

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

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCM 2022/0123

BETWEEN:

**[1] PARLES .A.S.
[2] DANIEL PERNER**

Claimants

**[3] BOHUSLAV KABÁTEK
[4] MAREK RYBÁR**

Proposed Applicants

and

WINSLEY FINANCE LIMITED

Respondent

Appearances:

Mr. Timothy de Swardt and Mr. Merrick Ricardo Watson of Kobre & Kim for the Applicants and the Proposed Applicants.

Mrs. Kimberly Crabbe-Adams and Mr. Gerrard Tin of Harneys for the Respondent.

Mr. Brož, the Czech Court-appointed Interim Administrator for Mr. Pernicka in attendance, watching proceedings.

2023: January 23, 24:
March 29.

JUDGMENT

[1] **MANGATAL, J (Ag):** The jurisdiction to grant freezing orders against non-cause of action defendants ("NCADs") is well-established and was

authoritatively expounded upon in ***T.S.B. Private Bank International S.A. v. Chabra and Another***.¹ The applications before me raise some important points about the boundaries of the Court's jurisdiction to grant what are often referred to as *Chabra injunctions*.

- [2] An important issue that arises is whether the Court has jurisdiction to grant *Chabra* injunctions on the application of unsecured creditors in aid of intended liquidations or extant insolvency or bankruptcy proceedings. These questions will involve discussion of the recent majority decision of the Judicial Committee of the Privy Council emanating from this jurisdiction, i.e. ***Broad Idea International v Convoy Collateral Limited***² and cases referred to therein.
- [3] If the Court does have such **jurisdiction** to grant *Chabra* injunctions in aid of intended liquidations and insolvency proceedings, the separate question arises as to whether the Court ought to exercise its discretion to grant such relief. Should the Court exercise its **discretion** to grant relief in circumstances where the freezing injunctions are being sought by unsecured creditors, and not by a provisional liquidator or other office-holder (emphasis mine).
- [4] The question also arises as to whether insolvency/bankruptcy proceedings in a foreign country constitute "*proceedings*" for the purposes of section 24A of the ***Eastern Caribbean Supreme Court (Virgin Islands) Act (Cap. 80)***, to which proceedings this Court can render assistance ancillary to the foreign proceedings.
- [5] Another issue is the relevance of the fact that the insolvency or bankruptcy proceeding is or may be taking place in a foreign country that is not a "designated foreign country" under Part XVIII of the ***Insolvency Act, 2003*** or "a relevant foreign country" under Section XIX of the ***Insolvency Act, 2003***. Those issues will merit reference to the decision of the Court of Appeal, in ***Net International Property Limited v Adv. Eitan Erez***³, delivered in February 2021, where the leading judgment was given by Webster J.A. and the differences between common law recognition and assistance were considered.

¹ [1992] 1 WLR 231.

² [2021] UKPC 24.

³ BVIHCMAP2020/0010.

The Applications

- [6] The four applications which were before me at the hearing in January are as follows:
- (1) Parles a.s. ("**Parles**") and Daniel Perner's (together "the Applicants") Notice of Application filed 20 July 2022 for the continuation of a Freezing Order ("the Freezing Order") first granted by Jack J (Ag) on 12 July 2022, which was temporarily continued by the learned Judge at the first return hearing on 27 July 2022 until the adjourned return hearing date ("the Continuation Application").
 - (2) The Notice of Application filed on behalf of the Respondent Winsley Finance Limited ("Winsley") on 31 October 2022, seeking an extension of time to file its evidence.
 - (3) The Notice of Application filed by Winsley on 4 November 2022, seeking that the freezing order be set aside ("the Set Aside Application").
 - (4) The Notice of Application filed on 5 January 2023 on behalf of the Interested parties Bohuslav Kabátek and Marek Rybár (together "the Proposed Applicants") seeking to be added as Applicants to these proceedings ("the Interested Parties Application").
- [7] The Freezing Order was applied for and obtained by way of a without notice, or *ex parte* application against Winsley pursuant to sections 24 and 24A of the ***Eastern Caribbean Supreme Court (Virgin Islands) Act (CAP. 80)*** ("the Act").
- [8] I will start by disposing of Winsley's application for an extension of time. That application was not opposed by the Applicants, save that they seek their costs in the general way pursuant to Rule 65.11(3)(b) of the Civil Procedure Rules 2000 ("the CPR"). Paragraph 1 of the application is granted as prayed, with costs to the Applicants to be assessed if not agreed. I further order that the late filing of Winsley's evidence and the Applicants' reply evidence be allowed to stand.

- [9] A further return date for the Continuation Application was itself adjourned on 3 October 2022 to be re-listed on the first available date for one day, after 12 December 2022. This adjournment was to allow for Winsley to file and serve its evidence in response, and for the Applicants to file and serve reply evidence. Directions were made by Jack J (Ag) in relation to those matters and the freezing order continued in effect.
- [10] On the 23 January 2023 I commenced the hearing, but as the applications had not been scheduled for the whole day, there was insufficient time and so I continued the hearing on the 24 January. I reserved my decision and I ordered that the freezing order first granted on 12 July 2022 be continued until judgment is delivered in these applications. This is my judgment in respect of the remaining three applications.

Background

- [11] Parles is a company incorporated in Czechia in 2007. Mr. Rybín is the sole owner and board member of Parles.
- [12] Mr. Petr Pernicka ("Mr. Pernicka") is a Czech businessman who allegedly owes the Applicants, together with the Proposed Applicants approximately U.S. \$12 million.
- [13] The Applicants and the Proposed Applicants all say that they are creditors of Mr. Pernicka. According to them, the amounts due and payable at the time that the Freezing Order Application was filed came to CZK (Czech crowns) 276 million or US \$11.7 million, as set out in the table below.

Creditor	Date 12.07.22	Due 23.01.23	Due Date
Marek Rybár	CZK 107,493,151	CZK 110,315,068	31 December 2023
Bohuslav Kabátek	CZK 24,057,000	CZK 25,447,500	18 March 2018
Daniel	CZK 131,789,589	CZK 137,546,301	31 July 2019

Perner			
Parles a.s.	CZK 12,648,209	CZK 13,504,446	22 August 2019
Total	CZK 275,987,949	CZK 286,813 316	
	(~US\$11.7 million)	(~US\$ 12.9 million)	

[14] Winsley is a company incorporated in the British Virgin Islands (“the BVI”) in 1993. Mr. Pernicka is the sole director of Winsley, and as far as the Applicants were aware at the time when they applied for the Freezing Order before Jack J in July 2022, Mr. Pernicka was and had remained, the sole shareholder of Winsley since incorporation. However, according to Mr. Pernicka’s evidence in Pernicka 2, he was the sole shareholder of Winsley up to February 2022 and is no longer a shareholder in Winsley. Mr. Pernicka claims to have transferred his shares to a Mr. Sojak on 23 February 2022. The Applicants question this alleged transfer. They say in effect, that this transfer was a sham. I will return to this matter later in this judgment when I deal with the issue of the risk of dissipation of assets.

[15] It is not in dispute that Winsley was used by Mr. Pernicka in his arms trading business. In particular, Winsley had responsibility for, and claims that it delivered, a part of a S-300 long range missile system to the Croatian Government in 1995. Winsley was not paid for the delivery of the S-300 system and the evidence is that Winsley assigned its claim for payment to Mr. Zubak, a long- time business associate, Croatian citizen and partner of Mr. Pernicka. Mr. Zubak initiated arbitration in 2001. The arbitration failed on a technical point, and was followed by over a decade of litigation, in which the claim is for US\$200 million (“the Croatia Claim”). The Croatia Claim was ultimately dismissed by the Zagreb Court in Croatia in October 2021. The original as well as a google translation of the judgment (“the Croatia Judgment”) are exhibited to Rybín 1. I will return to the Croatia Judgment later in this judgment.

[16] It is Mr. Pernicka’s evidence, in Pernicka 2, that in November 2021 an appeal was filed in relation to the Croatia Judgment.

- [17] Mr. Pernicka at paragraph 23 refers to the fact that Mr. Rybín has claimed that he (Mr. Pernicka) misled him about the prospects of the claim's success. However, Mr. Pernicka denies that, and claims that he believed fully that the Croatia Claim would succeed. He asserts that both he and Mr. Zubak are very aggrieved that it has been dismissed. Mr. Pernicka continues as follows:

"Winsley supplied a valuable asset to the Croatian government and it has a clear right to be paid for this. Mr. Zubak has appealed the Croatia Judgment and the appeal is due to be heard at any time now."

- [18] A partial copy of a translation of the application to the Court of Appeal ("the Complaint") is exhibited to Pernicka 2. The extract from the Complaint runs for some 13 pages, and amongst the headings are such matters as incorrect application of statute and rules of limitation, and *"Positions and practice of the European Court of Human Rights and the Constitutional Court of the Republic of Croatia on the issue of recognition of debts and interruption of limitation periods in comparable cases."*

- [19] According to the Complaint (at paragraph IV) the Court below:

"... ignores the fact that the contracting and procurement of the S- 300 system took place in conditions of aggression by the JNA and Serb forces against the Republic of Croatia and the state of war in the Republic of Croatia, in conditions of the current embargo on arms imports to the Republic of Croatia, [sic] any weapons especially weapons that have strategic effects for the course of the war, and in conditions of necessity to defend and preserve the survival of the Croatian state."

The Debt Allegedly due to the Applicants

Parles

- [20] Mr. Rybín in his evidence says that he is a businessman based in Czechia and although his native language is Czech, he speaks, writes, and reads English proficiently. He indicates further that he owns and operates a number of companies that are active in various areas of commerce, including real estate and consultancy services, mediation and negotiation. Mr. Rybín's evidence is that he is also an arbitrator in the Arbitration Court of the Czech Chamber of Commerce and has some experience with investor-state disputes and settlements.
- [21] Mr. Rybín and Mr. Pernicka met through their business dealings in 2016. It is not in dispute that Mr. Pernicka obtained various loans from Mr. Rybín in his personal capacity and that those loans were repaid.
- [22] Parles made a loan ("the Parles Loan") to Mr. Zubak. The loan was for CZK 7,922,575 guaranteed by Mr. Pernicka pursuant to a promissory note for CZK 9,000,000 on 22 August 2018.
- [23] Mr. Pernicka and Mr. Zubak had informed Mr. Rybín that they needed some funds in order to conclude a settlement of the Croatia Claim with the Government of Croatia. The circumstances surrounding the loan were quite involved, including real estate management agreements in anticipation of land transfers from the Croatia Government. However, it suffices to indicate that Mr. Rybín claims that the loan was provided solely for the purpose of settling the Croatia Claim and that this is evidenced by the Parles Loan, the translation of Clause 3 of which, provides as follows:

"3. Purpose of the Loan

The Loan may be drawn down and used only for the purpose of financing the performance related to the preparation and conclusion of the Settlement Agreement between the Borrower and the Republic of Croatia and the performance of its objective for the Borrower, which is to obtain compensation in the form of a free transfer of real estate from the Republic of Croatia to the Borrower, or to a legal entity designated by him.....

The Borrower undertakes to grant Mr. Filip Rybín an authorization to negotiate on the Settlement Agreement between the Borrower and the Republic of Croatia, which will remain in force until the completion of the subsequent transfer of the real estate from the ownership of the Republic of Croatia.”

- [24] Mr. Rybín's evidence is that, although he was initially reluctant, he was induced to make the Parles Loan on the terms that he did because Mr. Pernicka showed him a resolution dated 4 May 2018 (“the 2018 Resolution”) in which the Croatian government purportedly agreed to transfer state-owned real estate worth HRK 950 million (approx. U.S. \$133 million) to settle the Croatia Claim.
- [25] According to Mr. Rybín, it turned out that Mr. Pernicka had deceived him. By filing a request for information with the Croatian government in February, Mr. Rybín discovered that the 2018 Resolution was forged by Mr. Pernicka.
- [26] Mr. Rybín states that additionally, he only investigated the 2018 Resolution because (contrary to what Mr. Pernicka had promised), Croatia did not in fact settle the Croatia Claim, and instead defended and defeated it in court. According to Mr. Rybín, the published court judgment revealed that Mr. Pernicka had dishonestly forged a crucial document submitted in his evidence in the Croatia court, i.e. a purported “*Recognition of Debt*” signed allegedly by the Croatian Defence Minister in 1996.
- [27] Under the Parles loan documents, principal was paid to Mr. Pernicka's brother, Pavel (“Pavel”), at the instructions of Mr. Pernicka. At that time, Mr. Pernicka claimed that Pavel was a nominee to hold his assets, but that he (Mr. Pernicka) retained day-to-day control of his assets and beneficial ownership.
- [28] It is Mr. Rybín's evidence that there were supposed to be a number of meetings with Croatian officials in order to finalize the settlement. Mr. Rybín was also scheduled to be in attendance at these meetings, however they never materialized. There were repeated delays and excuses proffered by Mr. Pernicka and Mr. Zubak.

- [29] Mr. Rybín testifies that after the Parles Loan became due in August 2019, he requested payment upon a number of occasions, but Mr. Pernicka kept promising that a settlement with Croatia was imminent.
- [30] The settlement never happened, and on 24 October 2021, the Croatia judgment was delivered, which was in favour of the Croatian State.
- [31] A meeting took place on 24 November 2021, at Mr. Rybín's instigation, in order to see if the position of the Croatia Claim could be salvaged, and the Parles Loan repaid. Mr. Rybín's evidence is that at this meeting, Mr. Pernicka informed his creditors that, contrary to his previous assertions, in fact he had no assets at all, and Pavel was not in fact a nominee, but rather that everything legally and beneficially belonged to Pavel.
- [32] Mr. Rybín further asserts that the Parles Loan has not been repaid and is overdue. Litigation is now underway in Czechia to recover the sums due from Mr. Pernicka. After the Freezing Order was obtained in the BVI Court, Parles took the first step in commencing civil proceedings against Mr. Pernicka in the Czech Courts on 14 July 2022. This was done by Parles serving its request for payment in Czechia on Mr. Pernicka by way of a demand letter. Mr. Pernicka not having responded to Parles' demand letter, on 25 July 2022, Parles filed a civil claim against Mr. Pernicka in the Czech courts seeking repayment.
- [33] Mr. Pernicka has challenged that claim by, amongst other things, in the Czech courts, denying that he even signed the promissory note.
- [34] However, Mr. Pernicka acknowledges that the Parles Loan came about in connection with the Croatia Claim. At paragraph 24 of Pernicka 2, Mr. Pernicka gives evidence as to what he believes has motivated the claim by Parles against him, and its timing in relation to the dismissal of the Croatia Claim. Mr. Pernicka asserts:

"It was, however, following the dismissal of the claim that the relationship between myself and Mr. Zubak on the one hand and Mr. Rybín and Parles began to break down. In short I believe that ...Mr. Rybín wanted to take over the claim as he believes that he can settle it with the Croatian government and make a large gain for very little in the way of costs. Mr. Rybín tried to force me to cooperate with him so

that he could negotiate the settlement with Croatia in the name of Winsley, but I explained to him that the claim is in Mr. Zubak's hands and that the only way forward is to cooperate with him until we have a final decision from the appeal court."

Mr. Perner

- [35] Mr. Perner in his evidence given in November 2022 has confirmed the evidence given by Mr. Rybín on his behalf. Mr. Perner has indicated that he does not speak, write and read English fluently and therefore that the preparation of his Affidavit was done with the assistance of his lawyers and Mr. Rybín. The evidence is that Mr. Perner has provided financial assistance to Mr. Pernicka beginning in 2010, the fact of which was acknowledged by Mr. Pernicka in two notarial deeds signed by Mr. Pernicka in 2018 and 2022. In his evidence, Mr. Pernicka complains that Mr. Perner is relying on the 2022 notarial deed in these proceedings but relying on the 2018 deed in the related Czech proceedings. However, Mr. de Swardt, Counsel for the Applicants and Proposed Applicants, has referred me to the Notice of Application for the freezing order and submits that Mr. Perner has always intended to rely on the 2018 deed in the Czech proceedings, and that the amount he has claimed as due and owing in these proceedings is also based on the 2018 Deed.
- [36] Mr. Pernicka further claims that he was coerced into signing the 2018 notarial deed. Mr. de Swardt submits that contrary to what Mr. Pernicka claims, the objective evidence establishes that the notary before whom the notarial deed was signed has confirmed that there was no sign of threat or pressure by Mr. Perner. This can be seen, he submits, from the fact that the Czech police have recently confirmed both notarial deeds to be valid and that *"no coercion was detected in the signing of these records"* in their decision dismissing the criminal complaint made by Mr. Pernicka against Mr. Perner and Mr. Rybín. Further, the Czech police in that investigation indicated that there was a suspicion that the criminal offence of fraud may have been committed by Mr. Pernicka.
- [37] After the Freezing Order was obtained, Mr. Perner applied for the appointment of an exekutor in Czechia on 15 July 2022. His claim for the appointment of an

exekutor under the 2018 notarial deed is proceeding in the Czech courts. In evidence Mr. Rybín, in Rybín 2, paragraphs 4 and 5 explained on behalf of Mr. Perner, and Counsel Mr. de Swardt explained, both to this Court, and to Jack J at the *ex parte* hearing, that the immediate appointment of an “*exekutor*” was a process available to Mr. Perner because Mr. Pernicka has expressly acknowledged the existence of his debts to Mr. Perner via notarial deed. The deed in addition to the acknowledgement of debt contains permission for execution. Thus, the term “*exekutor*” in the Czech proceedings is not used in the context of a will of a testator or as a personal representative of a testate deceased’s estate. It was also suggested that the role of an exekutor is substantially similar to the role of a receiver. On the evidence before Jack J at the *ex parte* hearing, it was made clear that it was significantly less expensive for Mr. Perner to apply for the direct appointment of an exekutor rather than first seeking a money damages judgment. However, it was indicated that Mr. Perner was willing to commence proceedings for a money judgment if necessary.

Bankruptcy Proceedings

- [38] Since the court proceedings brought by the Applicants in Czechia, matters have moved on. Parles initiated Bankruptcy Proceedings, and Mr. Pernicka is now subject to bankruptcy proceedings. It is in fact on the application of Mr. Kabátek within those proceedings that the preliminary ruling and appointment of the Interim Administrator, Mr. Brož, were made.

The Continuation Application and the Set Aside Application

- [39] In their closing submissions, Counsel for Winsley indicated that the basis upon which it makes the Set Aside Application is the same basis upon which the Continuation Application is opposed. In my view, the two applications can therefore be dealt with together. I find helpful a passage in the judgment of Kerr LJ in *The Ninemia* at page 426 A where the practice that obtained in the English Commercial Court and in the Chancery Division before the advent of the Civil Procedure Rules (CPR) is explained. In my view, this passage demonstrates that our equivalent Rule 17.4 of the CPR has adopted a process

more akin to Chancery practice. Having confirmed that the judge who hears the proceedings inter partes must decide on all of the evidence that is laid before him, the learned Judge of Appeal had this to say:

“Whether the inter partes hearing takes the form of an application by the defendants to discharge the injunction, as is usual in the Commercial Court, or whether-as in the Chancery Division-the injunction is only granted for a limited time and there is then an inter partes hearing as to whether it should be continued, the judge must consider the whole of the evidence as it then stands in deciding whether to maintain or continue, or to discharge or vary, the order previously made.”

- [40] The amount of the debt allegedly due to Parles at the time of the Freezing Order was CZK 12,648,209 and the amount allegedly due to Mr. Perner was CZK 131,789,589. It is noted that the Freezing Order imposed a limit on Winsley’s assets up to the value of U.S.\$11.7 million, and therefore plainly, indeed, expressly contemplated, the composite sum allegedly due from Winsley to the Applicants as well as to the Proposed Applicants. The Proposed Applicants were not at the time of the order either applicants, or proposed applicants. Winsley’s Counsel have taken issue with this approach, and I will return to this point later in the judgment. The combined alleged debt of Parles and Mr. Perner is approximately U.S. \$5,721,966.00.

The Alleged Debts of the Proposed Applicants

- [41] Mr. Kabátek claims that he loaned Mr. Pernicka some CZK 6.5 million on 2 August 2016. When interest is taken into account, it is alleged that as of 11 July 2022 the amount due was CZK 24,030,000.
- [42] Mr. Pernicka says that he has repaid part of this loan by transferring a building in Liberec to Mr. Kabátek. However, Mr. Rybín claims to have personal knowledge of this transaction and claims that Mr. Kabátek was not involved at all. He states that the building in question was in fact used to secure a prior loan to Parles. He says that the transfer took place in 2019, and yet Mr. Pernicka signed an Acknowledgement of Debt on 22 March 2022.

- [43] Mr. Rybár claims to have loaned Mr. Pernicka EUR 2,000,000 on 18 September 2007 and EUR 300,000 on 10 February 2009. The loans were, according to the Proposed Applicants' Skeleton Arguments ("SKA"), and to Rybín 4, "repealed and replaced" with a single loan of EUR 2,922,043 and which Mr. Rybár claims remains outstanding to this day. However, Winsley argues that this loan is not yet due, and that indeed, on Mr. Rybár's own case, the loan is not due until 31 December 2023. .
- [44] Both of the proposed Applicants, along with the Applicants, have submitted claims in the Czech bankruptcy proceedings.

Procedural Chronology

- [45] I have found a procedural chronology set out in the Applicants and Proposed Applicants SKA useful. This chronology and the timelines outlined are largely uncontroversial and assist in following the events taking place in this matter where matters have been continuously unfolding. I set out the relevant portions here in paragraphs [46-65(inclusive)].
- [46] The Freezing Order was granted by Jack J(Ag) on 12 July 2022.
- [47] The Freezing Order and application materials were served on Winsley on 13 July 2022, and the transcript of the hearing on 14 July.
- [48] Parles took the first step in commencing civil proceedings against Mr. Pernicka in the Czech Courts 14 July 2022 when Parles served its request for payment in Czechia on Mr. Pernicka.
- [49] Mr. Perner applied for the appointment of an executor in Czechia on 15 July 2022.
- [50] On 19 July 2022, Mr. Rybín filed a criminal complaint with the Croatian police to report what he considered to be the forgery of the 2018 Resolution.
- [51] The Applicants applied to continue the Freezing Order in the BVI on 20 July 2022.

- [52] Mr. Pernicka not having responded to Parles' demand letter, on 25 July 2022, Parles filed a civil claim against Mr. Pernicka in the Czech courts seeking repayment.
- [53] There was a short continuation hearing before Jack J on 27 July 2022 at which Harneys, Counsel now on the record for Winsley, appeared, at that time, informally. Jack J adjourned the continuation hearing to allow Winsley more time to engage and instruct Harneys and continued the Freezing Order in the interim. The order made on 27 July 2022 recorded that Winsley had not made asset disclosure as required by the Freezing Order.
- [54] On 17 August 2022, Mr. Pernicka filed a criminal complaint against Mr. Perner and Mr. Rybín in Czechia. That complaint was dismissed on 15 December 2022.
- [55] The Czech Court made an initial order requiring Mr. Pernicka to pay Parles the full amount of the Parles loan on 22 August 2022.
- [56] FFP resigned as the registered agent of Winsley on 27 September 2022 and consequently the company has been struck off. However, it is not disputed that Winsley may continue to defend these proceedings pursuant to ss. 215(b) of the BVI ***Business Companies Act, 2004***.
- [57] On behalf of Winsley, Harneys filed the Set Aside Application and evidence in opposition to the Continuation Application, namely Pernicka 2, on 3 November 2022. Winsley's asset disclosure was also filed on the same date, considerably outside of the time for compliance established in the Freezing Order, indeed, well over three months out of time.
- [58] The Applicants filed their reply evidence on 25 November 2022, and in that evidence Mr. Rybín indicated that he would need to update the Court on certain events due to take place after the date Rybín 4 was filed.
- [59] There was a hearing on the Parles Claim in the Czech Courts on 7 December 2022. These are the proceedings in which Mr. Pernicka has denied that he

signed the promissory note upon which Parles relies. The Czech Court has requested expert analysis of the relevant signatures.

- [60] On 16 December 2022 the Czech Court in bankruptcy proceedings brought before it, initiated by Parles, and upon the application of Mr. Kabátek, appointed Mr. Jaroslav Brož, over Mr. Pernicka as an Interim Administrator (“the Interim Administrator”). Mr. de Swardt has indicated to the Court that the office of “Interim Administrator” is akin to the office of a trustee in bankruptcy, which office is well-known in this jurisdiction. However, the Interim Administrator’s appointment is on an interim basis.
- [61] The exekutor appointed by the Czech Court on Mr. Perner’s application has confirmed that Mr. Pernicka has no assets in Czechia. It appears therefore that the only asset he has is his interest in Winsley.
- [62] Since the bankruptcy proceedings began, all four, i.e. the Applicants, and the Proposed Applicants, have submitted proofs of debt to the Interim Administrator.
- [63] The Proposed Applicants filed their application to be joined as Applicants on 5 January 2023.
- [64] On 11 January 2023 Mr. Pernicka filed an appeal against the appointment of the Interim Administrator.
- [65] Mr. Rybín filed a supplemental Affidavit, Rybín 5, updating the Court on matters since the filing of Rybín 4 on 12 January 2023. There have been further affidavits filed, right up to the hearing dates, notably the First Affirmation of Mr. Jaroslav Brož, the Interim Administrator of Mr. Pernicka filed 23 January 2023, and Pernicka 3 and 4 , both filed 23 January 2023.

The Evidence

- [66] All of the evidence filed has been considered by the Court and as indicated in paragraph [8] above, all of the evidence filed outside of time has been allowed to stand.

Expert Evidence

- [67] However, Mrs. Crabbe-Adams, whilst not objecting to the late filing of the Affirmation of the Interim Administrator, submits that aspects of the testimony amount to expert evidence, and that the Applicants did not apply for permission to file in the proper way, as set out in the CPR. She characterizes this step as expert evidence being led through the back door. However, she further submits that even if allowed to rely on it, it demonstrates that the Interim Administrator has only been appointed on an interim basis. Indeed, that at paragraph 10.3 of his Affirmation, the Interim Administrator states that under section 250 of the Czech Insolvency Act, unmatured claims against the debtor are deemed to be due upon the declaration of bankruptcy and that declaration has not yet taken place. She submitted that such proceedings cannot be equated with the bringing of a claim and are not proceedings in respect of which the Court can grant its assistance under section 24A of the Act.
- [68] Mr. de Swardt concedes that the evidence of the Interim Administrator was filed very late in the proceedings, and he accepts that this evidence could be classified as being expert evidence. However, he urges the Court to find that it is right and in the interests of justice for the Court to take the evidence of the Interim Administrator into account as to what he states in relation to legislation, as he is not providing an opinion of Czech law or doing anything more than quoting what the Czech **Insolvency Act** itself states. He submits that there is no substantive need for expert evidence as to what the law is.
- [69] I agree with Mrs. Crabbe-Adams on her submission regarding expert evidence. This is not the way in which expert evidence should be introduced, particularly having been filed without the Court's permission, without the consent of the other side, and filed on the very day when the application was fixed to be heard. However, it is my view that there are other factual matters set out in the Affirmation of the Interim Administrator, such as the appointment of the Interim Administrator itself, and the fact that the appointment is of an interim nature, that this Court can, and should take into account. I also have

regard to the fact, which is common ground, that the Interim Administrator has not yet applied to this Court for recognition. In addition I note that the Interim Administrator has given evidence that Mr. Pernicka on 11 January 2023 filed an appeal in relation to his appointment and that appeal has not yet been heard. I am also of the view that there is no proper basis upon which there can be objection taken to referring to the Preliminary Ruling itself, which is exhibited to the Affirmation. However, in light of Mrs. Crabbe-Adams' objection to the aspects of the evidence citing the Czech **Insolvency Act**, I do not think that it is proper or appropriate, and as it turns out, nor is it necessary, for the Court to take the references to the sections of the quoted legislation into account.

Foreign Proceedings

[70] It is common ground that the BVI Court may grant freezing orders in aid of foreign proceedings pursuant to the jurisdiction expounded upon by Bannister J in his seminal and oft-cited decision in **Black Swan Investment v Harvest View Ltd. et al.**⁴ **Black Swan** and the reasoning of Bannister J has recently been upheld and approved by the majority in the decision of the Judicial Committee of the Privy Council in **Broad Idea International v Convoy Collateral International Limited**.⁵ A statutory basis for providing assistance was also brought into existence in 2020 in the form of section 24A of the Act, and this includes the grant of relief against NCADs. According to Lord Leggatt in paragraph 118 of the judgment in **Broad Idea**, “*the new section 24 A of the BVI Act can also operate alongside and in harmony with section 24 (1) of the Act.*”

[71] In **Claimant X v A TVI Company**⁶, the approach which should be adopted in construing s. 24 A of the Act was considered. At paragraphs [19] and [20] of the judgment Wallbank J (Ag) held that the Court should follow the two-stage approach used in England in relation to the equivalent English statutory

⁴ BVIHCV 2009/0399.

⁵ [2021] UKPC 24.

⁶ BVIHC (COM) 2021/0037.

provision, i.e. section 25 of the 1982 **Civil Jurisdiction and Judgments Act**.

The two steps are as follows:

- (1) to first consider whether the facts would warrant the relief sought if the substantive proceedings were brought in the BVI; and
- (2) if the answer to that question is yes, then secondly to consider whether, in the language of s.24A of the Act, the fact that the Court has no jurisdiction apart from that section (because the substantive proceedings are abroad) makes it inexpedient to grant the relief.

Winsley's Arguments

[72] In relation to Mr. Perner, Mrs. Crabbe-Adams has argued that no claim has ever been brought by Mr. Perner. Further, that the appointment of an exekutor over Mr. Pernicka's assets in Czechia, whilst akin to the appointment of an equitable receiver in the BVI, does not amount to a substantive claim. Rather, on the basis of the evidence in Rybín 2, this is merely an execution process. The argument continues that there will be no judgment at the end of this process stating that Mr. Pernicka is to pay a certain amount to Mr. Perner.

[73] Counsel submitted that, on the basis of the evidence in Rybín 2, there was no doubt that Mr. Perner would not be instituting proceedings in Czechia against Mr. Pernicka. There was therefore no basis to justify the grant of a freezing injunction in relation to Mr. Perner and that the freezing order granted in respect of Mr. Perner should be discharged.

[74] Reference was made to paragraph 102, of **Broad Idea**, where, Counsel submits it has been made clear that “....(iii) *There is no requirement that proceedings in which the judgment is sought should yet have been commenced nor that a right to bring such proceedings should yet have arisen : it is enough that the court can be satisfied with a sufficient degree of certainty that a right to bring proceedings will arise and that proceedings will be brought (whether in the domestic court or before another court or tribunal)”*
(Counsel's emphasis)

[75] In relation to Parles, it is accepted that foreign proceedings have been brought by Parles. However, Mrs. Crabbe-Adams argues that this claim is of very low value and there is nevertheless no justification for continuing the Freezing Order as there is no risk of dissipation. Counsel proffers the view that it is clear that what Mr. Rybín and Parles have sought to do in bringing the BVI proceedings is to focus on the larger sums which are alleged (but not accepted) to be owed to Mr. Perner, Mr. Rybár and Mr. Kabátek. However, Counsel submits, this is a misleading approach, since none of these three have brought any claim in any jurisdiction in respect of which this Court could grant assistance.

[76] In relation to the Proposed Applicants, it was submitted that they have brought no proceedings that a freezing injunction could potentially support and the court therefore has no jurisdiction under sections 24 and 24A of the Act or otherwise to grant the proposed Applicants freezing injunction relief.

[77] Mrs. Crabbe-Adams referred to section 2 of the Act, and the term “proceedings”. She submitted that this term does not apply to insolvency or bankruptcy proceedings.

The Arguments on behalf of Mr. Perner and the Proposed Applicants

[78] In reply, Mr. de Swardt submitted that as regards Mr. Perner it was made very clear to Jack J that Mr. Perner would be seeking appointment of an exekutor rather than pursuing a civil judgment. He points out that he also referred Justice Jack to the **Schemmer**⁷ and **Outen v Ablyazov**⁸ cases. Counsel submits that Jack J was content with Mr. Perner proceeding with the filing for appointment of an exekutor and that is why Mr. Perner filed his claim for that appointment some three days later.

[79] Counsel further submitted that the arguments advanced on behalf of Winsley were made on an outdated basis and are not in keeping with current law. Reference was made to **Broad Idea** paragraph 13, where Lord Leggatt noted

⁷ 1975 Ch. 273

⁸ BVIHC VAP 2011/0030.

that the law in relation to freezing orders is not static, and to paragraph 14 where it was pointed out that freezing orders have been made in support of costs orders, costs orders not being a form of substantive relief for which an action could be brought. Counsel referred in particular to paragraph 88 of **Broad Idea** and submitted that this paragraph demonstrates that freezing order relief can be and has been granted in aid of various types of proceedings, including receiverships and insolvency proceedings. He further submitted that Mr. Perner's claim does lead to a court order or judgment and reference was made to the wording of the Notarial Deed and to the Bailiff Authorization exhibited.

[80] Mr. de Swardt sought to rely on the decision in **Berliner Industriebank AG v Jost**⁹ and **Dicey, Morris and Collins on the Conflict of Laws** (16th edition) where the **Berliner** case is cited in a footnote that states, "as to what is a judgment" (see **Berliner**). However, in the **Berliner** case, expert evidence as to German Bankruptcy law as well as the legislation itself was put before the Court. I have no such evidence before me as to what amounts to a judgment under Czech law, properly, or otherwise and therefore in my view, these authorities do not assist me on the issue at hand.

[81] Mr. de Swardt also referred extensively to three cases cited in paragraph 88 of **Broad Idea**, i.e. **Algosaibi v Saad & Ors**¹⁰ a decision of the Court of Appeal of the Cayman Islands, **Cardile v Led Builders Pty Ltd**¹¹, a decision of the Australian Full Court, and to **Customs & Excise v Egleton**¹², a decision of Briggs J sitting in the Chancery Court of England and Wales. It was Counsel's submission that these authorities demonstrate that the Court has jurisdiction to grant freezing relief in aid of the Czech Bankruptcy proceedings and that it would be appropriate for the Court to grant the Joinder Application brought by the Proposed Applicants.

[82] Mr. de Swardt did candidly say that when one is proceeding in aid of insolvency proceedings, a provisional liquidator or liquidator might be the more

⁹ [1971] 2 Q.B. 463(C.A.).

¹⁰ [2011] (1) CILR 178]

¹¹ (1999) 198 CLR

¹² [2006] EWHC 2313, Ch. D

appropriate applicant. However, he said that the Interim Administrator would not be the appropriate applicant in the instant case for a number of reasons, as follows:

- (1) The Interim Administrator was not appointed at the time when this application was made;
- (2) The Freezing Order is not in aid of any proceedings that he qua liquidator might bring, as for example in **Egleton**, and all the Interim Administrator here would do is vote the shares in Winsley;
- (3) as the Interim Administrator himself made clear, absent common law recognition, he has no standing at the moment;
- (4) It is arguable that if the Interim Administrator did seek a freezing order, he would be seeking what amounts to assistance from the BVI Court.

The Law

[83] Section 24 of the Act provides as follows:

“...an injunction may be granted... by an interlocutory order of the High Court or of a judge thereof in all cases in which it appears to the Court or a Judge to be just or convenient that the order should be made either unconditionally or upon such terms and conditions as the court or judge thinks just..”

[84] Section 24A provides as follows:

- “(1) The High Court or a judge thereof may grant interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction.*
- (2) On an application for any interim relief under subsection (1) the High Court or a judge thereof may refuse to grant such relief if, in the opinion of the High Court or a judge thereof, (a) there is no jurisdiction, apart from this section, in relation to the subject-matter of the proceedings in a foreign jurisdiction; and (b) it is inexpedient in the circumstances for the High Court or a judge thereof to grant such relief.*
- (3) Subsection (1) applies notwithstanding that (a) the subject matter of the proceedings in a foreign jurisdiction would not, apart from this section, give rise to a cause of action over which the High Court or a judge thereof would have jurisdiction....*
- (4) In this section “interim relief”, includes any relief which the High Court or a judge thereof has power to grant in proceedings relating to matters within its jurisdiction, as well as, an order against a non-cause of action defendant.”*

Section 2 of the Act, provides as follows:

“proceeding” includes action, cause or matter”

“civil proceedings” means proceedings in any civil or commercial matters”.

Whether Proceedings brought by Mr. Perner for the appointment of an Executor or Bankruptcy or Insolvency Proceedings are Proceedings for the purposes of Sections 24 and 24A of the Act.

[85] In my judgment, it is clear that the proceedings brought by Mr. Perner, and the Czeck bankruptcy proceedings, fall within the meaning of “*proceedings*” because they are plainly commercial matters and therefore fall within the ambits of the definition sections of the Act.

[86] However, I am of the view that the reasoning in **Carlile** and **Algosaibi** and the reference in paragraph 88 of **Broad Idea** to those cases, as well **Broad Idea’s** reference to the **Egleton** case, do not purport to deal with the Court’s power to grant freezing orders in support of insolvency proceedings. I therefore do not accept Mr. de Swardt’s submissions on that point.

[87] This is what Lord Leggatt stated at paragraphs 88-90 of **Broad Idea**:

*“88. **The enforcement principle** also explains the basis and scope of the jurisdiction to grant a freezing injunction against a third party against whom no claim for substantive relief lies (i.e. “non-cause of action defendant”). The ordinary prerequisite for granting such an injunction (before taking account of discretionary factors) is that **the third party is in possession or control of an asset against which a judgment could be executed**. That test may be satisfied because there is good reason to suppose that the asset is beneficially owned by a defendant against whom the claimant has obtained or has a right to obtain a judgment. But it may be satisfied in other ways: for example, where the defendant would have a right of indemnity against the third party which could be enforced by a receiver (C Inc lpc v L [2001] 2 All E R (Comm) 446); or where a transaction by which the defendant transferred an asset to the third party might be avoided under section 423 of the Insolvency Act 1986 (Lemos v Lemos [2016] EWCA Civ 1181; [2017] 1 P & CR 12); or where enforcement of a judgment against the defendant might lead to its liquidation whereupon the liquidator would be able to pursue a claim against the third party (Revenue and Customs Comrs v. Egleton.) In each case the key question is whether the assets are or would be available to satisfy a judgment through some process of enforcement : see also Cardile v LED Builder Pty Ltd. (1999) 198 CLR 380; Algosaibi v*

Saad Investments Co Ltd 2011 (1) CILR 178, 43; Linsen International Ltd. V Humpuss Sea Transport Pte Ltd. [2011] EWHC 2339 (Comm);.....”

89. Although it is unnecessary to make the enforcement principle dependent on the identification of a legal or equitable right, there is no harm in expressing the interest of the applicant which a freezing order seeks to protect in these terms, provided it is understood to be different, and different in character, from the right on which a cause of action for substantive relief is based. **The interest protected by a freezing injunction is the (usually prospective) right to enforce through the court’s process a judgment or order for the payment of a sum of money.** A freezing injunction protects this right to the extent that it is possible to do so without giving the claimant security for its claim or interfering with the respondent’s right to use its assets for ordinary business purposes. The purpose of the injunction is to prevent the right of enforcement from being rendered ineffective by the dissipation of assets against which the judgment could otherwise be enforced.

No requirement of a cause of action

90. Once it is appreciated that the essential purpose of a freezing injunction is to facilitate the enforcement of a judgment or other order to pay a sum of money, it is apparent that there is no reason in principle to link the grant of such an injunction to the existence of a cause of action.” (my emphasis)

[88] Lord Leggatt cited the cases to demonstrate diverse ways in which the ordinary prerequisite that the third party is in possession or control of an asset against which a judgment could be executed, may be satisfied. This is an analysis that is completely different from saying that freezing injunctions may be granted in favour of insolvency proceedings. This is a nuanced point, but it has to do with the question of enforcement of a judgment, or “*the enforcement principle*”, as Lord Leggatt referred to it, and whether the assets are or would be available to satisfy a judgment through some form of enforcement. Thus, the fact that a liquidator or Trustee in bankruptcy may be able to pursue a claim against the third party has to do with the question of whether there will or may be assets against which a judgment can be enforced, and nothing to do with a freezing order being granted in aid of insolvency proceedings.

[89] In the instant case, the freezing order sought is as against a NCAD. One of the leading cases in relation to the grant of freezing order relief against NCADs is

the decision of the Cayman Islands Court of Appeal in **Algosaibi**. At paragraph 42, Chadwick P. reasoned that there must be “good reason to suppose that the assets in relation to which a freezing order is imposed would become available to satisfy the judgment which the claimant seeks.” At paragraph 43, the learned President elucidated the matter as follows:

“43. It is necessary to be satisfied that there is good reason to suppose either (a) that the CAD can be compelled (through some process of enforcement) to cause the assets held by the NCAD to be used for that purpose; or (b) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD.”

In order to understand how the jurisdiction is to be exercised, it is useful to see how Chadwick P applied it in relation to some of the NCADs involved in the case before him. At paragraphs 42, 43, 49-51, and 53 and 55 he states as follows:

*“42. It is necessary to keep in mind the basis upon which a court exercises the **Mareva** jurisdiction. It is to ensure that the effective enforcement of a judgment (when obtained) is not frustrated by the dissipation of assets which would be available to the claimant in satisfaction of that judgment. It is trite law that the jurisdiction is not exercised in order to provide the claimant with a security for his claim which he may otherwise have [sic-not have?]. But, as it seems to me, it is equally plain, as a matter of principle, that the jurisdiction is not exercised in order to give the claimant recourse to assets which would not otherwise be available to satisfy the judgment which he may obtain. The court needs to be satisfied of two matters before granting **Mareva** relief. First, that there is good reason to suppose that the assets in relation to which a freezing order is imposed would become available to satisfy the judgment which the claimant seeks; and second, that there is good reason to suppose that, absent such relief, there is a real risk that those assets will be dissipated or otherwise put beyond the reach of the Claimant.*

43. The fact that the potential judgment debtor (the CAD) has substantial control over assets which are held by a party against whom no cause of action is alleged (the NCAD)-say, because the NCAD can be expected to act in accordance with the wishes or directions of the CAD (whether or not it could be compelled to do so) – is likely to be of critical importance in relation to the question whether there is a real risk that the assets will be dissipated or otherwise put beyond the reach of the Claimant. But, as it seems to me, the existence of substantial control is not, of itself, enough to meet the first of the two requirements just mentioned. It is not enough that the CAD could, if it chose, cause the assets held by the NCAD to be used to

satisfy the judgment. It is necessary that the court be satisfied that there is good reason to suppose either (a) that the CAD can be compelled (through some process of enforcement) to cause the assets held by the NCAD to be used for that purpose; or (b) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD.

.....

(49) It is necessary to identify, with some degree of specificity appropriate to the evidence before the court, why it is that the court is satisfied that, following a judgment against a CAD, there is good reason to suppose that the claimant will be able to invoke some process of enforcement which will lead to the assets of the NCAD becoming available to satisfy that judgment.

(50) As I have said earlier in this judgment, Henderson J. set out... the basis for his finding that the assets of each of the four groups of NCADs who were applicants before him were under the control of Mr. Al Sanea. That led him to the conclusion- to which, it seems to me, there can be no sensible challenge- that “the risk of dissipation of assets by Mr. Al Sanea and by entities under his control is obvious.” But the analysis in those paragraphs does not lead to the further conclusion that there is good reason to suppose that the claimant will be able to invoke some process of enforcement which will, in the case of each of the NCADs, enable the claimant to have recourse to its assets to satisfy the judgment which it may obtain against Mr. Al Sanea, or against one or others of the CADs. In particular, it does not follow that a judgment creditor can look to the assets of a Cayman trust over which the judgment debtor (as settlor) may have substantive control, but under which he has no beneficial interest, for the satisfaction of his judgment: see the decision of this court in *TMSF v Merrill Lynch Bank & Trust Co. (Cayman) Ltd.*

(51). It is necessary, therefore, for this court to examine whether there are grounds upon which Henderson J could properly reach the conclusion that there was good reason to suppose that AHAB could invoke some process of enforcement against each of the NCAD appellants which would lead to the assets of the NCAD (if any) becoming available to satisfy the judgments which AHAB seeks against the CAD. In that context, it is convenient to take the NCAD appellants in groups.

...

(53).....the fact (if it be so) that Mr. Al Sanea had power to revoke the Saad Star Trust and cause the trust assets to revert to his beneficial ownership in June does not, of itself, provide reason to suppose that AHAB could invoke some enforcement process which would lead to those assets becoming available to satisfy AHAB’s claims against him.

.....

(55) Henderson J found that the 21st-27th named defendants were owned by the 20th named defendant, Saad Air Ltd...By the time of the hearing before Anderson J (Ag), there was evidence the 21st-27th named defendants were wholly-owned subsidiaries of Saad Air Ltd. ...Henderson J found, also, that Mr. Al Sanea owned a controlling interest in Saad Air Ltd. He made no finding that Mr. Al Sanea's interest in Saad Air Ltd was such that a trustee in bankruptcy of Mr. Al Sanea (if appointed) following a judgment against Mr. Al Sanea) would be able to put that company into liquidation. There was, however, uncontradicted evidence upon which such a finding could have been made...If Saad Air Ltd. were put into liquidation, there was good reason to suppose that the net assets (if any) of its wholly-owned subsidiaries would become available to meet its liabilities and, subject to that, for distribution to its shareholders (including, on this hypothesis, a trustee in bankruptcy of Mr. Al Sanea." (my emphasis)

However, in making reference to the **Egleton** decision, Mr. de Swardt was on more relevant and firm ground, at least as regards the question of the Court's jurisdiction to grant freezing orders where insolvency proceedings are ongoing. In **Egleton** a case referred to in some detail by Chadwick P in **Algosaibi**, it was considered that although correct that the purpose of a creditor's winding up petition is for the creditor ultimately to obtain payment of a debt owed by the company, this does not equate to being a money judgment. Notwithstanding, the learned judge, Briggs J considered that the particular nature of the relief sought by means of bringing insolvency proceedings, does not disable the petitioner from asserting that it is pursuing a cause of action for the purpose of conferring jurisdiction on the court to grant appropriate interim relief whether by way of freezing order or otherwise (my emphasis) (paragraphs 15 and 20).

- [90] In **Egleton** Her Majesty's Revenue and Customs ("Customs") had presented a winding up petition in relation to a company based on unpaid VAT amounting to nearly £40 million. In anticipation of the presentation of the Winding Up Petition, Customs had sought and obtained on a without notice/*ex parte* application, freezing orders against third parties who were in various ways implicated in a large-scale VAT missing trader and/or carousel fraud.

- [91] The learned judge went on to discuss that, if successful, the creditor's winding up proceedings merely bring into existence a statutory scheme for the getting in and distribution of the company's assets among its stakeholders, of which the creditor is no more than a member of a particular class, namely an unsecured creditor. He went on to point out that perhaps the reason why freezing orders are not in practice generally sought or obtained in relation to the assets of the company is probably that statutory provisions such as those invalidating transactions after the presentation and or advertisement of the originating insolvency proceedings, generally afford appropriate protection to the company's creditors.
- [92] However, at paragraphs 48-54, Briggs J indicates that it is therefore not a question of jurisdiction, but of discretion (my emphasis). He considered that there are powerful reasons why, if freezing orders are to be obtained against potential judgment debtors of a company pending the making of a winding up order, it should be a provisional liquidator rather than a petitioning creditor who seeks and obtains such relief. One such reason is that it is the officeholder rather than the creditor who is the guardian of the interests of all the company's stakeholders and who is best placed to make an independent judgment as to the wisdom of bringing proceedings against third parties, and as to the appropriateness of obtaining interim measures including freezing orders pending the conclusion of those proceedings.
- [93] He held that it would only be in exceptional cases that freezing orders would be made at the behest of creditors, and that in the ordinary course, creditors should not expect to be able to obtain freezing orders against potential judgment debtors of the company sought to be wound up. The judge made clear that the case before him was exceptional in a number of ways, because a winding up petition had been filed and was coming on for hearing in less than a week. Briggs J indicated that it was clear that if he were to rule against the continuation of the freezing orders which Customs had obtained, either on jurisdictional grounds or because the provisional liquidator alternative was preferable, Customs would be in a position immediately to seek the

appointment of a provisional liquidator, and very shortly thereafter for him to apply for freezing orders in his own right or on behalf of the company.

- [94] In the judgment of the majority of the High Court of Australia in **Cardile v Led Builders Pty. Ltd.**¹³ at paragraph 57 there is guidance, which has been accepted in the English Courts, and Cayman Islands Courts, as follows:

“57. What then is the principle to guide the courts in determining whether to grant Mareva relief in a case such as the present where the activities of third parties are the object sought to be restrained? In our opinion such an order may, and we emphasize the word “may”, be appropriate, assuming the existence of other relevant criteria and discretionary factors, in circumstances in which:

- (i) The third party holds, is using, or has exercised or is exercising a power of disposing over, or is otherwise in possession of assets, including “claims and expectancies”, of the judgment debtor or potential judgment debtor; or*
- (ii) Some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor.”*

- [95] From these decisions combined, I derive the following principles:

- (1) The law and practice regarding the grant of freezing injunctions has developed in many ways which have gone far beyond the practice that existed when a freezing order, mareva injunction was first granted in 1977-**Broad Idea**.
- (2) The common law in relation to the jurisdiction under paragraph 24 of the Act, and the statutory powers set out in section 24A are of enormous breadth-**Broad Idea**.
- (3) There need not be a cause of action but there will generally be a judgment or an order of the Court to pay money-**Broad Idea**.
- (4) The law has evolved since the **Chabra** decision and freezing orders may be granted against NCADs without there being a rigid requirement to show that, at the time the order is sought, the third party is already

¹³ (1999), 198 CLR 380.

holding or in control of assets beneficially owned by the defendant-**Cardile and Egleton.**

- (5) As part of the exercise that the Court has to carry out in deciding whether to grant freezing injunctions against NCADs that are not at the time in possession of assets, the Court has to ask itself whether there are real prospects that assets would be transferred or obtained by the NCAD in the future. The term “assets” includes claims and expectancies-**Cardile, Egleton, Algosaibi.**
- (6) The court needs to be satisfied of two matters before granting freezing order relief against an NCAD. First, that there is good reason to suppose that the assets in relation to which a freezing order is imposed would become available to satisfy the judgment which the claimant seeks; and second, that there is good reason to suppose that, absent such relief, there is a real risk that those assets will be dissipated or otherwise put beyond the reach of the Claimant -**Algosaibi.**
- (7) To satisfy the first matter set out in the paragraph above, it is necessary that the court be satisfied that there is good reason to suppose either (i) that the CAD can be compelled (through some process of enforcement) to cause the assets held by the NCAD to be used for that purpose; or (ii) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD-**Algosaibi and Cardile.**
- (8) The Court needs to be satisfied that some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor.
- (9) Although the purpose of a creditor’s winding up petition is for the creditor ultimately to obtain payment of a debt owed by the company, this does not equate to being a money judgment. However, the particular nature of the relief sought by means of bringing insolvency proceedings, does not

disable the petitioning creditor from asserting that it/he is pursuing a cause of action for the purpose of conferring jurisdiction on the court to grant appropriate interim relief whether by way of freezing order or otherwise-**Egleton** (emphasis mine). However, the discussion of “*cause of action*” has to be read subject to the learning in **Broad Idea**, the effect of which is to open the jurisdictional gates even wider. Combining the reasoning in **Egleton** and **Broad Idea** the Court would have jurisdiction to grant freezing order relief on the application of a petitioning creditor because he is not disabled from asserting that he is pursuing a cause of action or in any event pursuing proceedings that are of a nature that confers jurisdiction on the Court. (emphasis mine)

- (10) However, as a matter of discretion, there are powerful reasons why, if freezing orders are to be obtained against potential judgment debtors of a company pending the making of a winding up order, it should be a provisional liquidator rather than a petitioning creditor who seeks and obtains such relief. One such reason is that it is the officeholder rather than the creditor who is the guardian of the interests of all the company’s stakeholders and who is best placed to make an independent judgment as to the wisdom of bringing proceedings against third parties, and as to the appropriateness of obtaining interim measures including freezing orders pending the conclusion of those proceedings -**Egleton** (emphasis mine).
- (11) It would only be in exceptional cases that freezing orders would be made at the behest of creditors. In the ordinary course, creditors should not expect to be able to obtain freezing orders against potential judgment debtors of the company sought to be wound up-**Egleton**.

[96] Applying these principles to the circumstances in the case at hand, it seems to me that in relation to Mr. Perner’s proceedings for the appointment of the exekutor, the Court does have both jurisdiction and discretion to grant a freezing order because (a) such proceedings did result in an order for the payment of money (given the nature and wording of a notarial deed), or alternatively the particular nature of the relief sought by means of bringing proceedings for the appointment of an exekutor under the Notarial Deeds,

does not disable Mr. Perner from asserting that he is pursuing a cause of action or proceedings that confer jurisdiction on the Court to grant appropriate interim relief. Briggs J in rejecting the argument that the Court had no jurisdiction to grant freezing order relief in favour of a petitioning creditor, reasoned as follows in **Egleton**, at paragraph.21:

“ if Miss Smith’s objection were correct, it would apparently follow, as she indeed conceded, that although in the case of a disputed debt, the creditor would be asserting a cause of action sufficient to found an application for interim relief, both before and after judgment, a case in which the absence of any dispute as to the debt meant that the only necessary proceedings consisted of a creditors’ winding up petition would fall into a curious lacuna in which because of the absence of a cause of action, interim relief was wholly unavailable. That seems to me to be an irrational and unjust result and one which the court should avoid unless compelled to do otherwise.”

I adopt and apply that reasoning in relation to the proceedings brought by Mr. Perner.

The Joinder Application

- [97] For these purposes, Mrs. Crabbe-Adams also referred to the fact that the proposed Applicants are seeking to equate their making claims in the Czech Insolvency Proceedings as proceedings in respect of which this Court could issue supportive freezing injunctive relief.
- [98] She also argued that the Czech Insolvency proceedings have not been recognized in the BVI and no such application for recognition, which would have to be common law recognition, has been made.
- [99] Indeed, the Interim Administrator acknowledges this fact, and has reserved his rights to apply for recognition and other relief, if necessary. He expressly states in his Affirmation that at this stage he is not applying to the BVI Court for any relief.
- [100] At paragraph V of the Czech Court’s Preliminary Ruling, Mr. Brož was ordered to take steps to ensure his attendance at the BVI hearings. At paragraph 6, the

Court stated the following reason, justifying the appointment of the Interim Administrator:

“The need to appoint an insolvency administrator is based on the concern that the Debtor has taken steps that are directed at removing the Debtor’s assets from the insolvency estate, i.e. by registration of another person as the owner of shares in Winsley Corporate limited. The Creditor’s concerns are justified with respect to the previous conduct of the Debtor, who transferred in the past his assets to his next-of-kin, but he still retained the position of statutory representative. If the Debtor managed to conceal the last valuable assets from the Creditors, his liabilities would be in excess of CZK 120 million but there would be no assets that could be used to satisfy the creditors.”

- [101] Mr. de Swardt made clear that the Interim Administrator, absent common law recognition, has no standing at this time. He indicated that the Interim Administrator could not apply to be added to the BVI proceedings as the Proposed Applicants have done. He candidly accepted that it is arguable, although he reserved his position on that, that if the Interim Administrator were to seek a freezing order, that in itself might amount to him seeking assistance from the BVI Court, which, on the state of the Law, Counsel accepts he cannot do.
- [102] Counsel on both sides agreed that the decision in **Net International** indicates that assistance would not be available to Mr. Brož, only recognition would be available, and he would of course have to apply for that recognition.
- [103] Reference was made to paragraphs 28 and 37 of **Net International** where Webster J.A discussed the common law right of recognition and assistance under section 467(2) and (3) of the Insolvency Act afforded a designated foreign representative. At paragraph 28, having analyzed the relevant parts of the **Insolvency Act** Webster J.A. declared that the common law right of recognition survives in the BVI.
- [104] Mr. de Swardt submitted that the relief set out in paragraph 467(3) is distinguishable from the voting of shares, which, Counsel submits is what Mr. Brož can do once recognized. He further submits that the Interim Administrator

would not need to apply for any of the relief set out in Part XIX of the Act, or in any other section.

[105] Be that all as it may, in my judgment, although the Court may have jurisdiction to provide freezing relief in relation to creditors in insolvency proceedings, it ought not to exercise its discretion to do so for the reasons set out by Briggs J in **Egleton**. Although **Egleton** was decided over 16 years ago, in my view the reasoning of Briggs J remains relevant and is apposite to the instant case. Here, there is the further reason that the Interim Administrator has not applied for common law recognition in the BVI. It stands to reason that the Court will not exercise its discretion in favour of the Proposed Applicants.

[106] The proposed Applicants have submitted their claims as debts in the Bankruptcy Proceedings. Those Proceedings are ongoing in Czechia. In my judgment, there is therefore no proper basis on which the Court could grant the Joinder Application.

Quantum -Appropriate Maximum Sum Order

[107] Winsley and Mr. Pernicka take the position that the Freezing Order should, at most, only freeze up to U.S.\$5.7 million of Winsley's assets because the Court should only consider the Applicants' debts, and not those of the Proposed Applicants.

[108] Mr. de Swardt points to the transcript of the *ex parte* hearing before Jack J where Jack J considered that it was "*undoubtedly necessary*" to order that Winsley's assets be frozen in the full amount of all Creditors' claimed debt, i.e. U.S.\$11.7 million. According to Counsel, there would otherwise be a risk that the assets frozen by the freezing order would be insufficient to meet the claims of all Mr. Pernicka's creditors. At paragraph 69 of the SKA, it is put this way:

" If only \$4 million were frozen, as Jack J. puts it, there was a risk of Mr. Pernicka's other creditors coming along and snaffling the \$4 million"-Transcript at 3: 13-22."

- [109] Of course, that was at the *ex parte* hearing. When I asked Counsel if he had any authority that supported such an argument he readily conceded that he had none directly on point.
- [110] In my judgment, respectfully, there was no proper basis upon which the quantum frozen in the Freezing Order should include the amounts that were claimed by Mr. Kabátek and Mr. Rybár at a time when they had not applied to the Court and were not even Proposed Applicants. To adopt such a course generally, would in any event possibly have all sorts of complications in terms of the undertaking as to damages that is invariably required upon the grant of a freezing order. It would create issues as to the proper party to give the undertaking and as to its enforceability if necessary.
- [111] Ground 4 of the Set Aside application points out that the amount frozen by the Freezing Order also included amounts said to be claimed by Mr. Kabátek and Mr. Rybár when they had not applied for injunctive relief in the BVI. That ground therefore succeeds in respect of the maximum amount.
- [112] I will now therefore turn to a consideration of whether the Freezing Order should be continued in favour of Parles and Mr. Perner or whether the Freezing Order as regards their claims should be set aside.

Freezing Orders-The Law

- [113] It is well-established that a freezing order is a special type of injunctive relief, and the ultimate test for the exercise of the jurisdiction is whether, in all the circumstances, the case is one where it appears “just and convenient” to grant the injunction. In order to reach the required threshold, the applicant must:
- (1) establish a good arguable case. A good arguable case is one which is more than barely capable of serious, but not necessarily one which the

judge considers could have a better than 50 % chance of success-Mustill J in ***The Neidersachsen***.¹⁴

- (2) demonstrate there is a real risk of dissipation of assets if the injunction were to be refused. This must be demonstrated on solid grounds, and upon cogent evidence. The test of whether there is a real risk of dissipation is an objective one.
- (3) It must appear just and convenient to order the injunction.

[114] In matters involving the NCAD, as in other cases to do with freezing orders, the Court must be satisfied that it is just and convenient to make the order. However, there is a need for particular care when the Court is being asked to make such an order against a NCAD. In ***PJSC Vseukrainskyi Aktsionernyi Bank v Makisimov***¹⁵ Popplewell J. at 7(3) put the matter this way:

“the jurisdiction will be exercised where it is just and convenient to do so. The jurisdiction is exceptional and should be exercised with caution, taking care that it should not operate oppressively to innocent third parties who are not substantive Defendants and have not acted to frustrate the administration of justice.”

Good Arguable Case

Parles

- [115] It would seem clear that Parles has a good arguable case that Mr. Pernika owes the amounts that it claims. Indeed, before this Court, in Pernika 2 at paragraphs [20]- [22] although making the point that Mr. Zubak is the primary obligor, admits that he guaranteed the Parles Loan, saying that he has every intention to pay the Parles Loan if Mr. Zubak does not pay it off, and also giving evidence that he has already made certain repayments.
- [116] Though Mr. Pernicka is seeking to challenge the Parles Loan claim in the Czech Court, that Court has already issued an order requiring Mr. Pernika to pay Parles CZK 9 million, consisting of principal and contractual interest payable on the due date, plus interest.

¹⁴ [1984] 1 All ER 398

¹⁵ [2013] EWHC 422 (Comm)

[117] In the SKA filed on behalf of Winsley, there is no denial of Mr. Pernicka's indebtedness. Indeed the thrust of the arguments advanced on behalf of Winsley appeared to focus on denying that there was any real risk of dissipation of assets. The SKA admits that Mr. Pernicka is heavily indebted, and states that Mr. Pernicka has never disputed that he owes debts to both Applicants. What he does dispute, he says, is: (1) the allegation that he is not willing to pay these debts and ; (2) the amount of the debt owed to Mr. Perner.

Mr. Perner

[118] It would appear that Mr. Perner has a good arguable case that Mr. Pernicka is indebted to him also, although Mr. Pernicka variously says he was coerced into signing the 2018 notarial deed, and also alleges that Mr. Perner is relying on the 2022 notarial deed in these proceedings and on the 2018 deed in the related Czech proceedings. Mr. Rybín gave evidence in Rybín 4, at paragraph 26.3 that contrary to Mr. Pernicka in Pernicka 2 (paragraph 33) stating that Mr. Vorel, the Notary who notarized the 2018 deed has "*confirmed that he remembers me [Mr. Pernicka] requesting the cancellation of the First Notarial Deed*" and that "*he also remembers Mr. Perner agreeing that he would not rely on it*", Mr. Rybín exhibits a letter dated 13 September 2022, which is after the statement dated 25 July 2022 exhibited and relied upon by Mr. Pernicka, confirming, among other things, that the 2018 deed is in full force and effect and that there was no sign of threats or pressure from Mr. Perner, rather the opposite, that Mr. Pernicka and Mr. Perner had the appearance of being close friends.

[119] Further, the Czech police have found no evidence that there was coercion in Mr. Pernicka signing the notarial deeds.

[120] The Czech Court has already, on Mr. Perner's application, and based upon the debt set out in the 2018 deed, appointed an exekutor. The claim continues, and Mr. Pernicka is challenging it in the Czech Court, but it appears to me that Mr. Perner's case is more than barely capable of serious argument and that he has a good arguable case.

Real Risk of Dissipation of Assets

- [121] It is therefore plain to me that one of the main issues between the parties is the question of whether there is a real risk of dissipation of assets. Before dealing with the risk of dissipation issues, I think it is necessary to deal with the question of availability of assets, and in so doing, draw together the threads of some of the many issues that arise in this case.
- [122] It is not in dispute that at this time, the only asset that Winsley has is the Croatia Claim and that there is at present no real value in the Winsley shares. However, at paragraph 41, in discussing **Cardile**, Briggs J in **Egleton** opined that jurisdiction to grant freezing orders against third parties is not rigidly restricted by the **Chabra** requirement to show that, at the time the order is sought, the third party is already holding or in control of assets beneficially owned by the defendant (my emphasis). In **Algosaibi** at paragraphs 70 and 71, Chadwick P opined that, as part of the exercise that the Court has to carry out in deciding whether to grant freezing injunctions against NCADs that are not at the time in possession of assets, the Court has to ask itself whether there are real prospects that assets would be transferred or obtained by the NCAD in the future. I note that in its analysis in **Cardile**, the Court expressly included claims and expectancies within the concept of assets.
- [123] In the instant case, it is plain that although the Croatia Claim did not succeed in the first instance Court, an appeal is being pursued in relation to the Claim. Indeed, the email from Mr. Pernicka's son Marek, referred to above, clearly suggests that it is really Mr. Pernicka who is, or will be carrying on the Croatia Claim litigation, Mr. Pernicka, the sole director of Winsley, whatever may be the state of the vagaries of the assignment of the claim to Mr. Zubak. It is also clear that Mr. Rybín is of the view that there are real prospects of the claim leading to value being paid over to Winsley. I have already quoted Mr. Pernicka's evidence about the viability of the Croatia Claim at paragraph 17 above. At paragraph 43 of Rybín 4, Mr. Rybín opines as follows:

"43. Currently, the claim itself has uncertain value. On the one hand, the \$200 million Winsley claim, represented by Mr. Zubak, was defeated both in arbitration proceedings and in litigation. On the other hand, this claim is quite complicated and still represents a risk for

Croatia, therefore there is still some chance to settle the claim amicably for less than the claimed value. Since the risk for Croatia is low the theoretical settlement value is also low.”

- [124] In my judgment, when one looks at the evidence, the Parles Loan documentation, and indeed the stance of all the parties in relation to the Croatia Claim, it is plain that all are counting on the Croatia Claim, or at the very least, its susceptibility to settlement. In the minds of all the parties, certainly in the minds of Mr. Rybín and Mr. Pernicka, to borrow a phraseology, “*All roads lead to the Croatia Claim.*” It is to be noted that the case law makes clear, in discussing the concept of “*a real prospect of success*” the trite proposition that a “*real prospect of success*” is not the same thing as a real *likelihood* of success (emphasis provided). In my judgment, there are real prospects that Winsley may have assets in the future and that the shares will have value.
- [125] Mrs. Crabbe-Adams, on behalf of Winsley argues that it is the real risk of dissipation which justifies the imposition of freezing order relief and not a debtor’s failure to satisfy a debt. Further, that the failure to satisfy a debt would not on its own therefore, qualify as a risk that assets would be dissipated. Reference was made to ***Broad Idea*** paragraph 85, and to paragraphs 7-9 of the judgment of the Eastern Caribbean Supreme Court of Appeal in ***Liberty Club Ltd. v Grenada Technical and Allied Workers Union***¹⁶, delivered 23 May 2014.
- [126] Counsel for Winsley submitted that it is not enough for the Applicants to show that Mr. Pernicka has made no attempt to settle his debts. The submission is that it must be shown that Mr. Pernicka would be so determined not to pay his debts that he would take active steps to frustrate the recovery of sums due to his creditors by transferring or concealing assets or by some other form of unjustified dissipation.

¹⁶ GDAHCVAP2013.0010

[127] Winsley's Counsel relies upon the recent decision of in **Les Ambassadeurs Clu Ltd.v. Yu**,¹⁷ where Lord Justice Andrews noted as follows at paragraphs 14 and 19 of the judgment:

"14. The purpose of a freezing injunction is to ensure that a judgment in the applicant's favour will not go unsatisfied by reason of assets that would otherwise be available to satisfy it being dealt with in a manner that will make them unavailable by the time the judgment comes to be enforced. It is designed to protect against the frustration of the process of the court by depriving the claimants of the fruits of any judgment obtained in his favour. It is not intended as a safeguard against insolvency, nor as a means of providing security for a claim, however strong that claim may be and however large a sum of money may be involved. Nor is it just another standard means of securing enforcement of a judgment in favour of the applicant, like a charging order or third party debt order.

.....

19. In this context, there is an important distinction to be drawn between a defendant who can pay but refuses to pay his debts until he is forced to do so, and a defendant who is so determined not to pay that he would take active steps to frustrate the recovery of sums due to his creditors by transferring or concealing assets or by some other form of unjustified dissipation. In order to avoid the undesirable situation in which, as Gloster LJ put it in Hoyoake at [58] "the nuclear remedy of a freezing order would become a commonplace threat", there must be cogent evidence from which it can at least be inferred that the defendant falls into the latter category." (Counsel's emphasis)

[128] In my view, there is solid and ample evidence that points towards a risk of dissipation of assets by Mr. Pernicka and by Winsley, which is controlled by Mr. Pernicka:

- (1) Mr. Pernicka makes free, loose and cavalier use of nominees for structuring his assets. The evidence shows that he has also utilized the machinery of assignment of claims or perceived claims back and forth, depending upon what circumstances, or what claims face him at the particular time. By these mechanisms Mr. Pernicka renders transient and floating the nature of his interest in his assets and that of Winsley.
- (2) Mr. Pernicka has informed this Court that at some point Winsley's claim against the Croatian Government was assigned to Mr. Zubak. Mr.

¹⁷ [2021] EWCA Civ 1310

Pernicka indicates that Mr. Zubak paid nothing for this assignment, but he claims that it was agreed that if Mr. Zubak was successful then the proceeds would be shared between Mr. Zubak and Winsley. However, according to Rybín 4, at paragraph 42.1, government records obtained by the creditors show that it was assigned back to Winsley on 9 March 2022. In Pernicka 4, Mr. Pernicka makes a bare denial of this, without addressing the documents/records referred to by Mr. Rybín. Indeed, in Winsley's SKA the only answer that has been mustered, is not a denial, but that there is however, in reality no practical difference in who brings the Croatian Claim and that even if Mr. Zubak pursues the claim it has always been clear that there was an agreement between him and Winsley that Winsley would receive some of the recoveries.

- (3) It is plain that in effect Winsley operates in some fashion as the alter ego of Mr. Pernicka, and Mr. Pernicka has freely on his direction and under his control assigned claims due to Winsley, and indeed, transferred shares in Winsley as security for his own personal indebtedness.
- (4) Under the Parles Loan documents, principal was paid to Mr. Pernicka's brother Pavel ("Pavel"), at the instructions of Mr. Pernicka. In Rybín 1, Mr. Rybín says that Mr. Pernicka at that time claimed, as it turns out, dishonestly, that Pavel was a nominee to hold his assets and beneficial ownership. In Rybín 1 it is stated that, at a meeting on 24 November 2021, Mr. Pernicka informed his creditors, that contrary to his previous assertions, in fact he had no assets at all, and Pavel was not his nominee. As far as I can tell from the three Affidavits filed by Mr. Pernicka, the only place in which he addresses these allegations about his use of his brother Pavel as a nominee, untruthfully, is at paragraph 44 of Pernicka 2 where Mr. Pernicka has simply made a bare denial.
- (5) But perhaps the evidence that causes the most concern by itself, and in conjunction with Mr. Pernicka's other uses of assignment, nominees, and transfers, is the evidence about the transfer of shares in Winsley from Mr. Pernicka to Mr. Sojak. Winsley was incorporated in 1993 and Mr. Pernicka has remained from then the sole director. However, at paragraph 6 of Pernicka 2, Mr. Pernicka states as follows:

“As I explain below, until February of this year [2022], I was also the sole shareholder of Winsley but this changed as a result of enforcement action taken in connection with a loan agreement by a Mr. Filip Sojak (Mr. Sojak) who is now the sole shareholder of Winsley. I have, however, agreed to remain as director because if recoveries are made under the Croatain claim... then once my debt to Mr. Sojak has been repaid the shares or remaining assets in Winsley will return to me.” (emphasis mine).

[129] Mr. Pernicka denies that the transfer took place after the freezing injunction was in place and was then, as alleged by the Applicants, backdated. In short, the Applicants say that the alleged Share Transfer is a sham. Mr. Pernicka claims to have granted security over the shares in consideration of Mr. Sojak deferring the date for repayment of a loan to him. It is obvious that the Croatian Claim of U.S. \$200 million vastly exceeds the debt owed to Mr. Sojak, whether that is CZK 19,087,901.89 (approximately US\$859,453.90) as Mr. Pernicka says, or for U.S. \$195,152 as asserted in Rybin 4. Mr. Pernicka 's only answer to this seems to be what is argued on his behalf in Winsley's SKA at subparagraphs 19(d) and (e)(ii) and (iii), which is in essence that at the time when Mr. Sojak sought to enforce his security, all Mr. Pernicka had was his shares in Winsley and thus, since (interestingly), this particular debt was not in dispute, there was nothing else he could offer by way of settlement of his debt. I find the contents of the submissions at (ii) and (iii) interesting. It is there stated: *“(i) On Mr. Pernicka's evidence, his shares in Winsley were his last remaining asset before he transferred those shares over to Mr. Sojak in February 2022 and it is not beyond reason that he would seek to satisfy a claim against him using what he had in the way of assets; (ii) While a debt of US \$800,000 is minimal in the context of a \$200 million dollar value claim, in circumstances where Mr. Pernicka had nothing, it is not beyond reason to sympathize with the desperation he must have felt at having to turn over his last remaining asset, no matter its potential value, in satisfaction of a debt claim that he was unable to dispute.”* (My emphasis).

[130] In my judgment, these are at the very least, strange transactions. It is also plain that this so-called transfer took place at a time when Parles, Mr. Perner and others, were making claims for repayment of the debts owed to them. It is interesting to note Mr. Pernicka's willingness to acknowledge this alleged debt to Mr. Sojak, in contrast to Mr. Pernicka's wavering approach to his indebtedness to the Applicants and his general attitude in relation to other creditors and debts. The transactions with Mr. Sojak are quite incredulous.

[131] The following points advanced in the Applicants' SKA at paragraph 31 and in the evidence, are additional reasons for the Court's finding that the evidence about this transfer is not credible:

- (1) The Share Transfer is not recorded in any signed instrument of transfer at all. Sub-Section 54(1) of the BVIBCA2004 makes this a legal requirement in order to transfer shares in a company.
- (2) The only documents that have a credible date are two registers of directors and shareholders dated 15 August 2022-.i.e. after the Freezing Order was obtained. While the register of shareholders says that the shares were transferred on 23 February 2022, there is no contemporaneous version of the register of shareholders to prove that. As Mr. de Swardt contended, Mr. Pernicka has not produced (as he could have done) a copy or version of the share register prior to the Freezing Order being served. I am of the view that there is a reasonable inference to be drawn that, prior to 15 August 2022, the share register did not reveal that information.
- (3) It is Mr. Rybin's evidence, and this has not been denied by Mr. Pernicka, that prior to obtaining the Freezing Order, and even at the first meeting between the parties after the Freezing Order was obtained, Mr. Pernicka never mentioned Mr. Sojak or having given any share lien to any of his creditors.
- (4) Mr. Pernicka was in 2021 in active discussions with his creditors to transfer his shares in Winsley to his son Marek. In an email dated 9

November 2021, which is three months after the share lien allegedly became enforceable, Marek wrote to FFP discussing a transfer of Mr. Pernicka's shares to him, with no mention whatsoever of Mr. Pernicka's interest in the shares being encumbered. Amongst other matters he wrote to FFP discussing an appeal of the first instance decision in the Croatia Claim, and then he spoke of a plan B, and raised the issue of the share transfer to him as follows:

"Our plan B is to most likely initiate an arbitration process between Winsley Finance Limited and Croatia directly.

We certainly need to keep Winsley active and in good standing for these reasons.

To simplify things for everyone, my father is willing to step down as sole benefactor and director of WFL, due to his past. We suggest to pass the company onto me as he is old and tired to continue this court case, which may drag on for another decade. Would this be satisfactory to your company? What would be required in order to prepare WFL to formally be sold or passed onto me, Marek Pernicka, his son, as I am a Canadian citizen". (My emphasis).

[132] In my view, there is a good arguable case that Mr. Pernicka made the alleged transfer of his shares in Winsley to thwart the Applicants' efforts to seek to monetize their judgments from his shares in Winsley, whether before or after the Freezing Order was granted. Indeed, the extremely fluid manner in which Mr. Pernicka deals with the shares and the back-and-forth nature of his entitlement to the shares, is cause for grave concern regarding dissipation.

Dishonesty

[133] Counsel for Winsley referred me to the fairly recent decision of the BVI Court of Appeal in **Green Elite Limited (In Liquidation) v Fang Ankong et. al.**¹⁸ 11 June 2021, (unreported), in which Justice of Appeal Michel at paragraph 57, quoting from the judgment in **National Bank Trust v Yurov**¹⁹ page 1913, discussed the matter of dishonesty as follows:

¹⁸ BVIHCMAP 2019.0030

¹⁹ [2016] EWHC

*“On assessing whether there was a real risk of dissipation, Males J, at paragraphs 69 to 70 in **National Bank Trust v Yurov** had this to say:*

‘As has been said many times, the purpose of a freezing order is not to provide the claimant with security but to restrain a defendant from evading justice by disposing of assets otherwise than in the ordinary course of business in a way which will have the effect of making itself judgment proof. It is that concept which is referred to by the label ‘risk of dissipation’,...

Based on these authorities, the defendants advance seven propositions which the bank does not dispute and which I accept. They were as follows:

- (1) The claimant must demonstrate a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant’s assets.*
- (2) That risk can only be demonstrated with solid evidence, mere inference or generalized assertion is not sufficient.*
- (3) It is not enough to rely solely on allegations that a defendant has been dishonest, rather it is necessary to scrutinize the evidence to see whether the dishonesty in question does justify a conclusion that assets are likely to be dissipated.*
- (4) The relevant inquiry is whether there is a current risk of dissipation, past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held.*
- (5) The nature, location and liquidity of the defendant’s assets are important considerations.*
- (6) Whether and to what extent the assets are already secured or incapable of being dealt with is also relevant.*
- (7) So too is the defendant’s behaviour in response to the claim or anticipated claim.”*

[134] In my judgment, there is ample evidence from which this Court can find that Mr. Pernicka has exhibited dishonesty and that the dishonesty in question does justify a conclusion that assets are likely to be dissipated. I list below some instances of lack of probity and dishonesty:

- (1) It would appear that Mr. Pernicka has been considered capable of forgery and fraud by the Czech Courts and Czech Police. In the translation of the judgment of the Zagreb Court, of 25 October 2021, in the proceedings brought by Mr. Zubak against the Republic of Croatia, at paragraph 29, did not accept a document as true, but considered it a forgery, committed to strengthen the position of Mr. Zubak in the

dispute and pointed to the unconvincing nature of the testimony of Mr. Zubak and Mr. Pernicka.

- (2) The Czech Police, dealt with the investigation initiated by Mr. Pernicka against Mr. Rybín and Mr. Perner. Those investigations were terminated on 15 December 2022. Mr. Rybín exhibited the official notification of the outcome. The police confirmed on page 1 that Mr. Perner's notarial deeds were valid and that "*No coercion was detected when compiling or signing these records.*" At page 2 the letter goes on to note that Mr. Pernicka may himself have committed the criminal offence of fraud and this is under active investigation by the Prague police.
- (3) Mr. Pernicka has advanced an argument to this Court in which he seems to accept that he guaranteed the Parles Loan and intends to repay it. However, in the Czech Court, extraordinarily, he has taken a completely irreconcilable stance that he did not sign the promissory note, so much so that the Czech Court has now requested expert analysis of the signatures. This stands in stark contrast to his sworn evidence given to this Court. Consequently, I accept Mr. de Swardt's submission that these different accounts cannot be reconciled.

[135] Further, it does seem to me that if indeed the shares have in fact been transferred to Mr. Sojak, then that transaction could be unwound as a fraudulent conveyance - see **Gilfanov** approved in **Broad Idea**.

[136] Mr. Pernicka's behaviour in relation to these proceedings is also relevant to this issue. He did not comply with the disclosure obligations required of him as Winsley's sole director for a period in excess of three months.

[137] Mr. Pernicka has not denied Mr. Rybín's allegation in Rybín 1, supported by documentary evidence, that the U.S. State Department sanctioned Mr. Pernicka for breaching U.S. sanctions on selling weapons to North Korea.

[138] I accept that Mr. Pernicka has at times, as described in *Gee on Injunctions* at paragraph 12-033, consistently demonstrated low standards of commercial morality.

Whether Just and Convenient, Discretion

[139] This has been an unusual case. There are many angles to it, and it is common ground that there is a connection between the Parles' claim and the Croatia Claim.

[140] In all of the circumstances, I consider that the facts would warrant the relief sought if the substantive proceedings were brought in the BVI; and it is not inexpedient to grant the relief.

[141] I am of the view that it is just and convenient that the freezing order should be continued in relation to the amounts due to Parles and Mr. Perner, which I have rounded to U.S.\$5.7 Million, and thus the Freezing Order as first granted, therefore stands to be varied in that regard.

[142] The Court has power to grant and continue these aspects of the Freezing Order under either section 24 granting **Black Swan** type relief or under Section 24 A of the Act.

Disposition

[143] I will therefore order and direct the following:

- (1) Paragraph 1 of the Application for Extension of Time is granted as prayed.
- (2) Costs of the Application for Extension of Time are awarded to the Applicants to be assessed if not agreed.
- (3) In respect of the Notice of Application for Continuation of the Freezing Order, dated 20 July 2022, I order that the Freezing Order, first granted on 12 July 2022 and continued until judgment is delivered in these applications, be varied by deleting the maximum sum of U.S. \$11.7 Million at paragraph 4(b) of the

Freezing Order, and substituting therefor the sum of U.S. \$5.7 Million. The Freezing Order as varied is to continue until further order.

- (4) The Notice of Application to Set Aside the Freezing Order, dated 3 November 2022, is granted in part, on Ground 4 of the grounds stated in the Application.
- (5) The Joinder Application, dated 5 January 2023, is refused.

[144] I will invite the parties to agree costs, but if they are unable to do so, they may submit brief written submissions within 14 days of the finalization of the judgment for the Court's consideration.

[145] I wish to express my gratitude to Counsel and instructing Counsel for the thorough and thought-provoking submissions on the wide range of issues involved in this matter. They were of great assistance to the Court.

Ingrid Mangatal (Ag)
High Court Judge

By the Court

Registrar