Appeal embarked upon an improper or

impermissible exercise of assessing losses and the causes of the losses, which exercise should only have been undertaken at the stage of an inquiry into and assessment of damages.

VDHI's Case

[40] In response to MBFX's submissions on ground 2, VDHI contends that the Court of Appeal was doing nothing more than re-stating and applying well-established principles of BVI law. The critical principle when assessing losses under the cross-undertaking is that the court generally applied ordinary contractual principles where the party who has breached the contract is only liable for losses that would have occurred 'but for' the breach, and the burden of proof lies on the party asserting that loss has been suffered. Therefore, in an application for fortification, the burden is on the applicant to show that the losses it has, or may suffer, would not have occurred 'but for' the coercive or preventive effect of the injunction. In this regard, VDHI submits that paragraphs 35, 36 and 37 of the Fortification Judgment 'hits the nail on its head'.

[41] In support of these principles, VDHI cited extracts from **Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd**;[15] **Malabu Oil** at paragraph 54; **SF Tankers Ltd (formerly Fiona Trust and Holding Corp) v Privalov**;[16] and **Mints** at paragraph 27(ii)(a). Also, at paragraph 24, VDHI cites extracts from the judgment in **Air Express** (at paras. 3-4); **Financiera Avenida SA v Shiblaq** (cited in **Mints** at para. 27(ii)(d)); and **Mints** (at paras. 73-74). These cases are relied on in support of the 'well-established' principle that if part of the loss claimed would have occurred in any event as a result of the allegations in the underlying proceedings, it necessarily follows that the said loss was not caused 'but for' the injunction. It is submitted also that these authorities make clear that it is for the applicant for fortification to disentangle the loss that would have occurred (or has occurred) 'but

[15] (1981) 146 CLR 249, at 325.
[16] [2018] 1 WLR 5623, at para. 42.

for' the injunction, from losses that would have occurred in any event, for example, because of the underlying proceedings, which losses cannot be recovered.

[42] In this regard, VDHI submits that MBFX failed to disentangle the losses attributable to the coercive or preventive effect of the WFO from those attributable to the underlying proceedings which are not recoverable. The Court of Appeal so found and its decision on this is correct. The evidence, on affidavit and documentary, led by MBFX in support of its fortification application did not address the issue of disentanglement. To the contrary, the evidence relied on showed that the losses being claimed were more likely to be from the underlying proceedings. In these circumstances, VDHI argues, it cannot be shown that these issues give rise to questions of great general or public importance.

G3. Intelligent Estimate of Loss

MBFX's Case

[43] MBFX argued that the Court of Appeal was wrong to disturb and to set aside the intelligent estimate of loss for the purposes of fortification arrived at by the judge below, which sum represented a 'pragmatic' conclusion, the judge having considered it to be a sum which the actual losses might exceed. It is submitted that from a public policy perspective, the effect of the approach adopted in the Fortification Judgment is to make fortification applications much more difficult to make out and for the court to arrive at an appropriate or reasonable sum for fortification. The resulting effect would be, it is posited, to leave innocent defendants/respondents completely exposed, especially where, as here, VDHI has no assets or no assets available to meet losses flowing from the WFO, or to settle adverse cost orders.

[44] MBFX also submits that the Court of Appeal was wrong to treat the absence of particularized evidence as being fatal to the application for fortification. In so concluding, the Court failed to have regard to the relevant authorities on this point, and had it done so it would have concluded that it is not necessary for the Court,

in assessing the appropriate sum for fortification, to come to an 'intelligent estimate' as to the precise figure for the likely loss. Instead, 'it is sufficient for the Court to be confident that the amount it orders is an appropriate figure with regard to the possible level of loss.' In support of this proposition, MBFX relies on this extract from the first instance decision of the English court in **Sinclair Investment Holdings SA v Cushine**,[17] where Mann J states–

> '…while it may not be possible to put anything like a precise figure on the loss, the court will, if necessary, do what it can on the evidence before it to reach an appropriate figure.'

[45] Accordingly, it is MBFX's case on this ground that on the evidence adduced before the learned judge in the court below, it had calculated the loss caused by the loss of the Multibank Bond, which calculation led to a precise figure of Euro 68.5 million. In those circumstances the Court ought to have been satisfied, as was the judge below, that the figure of US$20 million sought in the fortification application 'was appropriate being a figure which the Court could have reasonable confidence may be exceeded by the actual loss that might be incurred and sought to be recovered on an inquiry under the cross undertaking, while also being a reasonable figure for the Court to order.'

VDHI's Case

[46] In addressing MBFX's points under ground 3, VDHI submits that this ground is really a complaint not about principles of law but about the application of well-established principles to the facts of the instant case. The conclusions of the Court of Appeal at paragraphs 63 to 66 of the Fortification Judgment represent an 'evaluative judgment' and are not matters of great general or public importance. Furthermore, MBFX is wrong to assert that the Court of Appeal accepted that the evidence 'showed a reasonable estimate of loss of EUR 68.5 million', and therefore it ought to have had no issue in maintaining fortification in the lower sum of US$20 million. What the Court of Appeal did find was that the only evidence as to the quantum of MBFX's loss was Kattoura 6, and that evidence was unreliable. This

[17] [2004] EWHC 218 (Ch) at para. 24.

points not to some error of principle or misunderstanding of the law, but to an evaluative assessment of the evidence before the judge in the court below, and the conclusion that such evidence was unreliable. It was therefore impossible for the Court to intelligently estimate MBFX's loss, however imprecise it may be, especially in circumstances where MBFX had failed to discharge its burden of disentanglement of loss flowing from the coercive or preventive effect of the WFO, from loss from other matters, including the underlying fraud proceedings.

In this regard, VDHI points to paragraph 56 of the Fortification Judgment where the Court of Appeal said (in part) that the calculation of loss is set out in Kattoura 6 which evidence is not supported by any documents from MBFX. It is a mere assertion by Mr. Kattoura of how he said MBFX suffered loss from the WFO. In that paragraph, the Court also remarked that while the estimate of loss was a specific amount of Euros 68.5 million, if the judge thought it was a reasonable estimate, he should have used it, or explained why he was not using it; and the reduction to US$20 million 'underscores the court's concern that the 68.5 million euros was not a reasonable estimate.'

[47] VDHI points in particular to the evidence at paragraph 4.6 of Kattoura 6, where Mr. Kattoura addresses the alleged loss of the 'Multibank Bond'. He deposes that the value of the bond was EUR 500 million, with the Multibank Group's projected returns of 20% per annum on foot of the bond issuance. 'This means that the projected losses in respect of the Multibank Bond failing to issue was 17% (i.e. 20% -3%). This places the annual losses to the Multibank Group in the region of EUR 85 million (17% of EUR 500 million).' Mr. Kattoura goes on to estimate the annual losses to MBFX as a result of the cancellation of the bond at approximately EUR 68.5 million (80% of EUR 85 million). It is VDHI's submission that this evidence was completely unsatisfactory for the reasons addressed in paragraph 43 of its written submissions.

[48] The essence of these factors is that MBFX has produced no proof or evidence to substantiate any of these statements, which are mere bald assertions by Mr.

Kattoura. VDHI concludes that the upshot of MBFX's case is that, even in the absence of proper evidence, the Court should 'take a guess' at what an applicant's recoverable loss is likely to be based upon unsubstantiated estimates, and that should be sufficient. This is not the law which requires an applicant to produce solid, credible evidence of losses or future losses. It ought 'to be supported by some underlying material and ought not be speculative. Without documentary evidence, a mere generalized assertion of loss will be scrutinized carefully by the Court and is unlikely to be sufficient.'[18] Likewise, '[i]t is not simply a case of the court forming a general impressionistic view but having careful regard to the witness and documentary evidence.'[19]

[49] As to MBFX's reliance on the principle in **Sinclair Investment Holdings**, VDHI, while accepting the correctness of the principle enunciated by Mann J, submits, in essence, that the instant matter is not one where on the evidence of quantification of loss before the court, is possible for the Court to reach an appropriate figure and to uphold the sum of US$20 million fortification ordered by the judge. It is VDHI's response to this point that, as the Court of Appeal found, there was no solid evidence of loss or the likely quantum of the loss in relation to the Multibank Bond. The evidence in Kattoura 6 amounted to nothing more than bald and unreliable statements, not supported or backed up, in any material particular, by documentation and/or other solid evidence of loss.

[50] VDHI submits also that the dicta in **Sinclair Investments Holdings** does not take account of, and it is not permissible for an applicant for fortification to essentially make a guess of the quantum of loss and to base his/her case for fortification upon unsubstantiated estimates and a lack of proper evidence. Accordingly, while it is for the court to seek to reach an appropriate figure for fortification and, in doing so, to not be deterred by the fact that it is unlikely to be able, on the evidence before it, to reach a precise figure on the alleged loss, the court must nevertheless be able, on

[18] See Mints at para. 27(iii).
[19] See Alta Trading UK Ltd (formerly Arcadia Petroleum Ltd) v Bosworth [2021] 4 WLR 72 at para. 22.

the evidence, to come to an intelligent estimate of the loss. Furthermore, it is not the duty of the court in attempting to do what it can on the evidence, to pluck a figure out of thin air, absent any solid evidence supportive of a particular figure, however imprecise or approximate it may be or is likely to be. VDHI also argues that the problem in the instant matter is not just that the Court could not put a precise figure on MBFX's recoverable loss, but that it could not make an intelligent estimate of MBFX's recoverable loss at all. It is also MBFX's position that the learned judge below seems to have thought that he should do his best in estimating loss, even where there was not solid, credible, and substantiated evidence of it. In essence, this amounts to saying that the learned judge plucked a figure out of the air, albeit the same figure which MBFX had sought in its application.

Analysis and conclusion - G.1 Types of Loss

[51] In the Fortification Judgment, the Court (Webster JA [Ag.]) from paragraph 18 dealt with the principles applicable to a court's determination of an application for fortification of a cross-undertaking in damages, in particular the three cumulative criteria that must be met before fortification can be ordered as set out in **Malabu Oil** and in **Mints**. The 'Malabu/Mints Test' was considered, and the Court concluded that the test to be met was to the relatively low standard of a' good arguable case'. From paragraph 26 onward, the Court considered the application of the Malabu/Mints Test to the instant matter. The Court identified the first criterion of the test as whether 'there is a good arguable case that there is a real risk that [the applicant] will suffer losses as a result of the freezing order.' With respect to this first criterion, the Court did not disturb the finding of the judge below that there was sufficient evidence of a risk that MBFX could suffer or did suffer loss because of the WFO. In doing so, the Court preferred Counsel for MBFX's submission that there was a risk of loss to MBFX, 'subject to the qualification that since it had applied for fortification in June 2021, there was no evidence of further losses above the amounts alleged in the application, suggesting that the risk has diminished.'

[52] The second criterion of the test is the 'but for' test of causation, whereby an applicant must show a good arguable case that but for the injunction the loss would not have been suffered. Regarding this second criteria, the Court, from paragraph 32, cited dicta from Calver J in **Mints** and Tomlinson LJ in **Malabu Oil**. In particular, the Court identified from the authorities the various phrases or expressions deployed to describe this requirement of causation. These are, '*without which*' in **Malabu**, '*but for*' in **Mints**, and '*effective cause*' of the loss in **SCF Tankers** Ltd. The position in law was summarized in this way:

> "[35] In short, the test for whether the WFO is the cause of the losses suffered by Multibank [MBFX] is whether the losses would not have been suffered but for the WFO. To show this, the applicant must show that the WFO was the effective cause of the loss or the cause without which the loss would not have been suffered. These two phrases do not in my opinion create two separate tests for causation or raise the level of proof required to show that the loss would not have been suffered but for the freezing injunction. In the final analysis, an applicant for a fortification of a freezing injunction must present a good arguable case that the loss would not have been suffered but for the freezing injunction. How this is done will vary from case to case."

Neither the first or second criterion of the Malabu/Mints test or its application by this Court in the Fortification Judgment has been challenged or sought to be challenged by MBFX in its application for conditional leave.

[53] At paragraph 36, the Court identified two additional principles of causation relevant to the instant matter. The first is that the presence of two or more competing causes for the loss is not fatal to an application for fortification. The Court, having found that, in this case, 'the competing causes are the WFO and the allegations of fraud against [MBFX] and Mr. Taher in the underlying proceedings', concluded that in this situation, 'the applicant must show that despite competing causes the WFO was the effective cause of the losses or the cause without which the losses would not have been suffered.' In support of this principle the Court cited the decision of **Alta Trading**.[20] MBFX seems to take issue with the finding of fact that there were two

[20] Ibid.

competing causes for the loss in operation here, one being the WFO and the other the underlying fraud proceedings before the court below.

[54] The second 'additional' principle of causation is set out in paragraph 37. It is to this principle that MBFX has leveled its main aim. The principle is 'the applicant must show that it is the coercive or preventive effect of the freezing injunction that caused the loss. The mere presence of a freezing injunction is not enough.' In support of this principle, the Court relied on the dicta of Calver J at paragraphs 27(ii) and 47, and Briggs J in **Harley Street** at paragraph 22 -

In **Mints** Calver J said in relation to causation at paragraph 27(ii)(c) that -

> "It is only loss which is caused or would have been caused by the preventive or, as the case may be, coercive effect of the injunction that is recoverable under the cross-undertaking: *Harley Street Capital* at [22]. It follows that if the loss would have been suffered in any event because of an injunction properly obtained in the proceedings against <u>other</u> defendants, that will not be recoverable…"

Later at paragraph 47 –

> "The losses said to have been suffered are accordingly far too remote. But even in the absence of remoteness as an obstacle, in order for causation to be made out, IM would have to establish to the standard of a good arguable case that the preventative or, as the case may be, coercive effect of the WFO/Return Date Undertakings is or was a cause without which Loss 1 would not be or would not have been suffered: *Harley Street Capital* at [22]"

Calver J's references to **Harley Street** are to paragraph 22 of the judgment of Briggs KS sitting as a deputy judge –

> "That analysis strongly suggests to me that it is loss caused by the preventive or, as the case may be, coercive effect of the injunction that is recoverable."

[55] At paragraph 38, the Court summarized the application of these criterion to the instant case -

> "[38] Applied to this case the issue is whether the loss suffered by Multibank [MBFX] was caused by the WFO or the allegations in the underlying proceedings, or both. In so far as they were caused by the latter they would not be recoverable under the undertaking."

[56] In my view, there is nothing to this first intended ground of appeal which rises to the level of being a matter of great general or public importance, within the meaning of that expression in section 3(2)(a) of the 1967 Order. The points raised by MBFX under ground 1, do not satisfy any of the criteria in **Martinus Francois** as they do not raise a difficult or serious question of law, or point to an area of law in dispute, or a legal question the resolution of which poses dire consequences for the public. Likewise, this proposed ground of appeal does not satisfy the criterion for conditional leave to appeal as set out in **Renaissance Ventures**, as it does not concern a principle of law which is not settled at a level which is authoritative and/or highly persuasive, or with respect to which there are differing views or conflicting dicta either from this Court or the other courts of the region, or in the United Kingdom and the wider Commonwealth. For completeness, this ground does not relate to the interpretation or application of a procedural rule, or the draconian effect of a rule of court, such that it can be said to satisfy the requirement under section 3(2)(a) within the principles expounded in **Pacific Wire and Cable Company**.

[57] The main point raised by MBFX under this ground 1 is that the Court of Appeal, at paragraph 37, formulated and applied too narrow or limiting a test or criterion of causation, and did so relying on dicta from two first instance decisions, which decisions are wrong and ought to be overturned by the highest appellate authority. In my judgment, this contention is misguided and plainly wrong. The Court relied on settled principles of causation in relation to recoverable loss or likely loss under the cross-undertaking in damages. The principle enunciated by the Court at paragraph 37 that to be recoverable, the loss must be caused by the 'coercive or preventive effect of the freezing order', is a well-established and accepted criterion of causation, and the Court was simply identifying this criterion before applying it to the facts of the instant matter. This second 'additional' principle of causation was clearly identified or reformulated by the courts in **Harley Street** and **Mints**, and

most significantly, referred to approvingly by the English Court of Appeal (Tomlinson LJ) in **Malabu Oil**. Moreover, this principle accords with the measure of damages for recoverable loss, that is, the contractual measure of damages, as identified in **Tharros Shipping** and by Lord Diplock in **La Roche**, a decision of the House of Lords.

[58] In **Harley Street Capital**, Briggs J identified from the authorities the three criterion which a defendant/applicant for fortification must satisfy. These requirements are: (i) that the court has made an intelligent estimate of the likely amount of loss which might result to a defendant by reason of the injunction; (ii) that the applicant for fortification has shown a sufficient level of risk of loss to require fortification; and (iii) that the contemplated loss would be caused by the grant of the injunction. These three criteria were adopted as being correct by the English Court of Appeal in **Malabu Oil** and forms part of the *ratio decidendi* in that case. Likewise, was this principle: 'While it is open to the respondent to the application for fortification to demonstrate that there is no causal link between the granting of the interim order and the loss in question, if disproving the asserted causal link as to which a good arguable case is shown requires the deployment of extensive contentious evidence and argument, that is not an exercise to be attempted at the interlocutory stage.'

[59] In **Harley Street Capital**, Briggs J quoted (at paragraph 21) from the judgment in **Tharros Shipping**, where Walker J declared that an inquiry into damages payable under a cross-undertaking is to be carried out on the same basis as an assessment of damages for breach of contract. This principle underscores the established legal position that it is the loss 'resulting from the coercive or preventive effect of the injunction' that is recoverable under a cross-undertaking in damages. The relevant dicta states:

> "[t]he assessment is made on the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction: see Smith v Day (1882) 21 ChD 421, 427, per Brett LJ."

[60] Accordingly, when Briggs J when on to say in **Harley Street Capital** '*that analysis strongly suggests to me that it is loss caused by the preventive or, as the case may be, coercive effect of the injunction that is recoverable under the cross-undertaking*', this was simply the judge's way of expressing correctly the relevant principle or criterion. It does not, as argued by MBFX, leave the door open to claiming losses which do not result from the coercive or preventive effect of the injunction, such that it raises an issue or question of great general or public importance.

[61] Furthermore, as pointed out by Tomlinson LJ in **Malabu Oil** at paragraph 13, Briggs J derived the above-stated three requirements from the judgments of Millett J and Mann J in **In re DPR Futures Ltd**[21] and **Sinclair Investment Holdings** respectively. Tomlinson LJ went on to quote extensively from the judgment of Mann J in **Sinclair Investment Holdings**, and from Briggs J in **Harley Street Capital**. These passages are, in my view, illuminating and instructive on certain key points of MBFX's argument on this application, but especially in relation to the next two grounds. However, it is unnecessary for present purposes to repeat them here in any detail.

[62] With regard to losses based upon 'reputational damage', in my view it is correct that the dicta relied on in **Mints** does not absolutely exclude this category of loss. However, what the passage cited does make clear is that while such loss may be theoretically available in an application for fortification or assessment of loss under the undertaking in damages, the loss must have been caused by the injunction and not by the underlying litigation or some other cause. It also makes clear that because of the inherent difficulties of proof of causation of such damage linking it to the injunction and not to other factors such as the underlying fraud litigation, such cases will be rare. That said, even if it is theoretically possible to claim losses based on reputational damage flowing from the WFO, this does not lead to it being

[21] [1989] 1 WLR 778.

arguable that the principles applicable to losses on an application for fortification of a cross-undertaking in damages, and whether such losses may extend either to the losses caused or attributable to the underlying proceedings or to reputational damage, are unclear, conflicting or a serious point of law has arisen such that conditional leave to appeal to the Privy Council ought to be granted to MBFX on its application.

Analysis and conclusion – G. 2 Disentanglement of Loss

[63] It is clear from the authorities (and this is not seriously disputed by MBFX), that the onus of proof of actual or likely (in the future) recoverable loss caused by the coercive or preventive effect of the injunction rests with the applicant for fortification, as it does upon a trial into the actual amount of damages to be awarded to a defendant where it has been determined that the injunction ought not to have been granted and the defendant has suffered loss. In the first instance, the standard of proof is that of a good arguable case. At the latter stage the standard of proof is on a balance of probabilities.

[64] In my judgment the principles set out at paragraphs 35, 36 and 37 of the Fortification Judgment are all correct as a matter of law. Any challenge or intended challenge by way of appeal to these principles is hopeless. Accordingly, no such challenge would or could give rise to any question or issue of great general or public importance. The law on this aspect is well-settled and the principles cannot be said to give rise to some draconian effect, nor are there conflicting decisions on this either in this jurisdiction or the wider Caribbean region or indeed in England and the Commonwealth. An applicant for a fortification order must show that 'but for' the injunction the applicant would not have suffered that loss or some likely loss. Put differently, the making of the injunction order was a cause without which the damage or loss alleged would not have been suffered. However, MBFX's second ground does not rest so much on the correctness of these well-established principles of causation, as on the approach to and application of them at the interlocutory stage.

[65] At paragraph 41 of the Fortification Judgment, the Court of Appeal accepted that there were two competing causes of the loss suffered or likely to be suffered by MBFX. However, the first instance judge made no finding of concurrent or additional causes to the WFO, albeit he did allude to the possibility and concluded that it would not be fatal to the application for fortification. With this latter principle, the Court of Appeal pronounced as to its soundness, and accepted that in such circumstances the injunction need not be discarded as a potential cause. This Court also underscored that it is for the applicant in such circumstances to demonstrate to the requisite standard that the loss was caused by the injunction, or the injunction was the predominant or effective cause.

[66] In the instant matter, there were originally four items of alleged loss relied on by MBFX in its Fortification Application. These were: (a) the loss of the Euros 500 million Multibank Bond to the tune of Euros 68.5 annual loss of prospective profits; (b) an unspecified amount of loss of prospective profits on the withdrawal of two institutional investors interested in investing in MBFX; (c) USD 30 million from an Indian owned gold trading company that withdrew its prospective investments upon becoming aware of rumours that MBFX was involved in fraud proceedings in Luxembourg and in BVI; and (d) Euros 100 million over 5 years of lost yearly returns from the withdrawal of the Multibank Bond. As noted at paragraph 44, (d) was not pursued and the judge effectively disallowed (c) as part of his estimation of the amount of fortification.

[67] At paragraph 50, the Court, in dealing with the Bond, observed –

> "The judge should not be faulted for finding that the WFO was a likely cause of the losses suffered by [MBFX] – this is what is in the recorded minutes and that is the cause that has been asserted by [MBFX] in its evidence."

Accordingly, and based upon the well-known principles of appellate restraint, the Court declined to interfere with this finding, but went on to state –

> "However, I find that the allegations in the underlying proceedings were an additional or concurrent cause of the loss…..The finding of concurrent

> causes does not mean, as the judge found, that the WFO had to be discarded as a cause of the loss."

[68] From paragraph 51, the Court analyzed the two emails dated 27th January and 27th April 2022 produced by MBFX shortly before the fortification hearing in July 2023, the substance of which were to the effect that certain investors had decided not to invest in MBFX because of the WFO. At paragraph 53 the Court observed that the judge found that the two emails are evidence that could be considered as showing a real risk of loss from the WFO and a cause of such loss, but this was an evaluative finding on written evidence, which 'this court is in as good a position to evaluate'. Accordingly, the Court determined that it was –

> "… satisfied that the judge erred as a matter of principle in not considering the underlying allegations of fraud as an effective cause of the loss suffered by [MBFX], and that the loss suffered from the WFO included reputational loss from the effect of the WFO. These are matters that should have been factored into the causes of the loss suffered by [MBFX], and the assessment of that loss in fixing the level of the fortification."

[69] It is to be observed that the Court did not go on to consider separately the question of disentanglement of losses, and to conduct its own evaluation of whether MBFX had established that the effective cause of the loss or a particular loss claimed, was the WFO or the underlying fraud proceedings. Instead, the Court moved to consider the issue of whether, on the evidence, it could make an intelligent estimate of the quantum of the loss, which is an evaluative assessment *de novo* of the evidence of loss relied on by MBFX. Before embarking substantively on this latter exercise, the Court reminded itself that 'only the losses caused by the coercive or preventive effect of the WFO should be included in estimating the amount that should be provided for fortification.' In adopting this approach, the Court treated disentanglement and intelligent estimate as interconnected or interrelated issues.

[70] It cannot be gainsaid that the onus is on an applicant for fortification to establish, to the standard of a good arguable case, that the loss in respect of which it seeks fortification of the cross-undertaking in damages would not have been suffered, or is not likely to be suffered, but for the coercive or preventive effect of the injunction. In

short, the 'but for' test is well established. As observed by Mann J in **Sinclair Investment Holdings**, in many cases the fact that there is a risk of loss will be obvious merely because of the general situation. This is particularly so where, as here, the Multibank Group trades in trust, and the judge accepted that the WFO is a likely cause of the loss of the Bond, which finding was upheld by the Court of Appeal.

[71] As Mann J also observed, while it might not be possible on the evidence to arrive at a precise figure of loss or possible loss, the court is required to do what it can on the evidence to reach a possible figure. That of course does not relieve MBFX of the onus of establishing to the standard of a good arguable case that the WFO is not only a likely cause of the loss, but the predominant of the two concurrent causes, one the WFO and the other the underlying proceedings. Put another way, whether the WFO was the effective cause of the loss or the cause but for which the loss or likely loss would not have been suffered by MBFX. However, MBFX contends that the Court of Appeal despite upholding the judge's finding that the WFO was a likely cause of MBFX's loss, found that the underlying proceedings were an additional or concurrent cause of the loss, but did not go on to make any finding on disentanglement or on the application of the 'but for' test.

[72] Instead, the Court determined the appeal on what it assessed as the poor quality and inadequacy of MBFX's evidence, which was said to consist mainly of bald unsupported assertions in relation to the Bond made in Kattoura 6 and lacking in any solid evidence or documentary evidence to back up the assertions made. The Court of Appeal also decided the appeal based on the difficulties which the judge had on the evidence in coming to an intelligent estimate of the loss of the Multibank Bond when assessing and arriving at the amount of fortification ordered, and the approach which he adopted in coming to his conclusion on quantum by, essentially, accepting MBFX's counsel's estimate of US$20 million on the basis that any loss would have exceeded that sum.

[73] In addressing disentanglement at paragraph 60, the Court of Appeal considered that this would be a 'difficult task'. At paragraph 61 the Court continued –

> "[61] The burden of disentangling the loss and showing what portion of it was caused by the freezing injunction rests squarely on the applicant for fortification (Multibank). This Court is not in a position on the state of the evidence to disentangle the losses, even applying a liberal approach, and come to an intelligent estimate of the loss caused by the WFO that should be covered by fortification. Multibank has not assisted the court on this issue. Their position is that the loss was caused entirely by the WFO and, by extension, no disentanglement is necessary."

[74] In my judgment, in a narrow but important sense, this ground raises an issue of great general or public importance. This issue concerns, arguably, a reasonable doubt as to the correctness in law of part of this Court's decision – that there were two operative causes or concurrent causes for the loss of the Multibank Bond, as evinced and quantified in Kattoura 6, which finding of additional or concurrent causes was not made by the court below, and if so how should an applicant for fortification, and ultimately the court itself, treat with the evidence before it on the issue of disentanglement of the alleged loss.

[75] It also raises questions or issues of great general or public importance as to whether the approach adopted by the Court of Appeal in dealing with the issue of disentanglement, the standard of proof, and whether that approach may or could have the effect of stifling genuine fortification applications or making them too onerous and difficult to dispose of within the fairly narrow confines of interlocutory or interim proceedings, was correct. These issues go to matters of substantive law and procedural law, and to the extent to which a judge ought to require cogent and solid evidence of disentanglement of the causes of the loss at the interlocutory fortification stage, as distinct from proof of damages or loss at a trial caused by the coercive or preventive effect of the injunction, bearing in mind the inherent difficulties which an applicant is likely to be faced with in producing such cogent evidence of disentanglement at that preliminary stage.

[76] In my opinion, these issues are especially serious and of jurisprudential importance in circumstances where, as here, MBFX was found to have satisfied the first and

second criteria of the Malabu/Mints Test for the making of a fortification order, including that the WFO was a likely cause of the loss of the Multibank Bond, and there was a real risk that the WFO was the cause of the loss of the said Bond. The Court of Appeal found *de novo* that there were concurrent causes of the loss of the Multibank Bond. The legal requirement on an applicant for fortification to disentangle the loss caused by the coercive or preventive effect of the injunction from loss caused by another cause (including the underlying proceedings) was addressed as a matter of principle and onus of proof by the Court of Appeal, and the evidence before the court below assessed as being so unsatisfactory as to render disentanglement a 'difficult task'.

[77] On that basis the appeal was allowed, and the fortification order set aside. However, there is a dearth of jurisprudence in this jurisdiction at the level of the Court of Appeal on how an applicant, at the interlocutory stage of applying for a freezing order, is to approach evidentially proof of disentanglement so as to enable the first instance court to determine whether the injunction was the cause but for which the loss claimed would not have been suffered. In particular, where, as here, some loss as a result of the freezing injunction itself is to be and was presumed by the judge below and upheld by the Court of Appeal. This issue becomes even more important when considering that it is not only the actual loss suffered, but also the loss likely to be suffered from the coercive or preventive effect of the freezing injunction, which ought properly to be considered by a court when assessing the quantum of fortification and determining the issue of disentanglement.

[78] There is also a dearth of authoritative judicial guidance in this jurisdiction on the approach which the first instance court ought to take when assessing the relevant evidence on the issue of disentanglement and the principles which generally should guide the court's conduct of this exercise in determining whether the evidence adduced is sufficiently solid and cogent to discharge that burden on an applicant for fortification. Moreover, and perhaps not unexpectedly, there is no guidance as to the

proper approach by applicants for fortification and by the courts on the specific issue of disentanglement in the Civil Procedure Rules 2000, including Part 17.

[79] I hasten to add that his does not mean that the judge hearing the fortification application ought to delve too far into the evidence of loss or conduct a mini trial of the issue of disentanglement, especially in circumstances where, as here, the risk of loss from the WFO was considered to be obvious. In my judgment, the matters above relate to an area of law not yet explored in a fulsome way in this jurisdiction and in the wider Caribbean, and certainly not at the level of the Court of Appeal. These matters raise sufficiently serious questions of law and evidence, and give rise to some uncertainty concerning the discharge by an applicant of his duty to disentangle the causes of a loss in circumstances where the evidence discloses, on any reasonable assessment, as it does in the instant matter, that there are or may be two conflicting or concurrent causes for the loss claimed by VDHI as representative of the three managed funds and ultimately as representative claimant of all Noteholders.

[80] In the circumstances, I find that ground 2, in the sense and to the extent stated in paragraphs 75 and 76 above, gives rise to questions of great general or public importance which ought to be referred to His Majesty in Council. I am also satisfied, for the same reasons, that this ground meets the 'or otherwise' test in section 3(2)(a) of the 1967 Order within the meaning of that expression in **Renaissance Ventures and Comodo Holdings**. In holding that this ground meets the necessary requirements for leave to appeal, I respectfully do not agree with learned counsel Mr. Cook KC for VDHI that the application must satisfy all three of grounds relied on in order to succeed. The 'narrow sense' in which I have found that ground 2 - 'disentanglement' - raises questions of great general or public importance or otherwise ought to be submitted to the Privy Council for determination and guidance, go to the core reason why the Fortification Appeal was allowed, that is, lack of satisfactory proof of and discharge of the obligation to disentangle the loss caused by the coercive or preventive effect of the WFO, from loss caused by the underlying

fraud proceedings, and is, in my judgment, sufficient for this Court to grant conditional leave.

[81] Accordingly, I would grant MBFX conditional leave to appeal to His Majesty in Council against the Fortification Judgment and order in this appeal No. 8 of 2022 on the usual terms as to security and other conditions. Costs of this application ought to be costs in the appeal itself.

Analysis and conclusion – G.3 Intelligent Estimate of Loss

[82] This is a short ground. In my view there is no merit in this ground which essentially seeks to challenge the application of established principle to the facts or evidence of the alleged losses. There is no point of principle relied on by MBFX which gives rise or could give rise to a question of great general or public importance, or which 'otherwise' ought to be referred to the Privy Council.

[83] MBFX's point concerning the learned judge coming to a pragmatic conclusion on the issue of quantum of fortification which the Court of Appeal ought not to have disturbed, is in my judgment misplaced. This issue was dealt with squarely at paragraphs 57 to 59 and 64 to 66 of the Fortification Judgment, where the Court dealt with the patent inadequacy of the judge's approach to the assessment of the evidence of loss, his characterizing the evidence as an 'informal calculation' of a large amount of money that will be lost, acknowledging that the loss was incapable of quantification, simply accepting the suggestion from MBFX's counsel of a sum of US$20 million in the face of a claim for an alleged loss of Euros 68.5 million in respect of the Bond, the complete absence of any of actual losses of the Bond other than bald assertions in Kattoura 6, and for the other reasons appearing in these paragraphs of the judgment.

[84] The simple fact is that MBFX was found in a sense by the judge and also more so by this Court to have produced no cogent evidence of the quantification of the loss of the Bond, and the reliance on the other losses alleged were either abandoned or simply not pursued with any vigour. The proverbial nail in that coffin, was the clear finding

that 'there is no satisfactory proof that the loss from the WFO, if any, was caused by the coercive or preventive effect of the WFO.' The rating of the bond was not prevented by the WFO. What appears to have happened is that S&P stopped the process voluntarily because of the WFO, not that it prevented them from continuing with the rating process. Multibank then decided to stop the process. For these reasons, this ground 3 does not satisfy the requirement of section 3(2)(a) of the 1967 Order.

Application for conditional leave to appeal - WFO Discharge Appeal No. 9 of 2021
Summary of intended grounds of appeal and each party's case

[85] MBFX relies on the intended grounds of appeal set out in the draft notice of appeal annexed to this application for conditional leave to appeal to His Majesty in Council on the basis that these grounds raise matters of 'great general or public importance or otherwise' and ought to be submitted to His Majesty in Council pursuant to section 3(2)(a) of the 1967 Order. The intended grounds of appeal have been corralled into two categories of issues. These are:

> (1) **Standing and the Intended EGM**: These issues concern (i) the standing of VDHI to apply for the WFO, and (ii) the reliance by the judge at the *ex parte* hearing on evidence of an intended EGM of the Noteholders to appoint VDHI as their representative in the extant proceedings before the Commercial Court in accepting that VDHI had or would have standing to obtain the WFO.
>
> (2) **Real Risk of Dissipation and Just or Convenient**: Whether the judge failed to properly consider the basic elements which must be satisfied in order to grant injunctive relief, including risk of dissipation, just and convenient, fortification of the cross-undertaking in damages, failure to make reasonable inquiries, and breaches of the duty of full and frank disclosure and fair presentation and in doing so took into account irrelevant matters or failed to take into account relevant matters.

[86] The first broad category of MBFX's intended grounds, concern whether VDHI had the requisite standing to apply for the WFO at the stage of the *ex parte* hearing -Stage 1,

and in particular, what are the rights or standing of third parties to apply for freezing injunctions on behalf of others, and whether the Court of Appeal in the WFO Discharge Appeal Judgment properly applied the principles or *ratio decidendi* from the decision of the Privy Council in **Convoy Collateral Ltd v Broad Idea International Ltd**.[22] They also concern whether, in finding that VDHI had standing, the Court of Appeal compounded its error of law by taking into account irrelevant factors, including that Mr. Priess, on behalf of VDHI, had given evidence by affidavit that it was intended to convene an extraordinary general meeting ("EGM") of the Noteholders in order to have VDHI appointed as a representative for the Noteholders to commence a claim before the Commercial Court in the BVI.

[87] In a nutshell, it is VDHI's case that the operative stage at which the court was required to examine the issue of standing is when it applied for the WFO *ex parte*, and not at any subsequent stage in the proceedings such as when an EGM would or may be held to obtain the agreement of the Noteholders for VDHI to represent them in bringing a claim. MBFX contends that when the issue of standing is considered in this way, VDHI clearly did not have the requisite standing to apply for the WFO and, on that basis, the WFO ought not to have been granted by the judge and ought, in the subsequent applications, not to have not been continued but should have been discharged. In failing to allow MBFX's appeal against such refusal by the first instance judge, MBFX considers that the Court of Appeal committed a serious error of law and principle, which issue is a matter of great general or public importance. Secondly, and in any event, MBFX argues that VDHI, as a third party to the litigation, had no standing to apply for the WFO within the principles enunciated by the majority decision of the Privy Council in **Broad Idea**, and in this respect the Court of Appeal also erred in its judgment in this appeal, giving rise to a serious question of great general or public importance. It is also MBFX's case that for all these reasons, even if the matters raised are not considered to be of great general or public importance, they ought otherwise to be submitted to His Majesty in Council.

[22] [2021] UKPC 24.

MBFX's Case: Category 1 - Standing and the Intended EGM

[88] MBFX seeks conditional leave to challenge the finding by the Court of Appeal that VDHI had the requisite standing and was, in all the circumstances, entitled to obtain the WFO on behalf of parties whom it did not at that time represent, on the basis that it would in the future be entitled to pursue claims in a representative capacity. The specific finding of the Court of Appeal is at paragraph 50 -

> "[50] …there was sufficient material before the learned judge at Stage 1 to satisfy the requirement of VDHI's standing to represent both the VDHI Managed Funds and the Noteholders, the former by virtue of the laws of Luxembourg and the latter by virtue of the expected Noteholders' resolution and the representation order to be made by the court. Both events came to pass by the time the claim form was issued on 22nd July 2021."

[89] In seeking to make out its case for conditional leave, MBFX first referred to paragraph 47 of the WFO Discharge Judgment where the Court stated, correctly in MBFX's view, 'if VDHI did not have standing at Stage 1 [i.e. the *ex parte* hearing stage], the WFO should not have been granted'. They contend that it was uncontroversial that, as regards the majority of the Noteholders (VDHI was the representative, at the time, for three Managed Funds who were also Noteholders) on behalf of whom VDHI purported to bring the application for the WFO and the claim to be filed subsequently, it had no authority to act on their behalf. VDHI had not before purporting to do so (as it could have), applied to be appointed a representative party at the *ex parte* stage of applying for the WFO. As matters turned out, such an application was not made by VDHI until some 2 months after VDHI had obtained the WFO. Accordingly, based on accepted principles, VDHI did not have standing at the requisite time to apply for the WFO at all, or at any rate in the sum of Euros 36.4 million, which sum was the aggregate amount of the funds invested by all Noteholders, and not just the three VDHI managed funds.

[90] In making its case, VDHI took aim at paragraphs 49 and 50 of the WFO Discharge Judgment. At paragraph 49, the Court recounts that VDHI had informed the judge below that 'it intended to bring the claim on behalf of and for the benefit of the Noteholders (which includes the three funds).' Reference was therein made to the

affidavit of Mr. Priess in support of the application for the WFO, as to VDHI's intention to subsequently hold an EGM of the Noteholders to obtain their agreement for VDHI to represent them in commencing the claim. At paragraph 49 the Court of Appeal concluded, incorrectly in MBFX's view, that applying the principles in **Fourie v Le Roux and others**,[23] and **Broad Idea**, 'was evidence that the learned judge could have relied on at Stage 1 to satisfy the requirement of VDHI's standing to represent the Noteholders.' The Court also opined that if such authorization was not secured by VDHI from the Noteholders, 'the issue of representing them would likely be resolved against VDHI.' However, as it turned out 'the Noteholders passed the required resolution' at the EGM, and the court below, on 21st June 2021, made the Representative Order authorizing VDHI to act as the representative claimant for the Noteholders in the extant proceedings.

[91] MBFX submits that it is of fundamental importance that a party establishes it has standing to seek the relief – particularly draconian relief such as freezing injunctions - at the time that the relief is obtained. This cannot be an issue which can simply or properly be left for the respondent to take up at a later date, by which time the damage may and very often will have been done. To permit otherwise, would have the effect of 'opening a pandora's box where in effect anyone could, without authority, apply for draconian relief such as a WFO without standing to do so and where the question of standing is inherently uncertain.'

[92] As to the principles regarding standing and having a sufficient interest in applying for a freezing order as set out in **Broad Idea**, MBFX takes issue with the Court's analysis at paragraphs 74 and 75 of the WFO Discharge Judgment -

> "[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 emphasize 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

[23] [2007] UKHL 1.

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 an appropriate case to freeze the assets held by the NCAD for possible satisfaction of a judgment against the cause of action defendant in existing or future proceedings.

[75] Applying the principles to this case, the evidence is that the claim had not been filed at Stage 1, but the applicant pleaded a claim for unlawful means conspiracy and listed the bare factual allegations in paragraphs 13 to 16 of the *ex parte* application…"

[93] At paragraph 77, the Court concluded that it was 'satisfied, to the threshold required by **Niedersachsen** that the learned judge did not err in finding that at Stage 1, VDHI had a good arguable case for claims for at least the tort of unlawful means conspiracy and for setting aside the Consent Order under the inherent jurisdiction of the court.' At paragraph 78, the issue of VDHI having existing claims was put on a better foundation by the time the proceedings got to Stage 2. And finally, as to the standing of VDHI at the time of the *ex parte* WFO, at paragraph 83 the Court concluded 'VDHI had standing to bring these claims in its own right and on behalf of the Noteholders, a situation that was reinforced by the grant of the representation order on 21st July 2021.'

[94] MBFX argues that these issues raise questions of great general or public importance which ought to be submitted to their Lordships Privy Council for consideration and determination. They submit that the issues regarding standing tie in with VDHI's related Fortification Appeal by which the Fortification Order was overturned by the Court, and which judgment and order is the subject of an application for conditional leave, raising or seeking to raise, issues as to the proper test as to likely recoverable losses when a court is considering fortification, and the possibility of an applicant being exposed to enormous irrecoverable loss on account of the WFO. MBFX also contends that, similarly, it ties in with the dismissal by the Court of Appeal of MBFX's

appeal against the making of and failure by the judge at first instance to discharge the Representative Order, since, if MBFX is correct and VDHI is not a proper representative party to be appointed as such by the court, it follows that it should not be pursuing draconian remedies, such as a WFO.

MBFX's Case: Category 2 – Real Risk of Dissipation and Just or Convenient

[95] As to its second category of issues (failing to properly consider the basic elements of granting injunctive relief and taking account of irrelevant matters and not taking relevant matters into account), MBFX's submissions focus broadly speaking on two principal requirements for injunctive relief and the Court of Appeal's approach to and findings in relation to each of them, and two important categories of duties on an applicant when applying *ex parte* for such relief. The first requirement is whether there is a real risk of dissipation of assets, the second is whether it was, in all the circumstances, just or convenient to grant the WFO. The first category of alleged breaches of duty when proceeding *ex parte* is whether VDHI had failed to make full and frank disclosure and fair presentation at the *ex parte* (Stage 1) hearing, and secondly, whether VDHI had failed to make proper inquiries before bringing the *ex parte* application for the WFO.

[96] As to the first of these four issues, MBFX argues that the Court of Appeal failed to deal properly with the issue of whether there was evidence of a real risk of dissipation of assets when considering whether to set aside the WFO. In this regard, MBFX submits that the Court failed to consider or to deal with one of its key submissions/arguments in the appeal - that there was no real risk of dissipation having regard to the status and nature of the Multibank Group (of which MBFX is a part) and MBFX itself. As the argument went, the Multibank Group is the provider of financial services in 11 regulated jurisdictions and would not run the risk to its reputation and status with the various regulatory bodies by dissipating assets, nor would it allow one of its group (MBFX) to dissipate assets, in order to avoid the consequences of a judgment in the instant proceedings. Also, MBFX itself is regulated by the BVI Financial Services Commission ("BVI FSC") and has assets of

its own in the sum of US$1 million. MBFX also argues that the Court did not take account of the undertaking given by Mr. Taher not to dissipate his own assets, which includes his sole shareholding in the Multibank Group valued at US$1 billion.

[97] In this regard, MBFX takes issue with the findings at paragraphs 88 to 91 of the WFO Discharge Judgment. There the Court of Appeal, in concurring with the judge below on the issue of real risk of dissipation, pointed specifically to the evidence before the lower court of the transfer by MBFX to Mex Clearing, within a week of the Consent Order/Tomlin Order in prior proceedings involving Mex Clearing and MBFX in the Commercial Court, of the sum of Euros 36.4 million to an entity in the People's Republic of China, and there being inadequate evidence as to its whereabouts before the Court. It is submitted by MBFX that the Court of Appeal incorrectly relied on such matters which, upon a proper analysis, do not go to the question of a real risk of dissipation.

[98] On the second issue MBFX argues that the first instance judge, having failed to consider the requirement of 'just or convenient' when deciding whether to grant the WFO, it then fell to the Court of Appeal to consider this important issue and to exercise the court's discretion *de novo*. Accordingly, the intended appeal to the Privy Council ought to be treated as a 'first appeal' against the decision and exercise of discretion on this important issue warranting leave to appeal being granted under section 3(2)(a) of the 1967 Order.

[99] MBFX also seeks to connect the issues of fortification of the cross-undertaking, VDHI overstating and/or misrepresenting its ability to meet any order for damages under the cross undertaking in the WFO, wrongly telling the first instance judge during the *ex parte* hearing that MBFX will suffer no loss, and its failure to discharge the duty of fair presentation or to make reasonable inquiries at that stage, with the failure by the Court of Appeal to allow its appeal and to set aside the WFO. In brief, MBFX complains of a failure by the Court of Appeal to deal with its argument on the issue of lack of fair presentation and breach of duty by VDHI at the *ex parte* hearing. They refer to paragraph 101(d) of the WFO Discharge Judgment where the Court, having

referred to the contemporaneous judgment allowing the Fortification Appeal against the Fortification Order made on 15th July 2022 by Wallbank J, concluded that nothing further needs to be said about the so-called inadequacy of the cross-undertaking in damages and fortification. They complain that this does not justify the Court's failure to deal with their argument, as the Fortification Order came some 15 months after the WFO was granted, and the fact that it was subsequently overturned is not relevant to the issue of whether VDHI breached its duty of fair presentation at the *ex parte* stage - Stage 1.

[100] MBFX's main points on this issue is that subsequent evidence establishes that VDHI as a company is 'insufficiently substantial asset wise' to meet an award of damages under the cross-undertaking, and the losses could exceed US$60 million or be well over US$100 million, and certainly exceeds US$20 million, as the first instance judge found, which findings were upheld by the Court of Appeal. This leads inevitably to the consequence that VDHI 'was wrong to tell the court that it was "good for" the cross undertaking in damages (it was not) and that [MBFX] was not likely to suffer loss (it was).' MBFX argues that this material was relevant, at minimum, to the issue of whether it was just or convenient' to grant the WFO and should have been drawn to the court's attention by VDHI. These were omissions and misrepresentations made either knowingly or recklessly by VDHI, amounting to breaches of the duty of fair presentation, which issue, MBFX contends, the Court of Appeal failed to address.

[101] Likewise, VDHI failed to make proper inquiries at the ex parte WFO stage 1, in particular, enquiries of its sister company, VDH AG, before applying for the WFO. It is submitted that the failure to discharge the duty of fair representation as to VDHI's financial ability to meet or to provide fortification for its cross-undertaking in damages and to make fair presentations; and to conduct reasonable inquiries; and the failure by the Court of Appeal to address these issues, amount to or raise issues which are of great general or public importance, or which are otherwise so serious that they ought to be submitted to His Majesty in Council.

[102] At this stage, I merely observe that these intended grounds of appeal which MBFX contends satisfies the requirements under section 3(2)(a) of the 1967 Order as being questions of great general or public importance or which otherwise ought to be submitted to His Majesty in Council, are matters of law and the application of the settled principles to the facts and circumstances of the instant matter. These may be summarized as:

(1) the standing to apply for, and the jurisdiction of the court to consider and to grant, freezing injunctions.

(2) the application of the principles regarding standing and jurisdiction to apply for freezing injunctions as formulated by the majority in **Broad Idea** to the facts and circumstances of this case, and whether the Court of Appeal got it wrong;

(3) the correctness, as a matter of principle, of a court relying on undertakings by an applicant of steps to be taken by them in the future to obtain the necessary agreement of the Noteholders to be appointed as their representative claimant in proceedings to be brought, when considering whether to grant the application for a freezing injunction.

(4) whether the Court of Appeal made errors in considering the important issues of real risk of dissipation and whether the nature of the Multibank Group as an international provider of financial services subject to the strictures of many national regulators and of MBFX as a licensed entity regulated by the BVI FSC, ought to have lessened any concerns with the court as to real risk of dissipation of assets by MBFX pending the trial and outcome of the claim, and accordingly, it was not just or convenient to grant the WFO; and

(5) the importance to the proper administration of justice in relation to applications without notice, of the duties of an applicant for the draconian relief of a freezing order to discharge its duty of full disclosure, fair presentation, and to make reasonable enquiries, and

the alleged failures of the Court of Appeal in its judgment to address or to properly address these issues.

VDHI's Case: Category 1 – Standing and the Intended EGM

[103] In general, VDHI's counter-arguments in relation to each of MBFX's two categories of intended grounds of appeal are summarized at paragraph 4 of its written submissions (therein referred to as grounds 1 and 2) –

> Ground *1*: The Privy Council in **Broad Idea**, a decision followed by the English Court of Appeal in **In re G**,[24] which (at para. 54) described **Broad Idea** as having 'comprehensively re-examined' the law in relation to the court's jurisdiction to grant freezing injunctions, has already decided relevant questions of law applicable to this ground. Given the Privy Council's 'comprehensive' exposition of the law in this area, there is plainly no basis for it to be troubled again with a further case dealing with the same point which also, therefore, does not involve a question of great general or public importance.
>
> Ground 2: the Court of Appeal (for the reasons set out in VDHI's written submissions) did not take into account irrelevant matters and/or fail to take into account relevant matters. Crucially though for the purposes of the present application, even if the Court of Appeal did err (which it did not), that fact is particular to the circumstances of the present case and (in any event) is not a question or matter of great general or public importance.

[104] Firstly, VDHI relies on the well-established principle in the Privy Council that the Board will not interfere with concurrent findings of fact of the lower court and court of appeal and/or the exercise of discretion, unless there are exceptional circumstances – some miscarriage of justice or violation of some principle of law or procedure - warranting its departure from that principle. In support of this principle,

[24] [2023] Fam 107.

it cites the decisions of the Board in **Sancus Financial Holdings Ltd v Holm**;[25] and **Ma Wai Fong v Kie Yik.**[26] VDHI submits that there are several concurrent findings of the court below and the Court of Appeal which would be subject to or caught by that principle. These are: (i) a good arguable case of fraud against MBFX, companies related to it, and Mr. Taher; (ii) that the Euros 36.4 million that was transferred by MBFX to Mex Clearing were held on a fiduciary basis for the benefit of the third-party Noteholder investors who VDHI represents; (iii) that there was a real risk of dissipation, including an actual dissipation by MBFX of the Euros 36.4 million sum paid away to an entity in China, which itself is not subject to the restraint of the WFO; and (iv) that the granting of the WFO was just and convenient. The gravamen of this submission is that these concurrent findings do not stand much, if any, chance of being overturned by the Privy Council and, in any event, are not questions of great general or public importance.

[105] [As to MBFX's characterization at paragraph 2 of its written submissions of the 'issues' in this case, VDHI counters that none of these issues were in dispute and they did not arise in the appeal. This relates specifically to MBFX's submission that the said issues 'boil down to' questions as to what, as a matter of law, is the correct standard to be met by applicants for a WFO in terms of (i) understanding and giving the court a proper understanding of its own case; (ii) having authority or standing to bring that case; (iii) understanding and giving the court a proper understanding of the respondent to the WFO and the effect the injunction may have; and (iv) what enquiries must be made before an applicant comes to court and what it must tell the court about these enquiries. Furthermore, VDHI argues, the appeals were only concerned with the application of these principles to the facts of the case, and in any event, they are all well-established principles which need no clarification, and do not raise any questions of great general or public importance. In short, it is submitted that raising these issues now in MBFX's application for conditional leave, is an *ex post facto* attempt by it to justify an appeal to the Privy Council.

25 [2022] 1 WLR 5181 at paras. 2-8.

26 [2022] BCC 953 at paras. 85-88; per Lord Thankerton in Devi v Roy.

[106] As to MBFX's category 1 set of issues, VDHI argues that the applicant's case is not one where the law is in dispute or unsettled, but where it is being contended that the Court of Appeal erred in its application of settled law and principles, which invariably will not, on its own, satisfy the requirement of great general or public importance, unless it can be demonstrated that the error of application was so serious as to give rise to a question of great general or public importance. Furthermore, it will be rare and only in exceptional circumstances, that an error in the application of settled principle can be considered to have met that test such that conditional leave to appeal under section 3(2)(a) of the 1967 Order ought to be granted.

[107] In relation to MBFX's contention that the Court of Appeal erred when applying the principles in **Broad Idea** to the issue of standing and jurisdiction and the question of third parties applying for a freezing injunction, VDHI cited certain key passages from the WFO Discharge Judgment where the Court of Appeal, correctly argues VDHI, identified and applied the relevant principles (paras. 69-74 & 85 - citing paras. 96-100 and 102 from *Broad Idea*). They also relied on certain passages from *Gee on Commercial Injunctions* 7^{th} *edition*. In the paragraphs cited, the Court of Appeal pointed out that the majority of the Board held that there was no requirement for a pre-existing cause of action at the date when the freezing injunction is applied for or granted, nor must the right to bring proceedings have arisen. It is therefore for the court to be satisfied, with sufficient certainty, that the right to bring the proceedings will arise and that proceedings will be brought. As it was put by the learned authors of *Gee on Commercial Injunctions*, the two requirements to be extracted from **Broad Idea** are (i) an interest which justifies exercising the power to grant an injunction to protect that interest of the claimant which merits protection; and (ii) a legal or equitable principle - in other words the injunction has to be justified as made for a proper purpose at the time of its grant. It is these principles, from the highest authority, which the Court of Appeal was simply applying to this case, argues VDHI.

[108] Secondly, as to the sub-grounds 1 to 7 under the first category of issues relating to 'standing', VDHI argues that these are merely arguments that the Court of Appeal erred as a matter of fact or in its application of established principles and are not matters of great general or public importance. In particular, the question of how and when the EGM of Noteholders was convened or when VDHI was appointed a representative claimant by the court, are all questions of fact and not matters of law.

[109] Thirdly, VDHI contends that MBFX's draft grounds of appeal 'present a confused and incorrect factual position'. In seeking to disentangle this perceived confusion, VDHI sets out (in some detail) its version of the factual chronology of key events. Some of the highlights are that at the time of applying for the WFO, VDHI held sufficient notes alone (on behalf of three managed funds) to apply for a WFO, and to convene the EGM of Noteholders to pass the resolution to issue proceedings on behalf of all Noteholders. This intended claim to challenge and to have set aside the Consent Order/Tomlin Order, was foreshadowed by Mr. Preiss in his affidavit, and would include a claim, at least, for the tort of unlawful means conspiracy. Second, VDHI was appointed the representative claimant on behalf of all Noteholders on 21st June 2021 and the Claim Form and statement of claim were filed the next day - 22nd June 2021. The EGM of Noteholders, the convening of which had been delayed as a result of the confidentiality restraints that were in place, in fact took place on 21st July 2021 and Messrs. Olaf Alexander Preiss and Carsten Frevel, two directors of VDHI, were appointed as a committee of Noteholders, and given authority to, *inter alia*, bring proceedings on their behalf.

[110] On the basis of this factual matrix, VDHI submitted that at the hearing on 26th April 2021 when the WFO was granted, 'given VDHI could itself, convene an EGM of the Noteholders, and had the support of the necessary two-thirds majority of Noteholders, there was (plainly) a sufficient degree of certainty that the right to bring proceedings as a representative party would arise and that proceedings would be brought.' Also, the finding that the undertaking given in Preiss 1 was sufficient has been upheld by the Court of Appeal. In fact, by the time of VDHI's application to

continue, and MBFX and Mex Clearing's application to discharge, and by the time the WFO came up for hearing on 28th and 29th July 2021, VDHI had been appointed a representative claimant for all Noteholders by the court's order dated 21st June 2021 and, therefore, no question of standing could have arisen at that point. Alternatively, even if there was no standing in VDHI at the point of the *ex parte* WFO (which VDHI does not concede), the appropriate course of action of the court would have been to set aside and immediately regrant the WFO in the same terms.

[111] Importantly, VDHI contends that MBFX's application for conditional leave to appeal on the issue of standing completely ignores the standing which VDHI clearly had at that stage in its capacity as the management company for the three Funds (each of which are Noteholders). This fact was made clear in Priess 1 where it was deposed that VDHI had brought the application for the WFO in its capacity as manager of these three Funds and is entitled to do so under the governing law of the Notes, that is Luxembourg.

VDHI's Case: Category 2 – Real Risk of Dissipation and Just or Convenient

[112] In addressing MBFX's second category of intended grounds of appeal (issues as to basic requirements for granting freezing injunctions and an applicant's duties to the court when proceeding on a without notice basis), VDHI makes four points or counter-arguments under section E of its written submissions titled 'Exercise of Discretion'. The first point is that whether or not the Court of Appeal or the court below exercised its discretion incorrectly by taking into account irrelevant or by failing to take account of relevant matters, does not give rise to a question of great general or public importance. There must be some serious issue of law which warrants further consideration by the highest appellate body.

[113] The second is that since the first instance judge and the Court of Appeal made certain concurrent findings of fact (as previously identified) which are more than sufficient to justify the granting of the WFO against MBFX, the Privy Council, applying its long-established practice, will not interfere with those findings. The third

point is that sub-grounds 8 to 20 of MBFX's draft grounds of appeal are an attempt to relitigate its application to discharge the WFO, which cannot be countenanced and does not assist them in satisfying the requirements for conditional leave to appeal under section 3(2)(a) of the 1967 Order. However, in any event, none of these alleged errors, even if correct, individually or cumulatively, give rise to a matter of great general or public importance. VDHI considers that these three points are sufficient to dispose of the said intended grounds of appeal.

[114] Fourthly, VDHI considered and sought to counter individually the specific errors in the judgment and reasoning of the Court of Appeal relied on by MBFX. It is not necessary for present purposes for me to traverse in detail these points and counterpoints addressed at paragraph 36 of VDHI's written submissions. Suffice it to say that VDHI addressed in subparagraphs 36.1 to 36.13 of its written submissions, the range of issues relied on by MBFX in its written submissions. Without meaning any disrespect, some of the more significant of MBFX's said points concern a real risk of dissipation and whether it was just or convenient to grant the WFO – these include the transfer of the sum of Euros 36.4 million by MBFX to Mex Clearing, the relevance of the nature of MBFX's business, the business of the Multibank Group as a multinational regulated financial services business, and Mr. Taher's undertaking; the alleged breaches of the duties of fair presentation and of full and frank disclosure at the *ex parte* hearing in relation to fortification of VDHI's undertaking in damages; the inquiries to be made by an applicant for a freezing injunction and the alleged failure by VDHI to discharge this obligation prior to applying for the WFO; and the on-going business relationship between Mr. Smith and Mr. Gollits, which evidence was the subject of a failed *Ladd v Marshal* application. In short, VDHI submits that these issues all relate to the application of settled principles, which were never in dispute before the Court of Appeal, to certain facts or alleged facts, none of which can or ought to give rise to questions of great general or public importance. Accordingly, it is submitted by VDHI, this MBFX's application for conditional leave to appeal from the judgment and order of the Court of Appeal in the WFO Discharge Appeal, ought to be dismissed.

Analysis and Conclusion - Standing and the Intended EGM of Noteholders

[115] In the recent decision of the Privy Council in **Broad Idea**, the Board carried out a comprehensive and thorough review of the statutory and procedural jurisdiction of the BVI courts and considered (1) the power of the court to order service out on a foreign defendant of a claim form in which a freezing injunction is the only relief, and (2) whether the BVI court had power to grant a freezing injunction against that party to assist enforcement through the court's process of a prospective (or existing) foreign judgment. In relation to the first issue, the Board in the majority judgment delivered by Lord Leggatt JSC (with whom Lord Briggs, Lord Sales and Lord Hamblen JJSC agreed) considered that to accept that proposition would be to depart from the decision of the House of Lords in **Siskina (Owners of cargo lately laden on board v Distos Cia Naviera SA**[27] ("***The Siskina***") to which Lord Nicholls of Birkenhead was referring in **Mercedes Benz AG v Leiduck**,[28] and the decision of the Board in in **Mercedes Benz** itself, from which Lord Nichols dissented, which decisions ought not to be disturbed. Any 'wrong turn' by the decision in **The Siskina** must be effected by amendment to the EC CPR. Accordingly, the appeal against the decision of this Court that the BVI court had no power to permit service of a claim form on the second respondent ("Dr Cho") outside the BVI failed.

[116] However, the majority agreed with the second proposition that the High Court in BVI had the power to grant a freezing injunction against a party over which it has personal jurisdiction to assist enforcement through the court's process of a prospective (or existing) foreign judgment. The Board considered that this proposition or principle already represented the law of the BVI, and of other jurisdictions where courts have inherited the equitable powers of the former Court of Chancery. Accordingly, this aspect of the appeal was allowed. In reaching this conclusion, the majority observed that the reasoning of the Court of Appeal had:

> "*failed to recognize the breadth of the power to grant injunctions already possessed by the BVI courts, the fact that the limit on the court's power*

[27] [1979] AC 210.
[28] [1996] AC 284.

> *which the EC Court of Appeal derived from The Siskina was not part of the ratio decidendi of that case, and how the law relating to injunctions generally – and freezing injunctions in particular – has developed in far-reaching ways since The Siskina was decided in 1977*."

[117] At paragraph 76 of the majority judgment of Lord Leggatt he addressed the very wide statutory jurisdiction of the BVI court to grant an injunction –

> "76. The notion that the power of the BVI court to grant a freezing injunction is confined to proceedings in which substantive relief is claimed in the BVI is not consistent with the language of section 24(1) of the BVI Act. That provision gives the High Court power to grant an injunction by "an interlocutory order … in all cases in which it appears to the court or judge to be just and convenient that the order should be made …" It would be hard to cast the power in wider terms than that."

[118] With regard to any perceived limitations on the BVI court's power to grant injunctive relief, the following extract from the majority judgment is most instructive:

> "As discussed earlier, there was and is no limit on the power of courts with equitable jurisdiction to grant injunctions except where restrictions have been imposed by statute." (para. 78)
>
> "If there is a relevant limitation on the freedom of the BVI court to grant a freezing injunction where it appears to the court to be just or convenient to do so, it could therefore only be based on established practice. There is no such limitation on the court's power." (para. 79)
>
> "But at this stage of the law's development it is possible to go further and to recognize that a freezing injunction is not, on a true analysis, ancillary to a cause of action, in the sense of a claim for substantive relief., at all." (para. 83)

[119] As to the correctness of drawing a distinction between cases where the right to be paid damages has already arisen at the time when the freezing injunction is sought and those where no such right exists at the time of applying for the injunction, the majority opined:

> "To draw such a distinction would be artificial, however, because any requirement that a right to be paid money [must be allegedly have accrued] before a freezing injunction can be granted is contrary to principle." (para. 97)
>
> "What matters is whether there is a sufficient likelihood (evidenced by the requirements of an intention to institute proceedings and a good arguable

> case) that a judgment will be obtained and that it will be rendered ineffective unless the court acts now to grant an injunction. Those requirements were all clearly satisfied in *The Veracruz I'"* (para. 99)
>
> '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). (para. 102(iii))

[120] In the instant matter, the BVI courts have personal jurisdiction over MBFX, as a BVI incorporated company regulated by the BVI FSC. There can be no doubt that the BVI court had the jurisdiction to grant a freezing injunction over MBFX. The question is whether that order could have been made on the application by VDHI (also a BVI company) in circumstances where VDHI is not and could not be the substantive claimant. Both the first instance judge and the Court of Appeal resolved this issue in favour of VDHI. They did so principally on two bases. The first is that VDHI as the manager of the three funds which each were Noteholders, had the necessary authority to bring a claim on their behalf to set aside the Consent Order/Tomlin Order, which order was made and entered by the BVI court in BVI proceedings involving both MBFX and Mex Clearing. The second basis was that in relation to the wider body of Noteholders generally, VDHI provided the necessary undertakings and representations, accepted by the judge, that it will convene an EGM of Noteholders to obtain their authority to bring the claim, at least for unlawful means conspiracy, on their collective behalf as a group.

[121] The first instance judge was satisfied as to the issue of VDHI's standing at the Stage 1 *ex parte* hearing, having been satisfied that VDHI had presented on the papers a good arguable case for the grant of injunctive equitable relief in order to protect the perceived rights and interest of the Noteholders in relation to the moneys which *prima facie* had been held by MBFX in trust for the Noteholders, including the three managed funds under the control of VDHI. The EGM did eventually happen and VDHI was appointed as the representative claimant of the Noteholders by order of

the Commercial Court dated 21st June 2021. This order was upheld by the judge below and MBFX's appeal from that decision was refused by this Court.

[122] In my judgment, the issues raised by MBFX under this first category of its proposed grounds of appeal relating to standing, have not pointed to any area of law which remains unsettled, or which is in dispute. The principles relating to the court's jurisdiction to grant equitable reliefs such as freezing injunctions before commencement of the claim, are well-established, as are the principles applicable to the exercise of that jurisdiction and power by the court at the Stage 1 *ex parte* stage. It is clear, and not seriously disputed, that in any event VDHI had standing as the entity managing and controlling the three noteholder funds, to commence a claim in relation to the Consent Order/Tomlin Order by which or following which the sum of Euros 36.4 million was transferred by MBFX out of the two accounts which they held seemingly as trustees for the Noteholders, to an undisclosed entity in China. This alone clothed VDHI with the necessary standing to apply for the WFO as the Court of Appeal also found, and was one of the evidential factors which was taken into account by the judge and by the Court of Appeal in deciding that VDHI had the requisite standing to apply for the WFO on behalf of all the Noteholders, each with an identical claim against MBFX in relation to the said funds, and each seeking to have the Consent Order/Tomlin Order set aside by the BVI court.

[123] The fact that VDHI was not at Stage 1 appointed as yet as a representative party of the wider group of Noteholders, while a matter for consideration, does not detract from or completely undermine VDHI as a person with standing to apply for the WFO at the *ex parte* stage 1. VDHI was clearly entitled to do so on behalf of the Noteholders which it then represented (the three managed funds). It was not in the true sense, as contended by MBFX, a 'third party' or a stranger to at least some of the Noteholders or to the underlying causes of action, so as to be said to have no standing to apply for the WFO. Moreover, the judge acted on the assurance given in Priess 1 that in undertaking to bring the claim, VDHI would take steps to convene an EGM, which it undoubtedly had the power to do as the manager of three

funds/Noteholders, and to obtain their consent or agreement for VDHI to commence, on their behalf collectively, the underlying proceedings. In fulfilment of this undertaking given to the court, VDHI was able to convene the EGM, obtain the necessary consent for two of its directors to authorize the commencement of the claim, and to apply for and be appointed by the BVI court as the representative claimant in those proceedings on behalf of all Noteholders.

[124] In my judgment, in relation to the first category of standing at the *ex parte* Stage 1, MBFX has failed to satisfy the requirement of raising a question of great general or public importance. The law is well settled by the majority decision in **Broad Idea**, and MBFX cannot point to any serious issue of law such that would otherwise satisfy this Court that the matter ought to be submitted to the Privy Council.

Analysis and Conclusion - Real Risk of Dissipation and Just or Convenient

[125] In my judgment, these several grounds of complaint do not give rise to any question or issue of great general or public importance. Each of the issues and intended grounds of appeal under this category relate to complaints concerning the application of settled principles by the lower court and the Court of Appeal to the facts of the instant matter. It has not been shown or demonstrated that any of the principles relied on were wrong or even in dispute as between the parties, nor are there conflicting dicta or decisions of the Court of Appeal regarding any such principles. Moreover, the applicant, MBFX, has not demonstrated that the Court of Appeal committed some serious error of law when considering these matters such as to satisfy the requirements of section 3(2)(a) of the 1967 Order.

[126] In this regard, the Court of Appeal accepted that it is at Stage 1 (the *ex parte stage*) that VDHI was obligated to satisfy each of the three requirements for the granting of an interlocutory freezing injunction. In relation to the requirement of a real risk of dissipation by MBFX of its assets, both the lower court and the Court of Appeal relied, in part, on the uncontradicted evidence that shortly after the Consent Order/Tomlin Order had been entered by the BVI court, MBFX transferred the sum

of Euros 36.4 million out of the two fiduciary accounts to an unknown and undisclosed entity in China. Furthermore, up to the hearing of the appeal itself, MBFX, a company with assets of US$ 1 million, had not put before the Court any evidence as to where these funds are being kept currently. Also, MBFX's attempt to minimize the negative effect of this evidence in terms of risk of dissipation before the Court of Appeal has been rejected.

[127] In my considered judgment, these are all matters which go more to criticisms by MBFX of the weight attached by the lower court and by the Court of Appeal to this and the other evidence pointing to a real risk of dissipation at the *ex parte* stage when the WFO was granted having been made out to the requisite standard. It is difficult to see, on any reasonable basis, how this issue and any of the intended grounds of appeal could give rise to a question or questions of great general or public importance. Likewise, the alleged failure by the Court of Appeal to consider fully the financial position, regulatory position and status of the Multibank Group and of MBFX itself, comes down, in my judgment, simply to the court's assessment and treatment of these pieces of evidence, the weight accorded to them individually and collectively, when considered alongside other relevant factors, in determining the issue of real risk of dissipation.

[128] Moreover, it is the risk of dissipation by MBFX, as the party sought to be enjoined by the WFO, of its assets and its actions in transferring out of reach of the BVI courts the sum of Euros 36.4 million held in two trust accounts for the benefit of the Noteholders, to which both the first instance judge and the Court of Appeal attached some paramountcy in the granular and practical consideration of risk of dissipation. Many of these matters raised by MBFX were addressed by the Court of Appeal at paragraphs 91, 92 and 93 of the WFO Discharge Judgment. Accordingly, I see no question or issue relating to the Court of Appeal's analysis and treatment of the judge's finding of real risk of dissipation posited by MBFX in its intended grounds of appeal which gives rise to a matter of great general or public importance.

[129] As regards the third requirement for granting an injunction at the interlocutory stage, that it must be it must be just or convenient at the time to do so, MBFX submitted, and the Court of Appeal accepted, that the first instance judge did not expressly deal with this issue. MBFX also submitted that the question of whether it was correct, as a matter of principle, for the Court of Appeal go on to deal with 'just or convenient' *de* novo is itself a matter of great general or public importance which ought to be submitted to the Privy Council. In my judgment, this point is without merit for the simple reason that, as recorded at paragraph 96 of the WFO Discharge Judgment, it was counsel for MBFX who suggested, and it was agreed to by the Court, that 'the practical way of dealing with this omission by the judge is for [the Court of Appeal] to consider the issue and make a finding.'

[130] In my view, it cannot now lie in the mouth of MBFX to not only complain that the Court of Appeal was wrong to adopt a course of action which it submitted the Court ought to adopt in the circumstances, but to now submit that doing so gives rise to a question of great general or public importance. Furthermore, this point really goes to the question of whether the Court of Appeal ought to have simply allowed the appeal on the basis that the first instance judge had failed to consider this third important requirement for granting interlocutory injunctive relief, discharged the WFO, and refer the matter back to the first instance judge for reconsideration, or whether it was open to the Court of Appeal, as it did, to consider *de novo* and determine the requirement of 'just or convenient' on the evidence before the lower court, and whether to uphold, discharge or regrant the WFO. The Court of Appeal, having considered the issue *de novo,* determined at paragraph 100 that it was just and convenient to continue the WFO.

[131] MBFX also takes issue in its intended grounds of appeal with the Court of Appeal's consideration and treatment of the issue of 'just or convenient'. In doing so, it relies on a number of factors which it argues were either not considered or not properly considered by the Court of Appeal. These include the issues raised regarding alleged breaches of the duty of full and frank disclosure and fair presentation, in

particular regarding whether VDHI was in a financial position to fortify its undertaking in damages, which they stress was a highly relevant factor in considering whether the requirement of just or convenient had been met at the *ex parte* stage. The gravamen of this issue is that while VDHI at the *ex parte* stage gave the court the assurance that it was in a position financially to fortify any undertaking in damages if called upon to do so, in fact it was not then in such a position, as subsequent disclosures and steps in the proceedings have now confirmed. These include (but are not limited to) VDHI being unable to satisfy the Fortification Order made subsequently in the court below in the sum of US$20 million, which order has been set aside by the Court of Appeal in the Fortification Judgment in No. 8 of 2022. MBFX submits that the effect of this is that there is no legally enforceable obligation on VDHI (as a representative claimant) to provide fortification, with the consequence that MBFX has been left fully exposed to losses caused by or flowing from the draconian relief of the WFO.

[132] This is an important issue when considering whether leave to appeal to His Majesty in Council ought to be granted from the WFO Discharge Judgment and order. The requirement of just or convenient was considered by the Court of Appeal from paragraph 94 of its judgment. The Court considered the provisions of section 24(1) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**[29] ("the Supreme Court Act"). It also cited and considered the oft cited formulation by Lord Kerr in **Niedersachsen** of the meaning and significance of the expression/requirement 'just or convenient'. No issue has been taken, and none can properly be taken, by MBFX with the applicable law and principles relied on by the Court of Appeal. Accordingly, it is with the application of these well-established principles that MBFX takes issue in its intended grounds of appeal.

[133] The first instance judge was satisfied with the usual undertaking in damages as a precondition to granting the WFO. It therefore fell to MBFX, if it so chose, to apply for fortification of the cross-undertaking in damages (if VDHI refused to offer

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

fortification in a sum commensurate with MBFX's request). This it elected to do. It is a well-settled principle that fortification is not automatic. It is also well-settled that in considering an application for fortification, it is for the first instance judge to decide whether fortification ought, in the circumstances, to be ordered. The judge decided that MBFX was likely to have suffered loss due to the WFO and that fortification ought to be ordered, and he determined that the appropriate amount of fortification was the sum of US$20 million. However, this order was on appeal set aside by the Court of Appeal for the reasons given in the Fortification Judgment.

[134] At paragraphs 94 to 99 of the WFO Discharge Judgment, the Court of Appeal considered the arguments relied on by MBFX as to why the first instance judge ought to have found that it was not, in all the circumstances, just or convenient to grant the WFO and accordingly, why the Court ought to set it aside. These included the 'nuclear effect' of a freezing injunction, particularly on a company's business; and the principle that even where an applicant for such an injunction has established a good arguable case and a real risk of dissipation, the grant or continuation of the injunction is not automatic, and the court must also be satisfied that it is just or convenient to do so. At paragraph 100 the Court of Appeal concluded that, in the circumstances, it is just and convenient to continue the WFO until trial or further order. Again, MBFX's complaints as to the Court of Appeal's treatment of the issue of just or convenient amounts not to any serious issue of law or principle, but to its application of well-settled principles to the facts in this case, and to its assessment of the factors relied on in the appeal by MBFX.

[135] From paragraph 103 of the WFO Discharge Judgment, the Court of Appeal considered the applicable principles relating to the duty of full and frank disclosure and fair presentation, and the matters complained of by MBFX as giving rise to breaches of this duty. Again, none of these principles are or were in dispute in the said appeal. At paragraph 106, the Court sets out the four main items or categories of material non-disclosure raised by MBFX on appeal. None of these include any issue relating to MBFX's ability to provide fortification of the cross-undertaking in

damages. They are (i) failure to mention possible defences; (ii) failure to mention the alternative claim available to the Noteholders for action oblique under the laws of Luxembourg; (iii) failure to mention important documents; and (iv) failure to make proper inquiries. Each of these were considered and rejected by the Court of Appeal.

[136] I shall shortly address the fourth of these matters - failure to make proper inquiries – as giving rise to a question of great general or public importance. However, it is important to note that, in any event, the Court of Appeal concluded at paragraph 112 that if there was material non-disclosure by VDHI which was deliberate, it would discharge and re-grant the WFO pending the trial of the action or further order. Accordingly, in my judgment this point with regard to alleged misrepresentation by VDHI on the issue of fortification at the *ex parte* stage and its importance to a consideration of whether it was 'just and convenient' to grant the WFO, does not give rise to a serious question of principle or issue of law of great general or public importance.

[137] That brings me to the final issue in this second category or catalogue of issues raised under the 'flag' of 'just or convenient'. That is the issue of failing to make reasonable inquiries before applying for the WFO. In this regard, the relevant legal principles are not in dispute. This application for conditional leave to appeal raises only questions as to the application of those well-settled principles. The main argument by MBFX in this application relates to the failure by VDHI to make inquiries of its 'sister' company VDH AG before applying for the WFO. These issues were considered and addressed by the Court of Appeal at paragraph 111. The Court concluded that:

> "any attempt to communicate with VDH AG or Mr. Gollits about the issues in the MCL Claim or the Luxembourg claim would have been in breach of the seal and gag orders. The suggestion that they should have made enquiries about the Consent Order is, at best, without merit. It appears that VDHI did the best that they could with the limited amount of information that was available to prepare the application for the WFO in the limited time available."

Again, I see no merit in this point as raising or giving rise to a question of great general or public importance.

[138] By way of general comment, it seems to me that most, if not all of these issues or intended grounds of appeal relating to 'just or convenient', are transparently another attempt by MBFX to reargue its appeal on its application for conditional leave to appeal to His Majesty in Council. This does not demonstrate, to the requisite standard, how each of them genuinely can be said to give rise to serious issues of law or serious errors by the Court of Appeal in the WFO Discharge Judgment; and whether taken individually or cumulatively, to questions of great general or public importance within the meaning of that phrase in section 3(2)(a) of the 1967 Order in **Martinus Francois** and in **Renaissance Ventures Ltd v Comodo Holdings Ltd.** Accordingly, for the reasons given above, I would dismiss this application, with costs to VDHI.

Application for conditional leave to appeal - Representative Appeal No. 32 of 2022

Summary of grounds and submissions

[139] In the draft grounds of appeal annexed to its notice of application for conditional leave to appeal the Representative Judgment dated 21st February 2023 MBFX relies on two main grounds. The first comprises five intended grounds of appeal under the '**Narrow Approach to Conflict of Interest**'. The second consists of one ground under '**Case Management Considerations**'.

[140] MBFX contends that, in various respects, VDHI is not an appropriate representative in the proceedings before the Commercial Court. These are: -

> (a) *VDHI obtained the WFO purportedly on behalf of Noteholders, the majority of which (at least) it had no right to represent at the time*.
>
> This point harkens back to the granting of the WFO *ex parte* on 26th April 2021 and is of no relevance to this application for conditional leave to appeal and certainly does not raise any issue of great general or public

importance. At the time being referenced, VDHI was the management company for three funds, each of which were then Noteholders entitled to apply for the WFO. The substantive claim/proceedings in the court below had not yet been commenced and the Representative Order had not yet been applied for or made. The order was made subsequently by the lower court on 21st June 2021, and the claim commenced in the name of all the Noteholders on 22nd June 2021. It is the Representative Order which was the subject of the discharge application by MBFX before Jack J, which application was dismissed by the learned judge on 28th March 2022. His decision was upheld on appeal, and it is that decision of the Court of Appeal with respect to which MBFX seeks conditional leave to appeal to the Privy Council.

(a) *VDHI is the potential subject of a claim by the Noteholders, that is, those it purports to represent, arising out of the very same facts as give rise to the instant proceedings.*

These matters were addressed both by the first instance judge and by the Court of Appeal in the Representative Appeal and found not to render VDHI incapable of representing the Noteholders in the extant claim to set aside the Consent Order/Tomlin Order made by the BVI court in the BVI proceedings on the basis of fraud. These matters represent another attempt by MBFX to reargue its failed discharge application and failed appeal therefrom, and do not raise any serious question of law or issue warranting granting leave to appeal to the Privy Council.

(b) *VDHI is subject to a further conflict of interest in that the Noteholders also have claims against VDH AG, a company closely related to VDHI.* Again, this is a matter considered by the Court of Appeal which reached the decision that even if correct it does not disqualify VDHI from being appointed the representative claimant in the instant proceedings to set aside the Consent Order/Tomlin Order. It is not an issue of great general or public importance.

(c) *VDHI is now the actual subject of claims by MBFX arising out of those same facts, putting it in a further conflict of interest*. The referenced claims presumptively arose after the appointment of VDHI as a representative party in the instant proceedings, which concerned the setting aside of the Consent Order/Tomlin Order, and subsequent to the refusal of MBFX's application to discharge that order, and further after the hearing and determination of the Representative Appeal. It is presumably a reference to a counter-claim or cross-claim brought by MBFX itself against VDHI. It was not a matter relied on before the Court of Appeal by MBFX and accordingly is not a factor which could be said to have given rise to a question of great general or public importance or a reason of such seriousness which ought to be submitted to His Majesty in Council.

(d) *VDHI has failed to correspond or communicate properly with the Noteholders, in the manner alluded to at subparagraphs (i) to (iv) of paragraph 3 of MBFX's written submissions.*

These are all matters of fact which were considered and dealt with by the judge below and the Court of Appeal at paragraphs 100 to 106, 136 and 137 of the Representative Judgment. They do not give rise to any serious question of law or to any question of great general or public importance.

(e) *VDHI failed to be open and candid with the Court, including as to issues such as the sale of VDHI itself.*

This was the subject of a fresh evidence application in the Representative Appeal. The application was allowed by order dated 24th January 2023 pursuant to the *Ladd v Marshall* principles. The evidence was considered from paragraph 134 of the Representative Judgment. The conclusion reached is that the evidence was material to the lower court's determination of MBFX's discharge application and ought to have been disclosed to the court by VDHI. VHDI failed to do so, amounting to a breach of its duty of full and frank disclosure on the without notice application. The Court of Appeal also found that this information was material to the question of the suitability of VDHI to be a representative claimant in the proceedings below. However, the Court concluded at paragraph 136 that this information 'does not render VDHI unsuitable to be appointed or to continue as the representative claimant in the proceedings below. This change in its ownership does not go to the threshold requirement that VDHI must have a sufficient interest in the proceedings below in order to be appointed as the representative claimant of the class of Noteholder[s] seeking to set aside the Consent Order (Tomlin Order) and recovery of the monies transferred or withdrawn from the accounts of Mex Securities with MBFX following such order being made.'

This is a conclusion reached by the Court of Appeal on the importance of this evidence to the question of a conflict of interest and whether it is sufficient in the circumstances to render VDHI unsuitable to be appointed as a representative claimant in the proceedings below. It does not raise any serious question of law, and does not give rise to any question of great general or public importance. The Court of Appeal also concluded at paragraph 137 that if this material non-disclosure was sufficiently serious to warrant discharging the Representative Order, it would, in any event, have regranted the said order appointing VDHI as the representative claimant.

[141] It is MBFX's case that the decision of the Court of Appeal was flawed in two respects. The first is that the Court took too narrow a view of the relevance of the conflict of interest between VDHI's role as a representative for the Noteholders. The Court's

determination ought to have taken into account whether there was an actual or potential conflict of interest between VDHI (the representative party) and the Noteholders (those it purported to represent) at all and, if so, whether that conflict impacted or potentially impacted its ability to act as a representative. Such a conflict, if it existed, ought to have disqualified VDHI from so acting. The second is that the Representative Judgment failed to take into account properly or at all that the decision of Jack J was on its face either solely based on or alternatively heavily influenced by case management considerations which were never a proper justification for retaining VDHI as a representative party and had by the time of the appeal fallen away.

[142] On the other hand, it is VDHI's case in response that none of MBFX's grounds of appeal have merit, and they do not give rise to any issue of great general or public importance. VDHI's position on each of the two grounds is summarized at paragraph 4 of its written submissions as follows:

> Re: *Ground 1 – Conflict of Interest*
>
> 4.1 The question of conflict between a representative and represented parties has only recently been considered by both the UK Supreme Court in the case of **Lloyd v Google LLC**,[30] and by the Privy Council in **La Brea Environs Protectors v The Petroleum Company of Trinidad and Tobago (Petrotrin)**.[31]
>
> 4.2 These judgments which are consistent with earlier authority, make it clear that an alleged conflict between a representative and a represented party is only relevant to the extent that it means the representative cannot be trusted to promote the interests of the represented class within the litigation. The Court of Appeal was therefore entirely right to adopt the approach it did. MBFX's contention to the contrary is wrong in law and there is no need for further guidance from the Privy Council on this issue. It does

[30] [2022] AC 1217.
[31] [2022] UKPC 22.

not raise a question of great general or public importance. Further, it is an example of the Court of Appeal applying well-settled principles to the facts of this case.

Re: Ground 2 – Case Management Considerations

4.3 Contrary to MBFX's submissions, the judge did not dismiss MBFX's application on case management grounds alone. Even if he had 'elevated them to the most important factor in his decision making' (MBFX's ground 6), this would have been entirely consistent with the principles set out in **Google** and **La Brea**, which make it clear that case management considerations and the Overriding Objective are key when considering whether to appoint a representative party. Further, even if the judge had based his decision purely or mainly on case management grounds and was wrong to do so, this would not matter because the Court of Appeal has found, correctly, that the Representative Order was rightly made in any event.

[143] VDHI also makes the general observation that MBFX has raised, particularly in its introduction, a number of complaints that were not in its grounds of appeal, which is impermissible and accordingly not dealt with by VDHI in its submissions.

G. 1 Conflict of Interest

[144] MBFX criticises the Court of Appeal's approach to the issue of 'conflict of interest' by VDHI as being too narrow. The gravamen of this ground 1 is that in the Representative Judgment the Court of Appeal limited its consideration of this issue to whether there was a conflict of interest within the proceedings, and did not consider, as it ought to have done, whether VDHI and VDH AG may have a conflict of interest with the Noteholders (who its purports to represent), they having the same interest in pursuing this litigation. In brief, VDHI argues that the Court of Appeal erred in failing to take into account a relevant matter, namely, that there is a potential conflict of interest between the Noteholders and their representative (VDHI), in that (i) the Noteholders may have claims against VDHI arising out of the very matters

which are in dispute in the proceedings making VDHI not a fit and proper representative party; (ii) the Noteholders may also have claims against VDH AG, a company closely related to VDHI, arising from the same facts; and (iii) MBFX itself actually has claims against VDHI arising out of those same facts, making VDHI a representative claimant, a potential defendant to claims by the Noteholders in relation to managing the notes, and an actual defendant to claims by MBFX in relation to the breakdown of the relationship between VDH AG and MBFX, and the collapse of the joint venture.

[145] I would observe at this juncture, that it is MBFX and not the Noteholders themselves which VDHI represents who is carrying the banner of alleged conflict of interest with the Noteholders. There has been no move by any of the Noteholders in the instant proceedings to seek to dislodge VDHI as their representative. I also observe that the matter before the Commercial Court in BVI concerns a claim against MBFX to set aside a Consent Order/Tomlin Order entered in other BVI proceedings on the ground of the alleged fraud of MBFX and to recover the sum of £36.4 million transferred from two accounts of Mex Securities with MBFX to an unknown entity in China, the location of which funds have not been disclosed by MBFX and which funds or the corresponding sum has not been paid into court in BVI by MBFX. Thirdly, I observe that MBFX does not seek to challenge the Court of Appeal's approach to and findings in relation to VDHI's interest and that of the Noteholders in the proceedings below in setting aside the Consent Order/Tomlin Order being aligned, and that the judge was correct to find that there was no relevant conflict in the said proceedings between VDHI and the Noteholders.

[146] As VDHI pointed out in its submissions on this aspect, the Court of Appeal did consider the issue of whether potentially the Noteholders may also have claims against VDHI and/or VDH AG, at paragraph 93 of the Representative Judgment. It is therefore factually incorrect for VDHI to assert that this issue was not considered. The finding of the Court of Appeal was that those potential claims were not part of Claim No. 73 of 2021 and were 'irrelevant to the question of whether VDHI is an

appropriate representative party in the said proceedings' to represent the Noteholders, where there was, as the judge below put it, 'a complete community of interest' in having the Consent Order/Tomlin Order set aside.

Conclusion on G. 1 - Conflict of Interest

[147] In my judgment MBFX has not raised any issue or question of great general or public importance relating to the issue of conflict of interest or potential conflict of interest, and VDHI being not a fit and proper person to be appointed a representative party in the said proceedings to represent the interest of the Noteholders, which interest is completely aligned, in having the Consent Order/Tomlin Order set aside. The law relating to 'conflict of interest' between a representative and the represented in court proceedings is well-established and the principles enunciated by the highest authorities in **Google**[32] and **La Brea**. The Court of Appeal considered at length and applied the principles from the decision of the UK Supreme Court in **Google**. These principles and the approach to issues of conflict of interest or potential conflicts of interest between the representative and the represented were endorsed and further expounded on by Lord Kitchen in **La Brea** (at paras. 21 to 25), a decision of the Privy Council itself. It is not necessary for present purposes to set out those extracts here. Suffice it to say that MBFX has not raised any serious legal issue that requires determination by the Privy Council. Likewise, they have not demonstrated that there is any good reason why this Court ought to grant permission to appeal under the 'or otherwise' limb of section 3(2)(a) of the 1967 Order. In this respect, I agree with and adopt the submissions by VDHI at paragraphs 22 to 33 of its written submissions. Accordingly, this ground of the application fails.

G. 2 Case Management Considerations

[148] In my judgment, this intended ground of appeal is hopeless. It certainly does not give rise to any issue of great general or public importance. This issue was considered by the Court of Appeal at paragraph 81 of the Representative Judgment. It found that 'there is little if any merit' in this ground; and '*The learned judge did not base his*

[32] Per Lord Leggatt JSC at paras, 68 and 71.

decision purely or mainly on case management grounds, and to the extent that he took such considerations into account, he was correct as a matter of principle to do so.' MBFX says this finding or decision of the Court of Appeal was flawed for the reason that from an examination of his decision it is clear that he viewed the case management considerations as being of paramount importance. They also submit that the judge erred as a matter of principle in taking case management considerations into account.

[149] VDHI, on the other hand, submits firstly that in any event this is not a matter of great general or public importance. Secondly, it is wrong to say that the judge below did base his decision not to discharge the Representative Order purely on case management decisions and that the Court of Appeal erred in so concluding. Thirdly, VDHI relies on this extract from the opinion of Lord Lloyd SJC in **Google** –

> "[75] …as with any power given to it by the Civil Procedure Rules, the court must in exercising its discretion seek to give effect to the overriding objective of dealing with cases justly and at proportionate costs."

[150] Reliance was also placed on the dicta of Lord Kitchen in **La Brea** at paragraphs 21 to 25 which emphasises that in considering the elements of EC CPR Part 21, courts are required to adopt a 'purposive approach', and 'the overriding objective has an important part to play, and the court must have regard to the value of the representative rule as a flexible tool of convenience in the administration of justice, and one that may be applied to meet the demands of modern life, as occasion requires.' Lord Kitchen said at paragraph 25 –

> "Nevertheless, the words do have a boundary … in advancing its arguments, the representative must not be placed in a position of conflict in relation to any of the persons it represents. These requirements therefore give an indication of where that boundary lies."

Conclusion on G.2 – Case Management Considerations

[151] The principles in **Google** and to a large extent those subsequently set out in **La Brea** were considered and applied by the Court of Appeal in dismissing the Representative

Appeal. The Court considered the issue of whether there was a disqualifying conflict of interest between VDHI and the Noteholders in the proceedings below and concluded that there was an alignment of interest and a commonality of purpose in those proceedings. That conclusion does not seem to be the target of MBFX. The Court also considered whether there is a disqualifying conflict of interest between VDHI and VDH AG on the one hand and the Noteholders on the other and concluded that any such potential conflict does not affect the ability of VDHI to represent the Noteholders' collective interest as a class in seeking to have the Consent Order/Tomlin Order set aside on the grounds of the fraud of MBFX. As the above authorities indicate, the question of where the line of demarcation ought to be drawn where if crossed would be a disqualifying factor, is a matter for the courts to determine in their own discretion taking into account the purposive approach to Part 21, the element of intended flexibility in the rule, and applying the overriding objective to its interpretation and application to the particular facts and circumstances of each case. These are not issues of great general or public importance. Furthermore, the applicant has failed to demonstrate that there are any good reasons why this issue ought to be submitted to His Majesty in Council.

[152] For the reasons above, this ground 2 of the application also fails. Accordingly, the application ought to be dismissed with costs to VDHI.

Disposition

[153] For the reasons set out above in relation to each of the three applications for conditional leave to appeal to the Privy Council, the decision and orders of this Court are as follows:

(1) The Notice of Motion application in Civil Appeal BVIHCVAP2022/0008 – the Fortification Appeal - is dismissed, except that conditional leave to appeal to His Majesty in Council is granted in relation to the questions and issues set out at paragraphs 75 and 76 above only, with costs of the application in the appeal. The said application in the Fortification Appeal is granted upon the following conditions:

(a) the applicant within 90 days of the date hereof do enter into good and sufficient security in the sum of five hundred pounds sterling for the due prosecution of the appeal, such security to consist of a deposit of the said amount at the court office;

(b) within 90 days of the date hereof, the applicant takes the necessary steps for the purposes of procuring the preparation of the records, the settling of such records with the solicitors for the respondent to this application, and the certification of the record by the Registrar of the Court of Appeal;

(c) the record shall be prepared in accordance with rules 18 to 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 and its Practice Direction 4.2.1 to 4.3.2 and Practice Direction 5; and shall be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted.

(2) The Notice of Motion application in Civil Appeal BVIHCVAP 2021/0009 – the WFO Discharge Appeal – for conditional leave to appeal to His Majesty in Council is dismissed with costs to VDHI to be assessed by a judge of the Commercial Court if not agreed by the parties within 21 days of the date of delivery of this judgment.

(3) The Notice of Motion application in Commercial Appeal BVIHCMAP2022/0032 – the Representative Appeal – for conditional leave to appeal to His Majesty in Council is dismissed with costs to VDHI to be assessed by a judge of the Commercial Court if not agreed by the parties within 21 days of the date of delivery of this judgment.

[154] With respect to the grant of conditional leave to appeal granted above in BVIHCVAP2022/0008 – the Fortification Appeal, a draft order reflecting the grounds stipulated at paragraphs 75 and 76 above shall be prepared and submitted by counsel

for MBFX to the Office of the Court of Appeal, with a copy to counsel for VDHI, for final vetting and approval by the Court.

I concur.
Mario Michel
Justice of Appeal

I concur.
Trevor Ward
Justice of Appeal

By the Court

Deputy Chief Registrar