

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2021/0009

BETWEEN:

MULTIBANK FX INTERNATIONAL CORPORATION

Appellant

and

VON DER HEYDT INVEST S.A.

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Paul Webster
The Hon. Mr. Gerard St. C. Farara

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

Appearances:

Mr. Hodge Malek KC, Mr. Hefin Rees KC with them Mr. Phillip Hinks for the Appellant
Mr. Tim Penny KC with him Mr. Alexander Cook and Mr. Simon Hall for the Respondent

2022: April 25, 26, 27, 28 & 29;
2023: February 21.

Interlocutory Appeal – Worldwide Freezing Order (“WFO”) - Refusal of trial judge to discharge WFO – Appellate interference with exercise of judge’s discretion – Test for grant of application for WFO - Good arguable case – Whether VDHI had standing to bring claim – Whether VDHI, as a third party, had sufficient interest to challenge consent order – Whether applicant for a WFO must have an existing claim or a claim that he can institute immediately or within a specified time – Whether VDHI’s claims capable of producing a money judgment – Risk of Dissipation – Whether just and convenient to grant and or continue WFO - Material non-disclosure - Whether VDHI committed material non-disclosure at the ex parte application – Application to adduce fresh evidence – Ladd v Marshall principles

This appeal is one of eight interlocutory appeals in connection with ongoing proceedings in the Commercial Court between Multibank FX International Corporation, Mex Clearing, Mex Securities, Mr. Naser Taher and Von Der Heydt Invest SA.

Multibank FX International Corporation ("Multibank") is a British Virgin Islands ("BVI") company. It is a subsidiary of Mex Group Worldwide ("MGW") which is the top holding company in the group of companies known as the Multibank Group. Mr. Naser Taher ("Mr. Taher") is the ultimate beneficial owner of the Multibank Group. The respondent, Von Der Heydt Invest SA ("VDHI"), is a Luxembourg investment management company which runs a foreign exchange trading platform.

Von der Heydt & Co AG ("VDH AG") is an investment management company based in Germany whose chief executive officer is Mr. Michael Gollits ("Mr. Gollits"). In 2016, VDH AG established an index fund known as the Moser Index (later the Moser Alpha Index) to engage in foreign exchange trading, linked to notes known as Alpha Notes. The trading strategy of the Alpha Notes was not successful and the notes incurred losses of about €4.5 million by early 2017.

During the summer of 2017, MGW agreed with VDH AG, to establish a new index fund called the Multibank Index to issue new notes. The Alpha notes became known as "the Old Notes" and the investors of the Old Notes could exchange them for the new notes ("the Notes") at the conversion rate of one for one. The holders of the Notes are referred to as "Noteholders". Three funds managed by VDHI ("the VDHI Managed Funds") invested approximately €2.88 million in the Notes. Thus, the VDHI Managed Funds were also Noteholders. The sums invested in the Notes were held in accounts in the name of Mex Securities at Multibank designated as FE 2 and FE 3 ("the FE Accounts"). The Multibank Index began trading in August 2017 and from 2017 to 2019, outperformed the Moser Alpha Index.

In October 2019, a dispute arose between the managers of the Old Notes (Oaklet GmbH) and VDH AG resulting in significant losses to the value of the Notes. MGW agreed to help by providing financial assistance on certain conditions. Between October 2019 and May 2020, MGW injected approximately €9.8 million to support the Notes.

In December 2020, Mr. Gollits of VDH AG wrote to Mr. Taher of Multibank indicating that due to 'recent regulatory changes' the Multibank indices were not allowed to trade in gold and precious metals. The solution therefore was to sell its position immediately which would involve a very substantial redemption from the funds. It was at this stage that MGW felt that VDH AG had acted in breach of its obligations, had mis-managed the Notes, and were now demanding a substantial redemption of the funds held by Mex Securities at Multibank. MGW did not comply with the request for the redemption.

On 4th December 2020, Sabals law firm, acting on the instructions of MGW wrote to Mex Securities demanding payment by 8th December 2020 of "... EUR 34,831,216 ("the indebtedness") being sums advanced by Mex Group to Mex Securities ...". This was followed by meetings in Dubai between Mr. Taher and Mr. Adam Duthie, an English solicitor acting for MGW, and Mr. Colm Smith ("Mr. Smith") on behalf of Mex Securities. Following the agreements made during the meetings, MGW assigned the indebtedness to Mex

Clearing, a wholly owned subsidiary of MGW, and sent notice of the assignment to Mex Securities. On 10th December 2020, Mex Clearing, as the assignee of the MGW claim, issued a claim against Mex Securities and Multibank in claim number BVIH(COM) 202/0215 for the total sum of €36,385,509.52 (“the MCL Claim”). Mex Securities was sued as the debtor and Multibank as the person holding the claimed monies on behalf of Mex Securities. The meetings in Dubai between the representatives of MGW and Mex Securities continued. The transcript of the meetings in December show that the representatives of Mex Securities and MGW discussed the merits of entering into a consent order (in the MCL Claim) on the same day that the claim was filed and with no separate representative of Mex Clearing present during the discussion.

On 11th December 2020, Mex Clearing applied for summary judgment on its claim. On 14th December 2020, the following occurred: (i) terms of settlement of the MCL Claim were agreed and entered as a Tomlin Order (hereinafter the “Tomlin Order” or the “Consent Order”) by which it was ordered that Mex Securities would transfer the full amount in the two FE Accounts in its name at Multibank to Mex Clearing, and MGW would assign to Mex Securities its potential claims against VDH AG estimated by Mex Securities to have a value well in excess of the amount of the MCL Claim; (ii) MGW executed a Deed of Indemnity in favour of Mr. Smith promising to indemnify him against any claims arising out of him approving the Tomlin Order; and (iii) Wallbank J issued an order sealing the court’s file in the MCL Claim and anonymised the claim. On 18th December 2020, the funds in the two FE accounts at Multibank were paid out to Mex Clearing pursuant to the terms of the agreement in the Tomlin Order. The funds were then transferred from Mex Clearing to a company in China for trading and investment purposes.

Later in December 2020, Mex Securities sought information from Sabals law firm about the entry of the Consent Order. By this time, the funds had already been removed from the FE Accounts. It was not until 21st April 2021 that VDHI became aware that monies in the FE Accounts had been removed.

VDHI then issued ex parte proceedings against Mex Clearing, Mex Securities and Multibank (together “the Defendants”) for inter alia, interim relief in the form of a Worldwide Freezing Order (“WFO”). The WFO was granted. VDHI then applied on notice to continue the WFO until trial. Multibank and Mex Clearing cross-applied to discharge the WFO. The continuation and discharge applications were heard over a period of five days in July and September 2021 and on 4th October 2021 Jack J delivered a written judgment by which he dismissed the discharge application and continued the WFO until trial.

Multibank appealed against the Judge’s decision. The appeal was set down for hearing during the week of 25th -29th April 2022.

On 22nd April 2022, Multibank applied for permission to adduce fresh evidence in the appeal (the “first fresh evidence application”). On 27th January 2023, VDHI filed an application for permission to adduce fresh evidence to be considered before the delivery of judgment in this appeal and the Fortification Appeal (BVIHCVAP2022/008) (the “second fresh evidence application”).

The issues that arise from the Judge's key findings, the notice of appeal and the submissions of counsel that will be considered in this appeal are: i) VDHI's standing on the ex parte application to bring claims for the €36.4 million; ii) Whether VDHI made out a good arguable case against Multibank; iii) Whether there was a real risk that Multibank would dissipate its assets; iv) Whether it was just and convenient to grant and/or continue the WFO; v) Whether VDHI committed material non-disclosure at the ex parte application; and vi) The applications by Multibank and VDHI for permission to adduce fresh evidence.

Held: Dismissing the appeal and the first and second applications for permission to adduce fresh evidence; ordering the appellant, Multibank, to pay the costs of the appeal and the costs of the first application for permission to adduce fresh evidence, and VDHI to pay the costs of the second fresh evidence application, all such costs to be assessed by a judge of the Commercial Court if not agreed within 21 days, that:

1. A freezing injunction is an interlocutory order of the court granted in aid of enforcement of a present or future judgment. Its purpose is to preserve the assets of the defendant in circumstances where the court is satisfied that preservation is necessary so that the assets can be available, if necessary, to satisfy a money judgment obtained by the claimant. It can also be granted to freeze the assets in the name of a third party (a non-cause of action defendant or "NCAD"), if the court is satisfied that the assets of the NCAD are beneficially owned by a person against whom a substantive claim is asserted. Whether an applicant will be successful in its application for a freezing injunction depends on whether the court is satisfied that: (i) there is a good arguable claim in the amount sought to be frozen; (ii) there is a real risk that the respondent will dispose of its assets in such a manner that a judgment against it will go unsatisfied; and (iii) it is just and convenient to make the order sought.

TSB Private Bank International SA v Chabra [1992] 2 All ER 245 applied.

2. VDHI, in making its ex parte application for the freezing injunction ("Stage 1"), and then later at the inter partes hearing to continue the injunction ("Stage 2"), was obligated at both stages to prove that it had a good arguable claim in the amount sought to be frozen. The threshold for establishing a good arguable case is not a high one and an applicant only has to satisfy the court that its case is more than barely capable of serious argument, and yet not necessarily one that the judge believes has a better than 50% chance of success.

Ninemias Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen [1984] 1 All ER 398 applied.

3. On the issue of good arguable case, VDHI had to establish that it had standing to bring the claim in its own right or as a representative of the Noteholders, and whether it had sufficient interest as a third party to challenge the Consent Order. There was sufficient material before the Judge at Stage 1 to satisfy the requirement of VDHI's standing to represent both the VDHI Managed Funds and

the Noteholders. VDHI, as the managers of the three funds which invested in the Notes also had sufficient interest to apply to set aside the Consent Order to protect the Noteholders' interests.

Fourie v Le Roux and others [2007] UKHL 1 applied; **Convoy Collateral Ltd v Broad Idea International Ltd** [2002] 2 WLR 703 applied; **Roshan v Singh and others** [2017] EWHC 176 (Ch) considered; **Smagin v Yegiazaryan and another** [2021] EWHC 1383 (Comm) considered.

4. It is not a requirement that an applicant for a WFO must have an existing claim or a claim that it can institute immediately or within a specified time, nor that a right to bring such proceedings should have already arisen when the application is made. What is necessary is that the applicant must satisfy the court to 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. In this case, VDHI had not filed a claim at Stage 1, but had pleaded a claim for unlawful means conspiracy, listing the bare factual allegations and gave undertakings to issue proceedings. This was enough to satisfy the Judge to a sufficient degree of certainty at the Stage 1 hearing that notwithstanding the absence of a pleaded claim, even in draft, VDHI had claims against the Defendants. Accordingly, the learned judge did not err in finding at Stage 1 that VDHI had a good arguable case for claims for at least the tort of unlawful means conspiracy and for setting aside the Consent Order under the inherent jurisdiction of the court. Furthermore, the issue of VDHI having existing claims was put on a better foundation by the time the proceedings got to Stage 2 with the issuance of a claim form and statement of claim.

Fourie v Le Roux and others [2007] UKHL 1 applied; **Convoy Collateral Ltd v Broad Idea International Ltd** [2002] 2 WLR 703 applied.

5. A claim for a freezing injunction should result in a judgment for the payment of a sum of money, in default of which the judgment creditor can enforce the judgment against the assets that have been frozen by the injunction. VDHI's claims include damages for unlawful means conspiracy which, if successful, will result in a monetary award to VDHI on behalf of the Noteholders. In addition, if the claim for a declaration setting aside the Consent Order is granted, this could lead to a further order for the repayment of the funds transferred out of the accounts following the entry of the Consent Order. These claims satisfy the money claims requirement for the purposes of applying for a freezing injunction.
6. VDHI has established that it had a good arguable case of fraud against Multibank and there is no basis to interfere with Jack J's finding to this effect.
7. To satisfy the requirement of dissipation, there must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. It is not enough to prove that the defendant has the ability

to dissipate his assets. Cogent evidence of the risk of dissipation must go to the defendant's propensity to dissipate his assets unjustifiably from which the court can infer a serious risk of dissipation. In this case, there was evidence to support the finding of a good arguable case of an unlawful means conspiracy against the Defendants to misappropriate the €36.4 million in the FE accounts of Mex Securities at Multibank. In addition, Multibank was a part of the alleged conspiracy and the €36.4 million in the FE accounts had been removed and was no longer held by an entity within the Multibank Group. There was sufficient evidence before the Judge at Stage 1 to satisfy him that there was a real risk of dissipation and a fortiori at Stage 2 when he had a more complete picture of the evidence and the benefit of counsels' submissions.

Green Elite Limited (in liquidation) v Mr. Fang Ankong et al BVIHCMAP2019/0030 (delivered 11th June 2021, unreported) followed; **Fundo Soberano De Angola and others v Santos and others** [2018] EWHC 2199 (Comm) applied; **Lakatamia Shipping Company Ltd v Morimoto** [2019] EWCA Civ 2203 considered.

8. The grant or continuation of an injunction is not automatic even in a case where a good arguable case and a risk of dissipation have been established. The court must also be satisfied that it is just and convenient to grant or continue the injunction. Consideration must be given to the effect that granting a freezing injunction would have on a company's business. Multibank asserts that it is a substantial and established trading company operating internationally and the stigma attached to a freezing injunction against the company is damaging to its commercial interest and should weigh heavily in the assessment of just and convenient. However, the evidence shows that Multibank is not a trading company in the popular sense of being a company engaged in the buying and selling of goods. This limits the purported reputational loss. The Court therefore finds it just and convenient to continue the WFO until trial or further order.

Section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act** considered; **Petroceltic Resources Limited v Archer** [2018] EWHC 671 (Comm) considered; **Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen** [1984] 1 All ER 398, considered.

9. An applicant making an ex-parte application has a duty to give full and frank disclosure of all material facts. Material non-disclosure is a ground for discharging a freezing injunction. In considering the issue of material non-disclosure as alleged by Multibank, the Court should bear in mind that, particularly in heavy commercial cases, the borderline between material facts and non-material facts may be somewhat uncertain. It is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established. Upon consideration of the allegations by Multibank of material non-disclosure and the

evidence before this Court, it cannot be said, whether taken individually or cumulatively, that the allegations amount to material non-disclosures and are sufficient to discharge the WFO.

Brink's Mat Ltd v Elcombe and others [1988] 1 WLR 1350 applied; **Crown Resources AG v Vinogradsky and others** [2001] Lexis Citation 08 considered.

10. In fresh evidence applications, all three limbs of the test in **Ladd v Marshall** must be satisfied, albeit the application of the test is more relaxed in interlocutory appeals than in appeals from final judgments after trial. Bearing these principles in mind, the applications to adduce fresh evidence by Multibank filed on 22nd April 2022 and by VDHI filed on 27th January 2023, have not satisfied the test for the admission of new evidence and are dismissed.

Ladd v Marshall [1954] 3 All ER 745 applied.

JUDGMENT **(The Discharge Appeal)**

- [1] **WEBSTER JA [AG.]:** This is an appeal by the appellant, Multibank FX International Corporation against the interlocutory judgment and order of the learned judge, Jack J (“Jack J” or “the Judge”), delivered on 4th October 2021 (and corrected under the slip rule on 19th October 2021), by which the Judge: (i) dismissed the appellant’s application to discharge a worldwide freezing injunction originally granted ex parte on 26th April 2021 in favor of the respondent (“the WFO”), and (ii) continued the WFO until trial or further order (“the Discharge Appeal”). The Discharge Appeal is one of eight interlocutory appeals heard by this Court at a special sitting on 25th to 29th April 2022 in connection with ongoing proceedings before the Commercial Court between the parties, details of which appear below. The second defendant in the court below also appealed against the Judge’s orders in BVIHCMAP2021/0026. This appeal has not yet been heard.

Parties

- [2] The disputes between the parties to the proceedings in the court below are wide-ranging and complicated and involve numerous persons in varying roles. I will

attempt, in the first part of this judgment, to identify the main parties and outline the background to this appeal.

- [3] Mex Group Worldwide Limited (“MGW”) is the top holding company in the group of companies known as the Multibank Group. The Multibank Group is one of the leading Forex and CFD financial institutions in the world. The ultimate beneficial owner of the Multibank Group is Mr. Naser Taher (“Mr. Taher”), and its chief counsel is an English solicitor, Mr. Adam Duthie (“Mr. Duthie”). I will say more about the Multibank Group when I deal with the risk of dissipation.

- [4] The appellant (the third defendant in the court below), Multibank FX International Corporation (“Multibank”), is a British Virgin Islands (“BVI”) company. It runs a foreign exchange trading platform and is regulated by the Financial Services Commission of the BVI. The first defendant in the court below, Mex Clearing Ltd. (“Mex Clearing”), is a regulated broker company in the United Arab Emirates. Both Multibank and Mex Clearing are subsidiaries of MGW and parts of the Multibank Group.

- [5] The respondent (claimant in the court below) is Von Der Heydt Invest SA (“VDHI”), a Luxembourg investment management company. It was, until February 2022, a wholly owned subsidiary of Bankhaus von der Heydt GmbH & Co KG (“VDH KG”). VDH KG is a long-established and reputable German bank. The ultimate beneficial owner of VDH KG is Mr. Dietrich von Boetticher.

- [6] The second defendant in the court below, Mex Securities S.A.R.L (“Mex Securities”), is a Luxembourg securitisation company. Although carrying the word “Mex” as a part of its name, it is not a part of the Multibank Group. There is an ongoing dispute between the parties regarding the ownership and control of Mex Securities.

- [7] An important player in the disputes between the parties, though not a party in the proceedings, is Von der Heydt & Co AG (“VDH AG”), a public limited liability company registered and regulated in Germany. It carries on business as an investment management company from its offices in Frankfurt. Michael Gollits (“Mr. Gollits”) is the chief executive officer of VDH AG.

- [8] Viacheslav Volotovskiy (“Mr. Volotovskiy”) who is referred to in the court below as “Slava” (with no disrespect), and Colm Smith (“Mr. Smith”), are directors and/or officers of Mex Securities.
- [9] Salem Kattoura (“Mr. Kattoura”), the chief operating officer of Multibank, and Olaf Priess (“Mr. Priess”), a director of VDHI, swore affidavits in the proceedings in both courts on behalf of Multibank and VDHI respectively.

Background to the Discharge Appeal

- [10] In 2016, VDH AG established an index fund known as the Moser Index (later the Moser Alpha Index) to engage in foreign exchange trading, linked to notes known as Alpha Notes. The Alpha Notes were issued by two entities - Suncap SCOOP SA and Ardilla Segur SA, both registered in Luxembourg and under the control of Oaklet GmbH (“Oaklet”) which is registered in Germany. The trading strategy of the Alpha Notes was not successful and the notes incurred losses of about €4.5 million by early 2017. Following negotiations between Mr. Taher and Mr. Gollits, MGW agreed to make certain payments to VDH AG to provide financial support for the notes on terms that included that VDH AG would ensure that the notes would not be redeemed before the maturity dates in 2026 and 2027, and that VDH AG would introduce new investors in significant numbers. The Alpha Notes were later described as “the Old Notes”. The investors acquiring the Old Notes were UCITS¹ investment funds and included three funds managed by VDHI (“the VDHI Managed Funds”). UCITS funds are heavily regulated and require high levels of liquidity and transferability of the securities held by the funds. They can trade publicly across the European Union. It is important to note that they are not allowed to trade in precious metals.
- [11] During the summer of 2017, MGW agreed with VDH AG to establish a new index fund called the Multibank Index to issue new notes. The issuer of the new notes would be Mex Securities, and VDH AG was appointed as investment manager. The new notes

¹UCITS is the acronym for an “Undertaking for collective investment in transferrable securities”.

were later issued in two indices: Alpha FX 11 Index Linked Notes and the Multibank Group FX Index Linked Notes. The holders of the Old Notes could exchange them for the new notes at the conversion rate of one for one. The new notes are hereinafter called “the Notes” and the holders of the Notes are described as “the Noteholders”. The sums invested in the Notes were held in accounts in the name of Mex Securities at Multibank designated as FE 2 and FE 3 (“the FE Accounts”). The Notes would trade in precious metal derivatives that were expected to be more profitable than trading in foreign exchange contracts. The Multibank Index began trading in August 2017. Mr. Taher was one of the first investors in the Multibank Index by investing in the Notes and became its largest investor.

- [12] The VDHI Managed Funds invested approximately €2.88 million in the Notes. Thus, the three VDHI Managed Funds were also Noteholders.
- [13] From 2017 to 2019, the Multibank Index outperformed the Moser Alpha Index due to the presence of precious metals in the underlying trades.
- [14] A dispute developed between Oaklet and VDH AG on 17th October 2019 when Oaklet caused the calculation agents to cease calculating the daily prices for the Notes and requested the withdrawal of funds from Mex Australia Pty Ltd. Mex Australia Pty Ltd. is an Australian regulated entity in which Oaklet had previously opened a trading account and invested €9 million. Oaklet’s action resulted in an immediate de facto suspension of trading of the Notes on the Frankfurt Stock Exchange. VDH AG, in its capacity as investment manager, rejected the withdrawal requests from Oaklet and instructed Mex Australia Pty Ltd. not to comply with the withdrawal requests. The dispute between VDH AG and Oaklet resulted in significant losses to the value of the Notes. Mr. Gollits then requested a further advance of €5 million from MGW. MGW agreed to provide assistance but insisted that VDH AG provide certain guarantees and assurances.

- [15] On 26th November 2019, VDH AG signed a letter of undertaking stating that the €5 million loss was the result of Oaklet's conduct and that MGW agreed to inject a further €5 million 'as a one-off ex gratia payment for the benefit of all Noteholders'.² The letter also confirmed VDH AG's agreement not to withdraw sums from the Notes until their maturity and that it would advise its clients not to do so.
- [16] In May 2020, VDH AG asked MGW to advance a further €2.4 million in support of the Notes to meet continuing shortfalls, and later a further €2.4 million to purchase additional Notes. This led to the signing of a Deed of Affirmation dated 17th May 2020 between VDH AG and MGW. The Deed confirmed, among other things, that MGW had advanced various sums of money to VDH AG to support the Notes and that VDH AG had given undertakings to maintain the levels of deposits of the Notes and would advise investors not to withdraw funds before maturity. Further, VDH AG confirmed in clause 3.2 that '...VDH [AG] recognises that the [MGW] support for the Project was provided in the expectation that the Project would generate at least €200 million profit for [MGW] Group over the 10-year term of the Old Notes'.³
- [17] The dispute between Oaklet and VDH AG led to litigation in Australia and Luxembourg which was compromised on 15th September 2020 when the disputing parties entered into a settlement agreement governed by Australian law ("the Australian Settlement Agreement"). This caused further losses to the Notes. Multibank claims that further cash payments were made to support the Notes.
- [18] On 2nd December 2020, Mr. Smith emailed Mr. Volotovskiy:
- "Hi Slava,
I spoke to VDH [AG] this morning. The Multibank indices allow for trading in gold, this is not permitted per certain VDH investor profiles. Despite looking at other potential alternatives, VDH [AG] must instruct the redemption of approx. EUR 10 million in total from FE2 & FE3. Maybe they can reinvest in a new note without gold at a future point, however, they must

² Bundle 7B (v2) tab 6 pages 23-24.

³ Bundle 7D (v2) pages 555-562 at page 560.

do the redemption before year end. VDH will discuss this in advance with Multibank.”⁴

[19] On 3rd December 2020, apparently quite early in the day, Mr. Gollits wrote to Mr. Taher advising him, among other things, that –

“And then worst comes to worst. I was informed by our fund administrator and the auditor, that there have been recent regulatory changes and that we are not allowed to hold instruments which have gold included and we have to sell the position immediately. There is no choice for me to avoid this.... In addition to the problem with gold, the fact that PWC has resigned its mandate to audit the annual financial statements of MEX Securities is not conducive to the external image of the notes – especially since PWC also audits the annual statements of our fund of funds.

This all came as a total surprise but as I said I have no choice, but finding solutions, which unfortunately does not work overnight.

I am very sorry, but we have to send you a very substantial transfer request for the transaction out of the funds.

Please don't get me wrong, I am very much looking forward to continue (sic) our successful co-operation. To do so, we unfortunately have to swallow this bitter pill first.

Despite this bad news have a nice remaining day.” (Underlining and bold as in original).⁵

[20] Later in the day on 3rd December 2020, Mr. Gollits “zoom-called” Mr. Taher and requested the transfer to VDH AG of the funds held by Mex Securities in the FE Accounts at Multibank. Mr. Taher suggested an alternative of reversing the gold trades but after consulting the fund administrator and the auditors Mr. Gollits informed Mr. Taher by email, that the alternative was not acceptable and that the Notes had to be sold ‘...because of the changes in regulatory requirements...’.⁶ The email message continued: ‘I ask you in my function as investment manager not to open any further trade positions until the transfer has been executed ...’.⁷

⁴ Bundle 7E (v2) page 27.

⁵ Bundle 7B (v2) pages 483-485.

⁶ Bundle 7B (v2) page 479.

⁷ Ibid.

- [21] The statement by Mr. Gollits that the regulatory requirements had changed (in relation to trades in precious metals) is at best inaccurate. There was no such change. The rule against trading UCITS regulated funds in precious metals has been in place in Luxembourg since 2014⁸ and there were no recent changes. The issue that confronted VDH AG was that the Notes should not have been traded in precious metals and there were other issues about the Notes that the regulator in Luxembourg (CSSF)⁹ had written to VDH about in October 2020. The CSSF letter listed several deficiencies in the way that the funds were being administered and concerns that the auditor (KPMG) had resigned. At this stage, MGW felt that VDH AG had acted in breach of its obligations, had mis-managed the Notes, and were now demanding a substantial redemption of the funds held by Mex Securities at Multibank. MGW did not comply with the request for the transfer.
- [22] On 4th December 2020, a BVI law firm, Sabals Law, acting on the instructions of MGW, issued a letter to Mex Securities demanding payment by 8th December 2020 of ‘... EUR 34,831,216 (“the indebtedness”) being sums advanced by MEX Group to Mex Securities ... which were in any event repayable to MEX Group on demand’.¹⁰
- [23] This was followed by meetings in Dubai on 9th and 10th December 2020 between Mr. Taher and Mr. Duthie on behalf of MGW, and Mr. Smith on behalf of Mex Securities. Mex Clearing was not represented at the meetings, but I remind myself that it is a wholly owned subsidiary of MGW. Transcripts of the meetings were put in evidence, curiously by Multibank. The transcripts disclose discussions between the persons at the meetings regarding the problems and losses that had arisen with the Notes and the monies injected by MGW in support of the Notes. One proposal was that MGW would assign its entitlement to the indebtedness outlined in the Sabals Law demand letter to its wholly owned subsidiary, Mex Clearing, and

⁸ See letter from Eversheds Sutherland (Germany) LLP to Mr. Gollits dated 8th December 2020 – Bundle 1 (v2) pages 85-88.

⁹ Commission de Surveillance du Secteur Financier (CSSF).

¹⁰ Bundle 20 page 188.

that Mex Clearing, as assignee, would file a claim in the BVI against Mex Securities. The claim would result in a consent judgment in favour of Mex Clearing for the amount of the indebtedness.¹¹

[24] Following the agreements made during the meetings, MGW and Mex Clearing executed a Deed of Assignment on 9th December 2020 by which MGW assigned its right to the indebtedness to Mex Clearing and sent notice of the assignment to Mex Securities. The indebtedness is described in the Deed as 'loans and other claims in respect of payments made for the benefit of [Mex Securities] in the total sum of €36,385,509.52'.¹²

[25] On 10th December 2020, Mex Clearing, as the assignee of the MGW claim, issued a claim against Mex Securities and Multibank for the said €36,385,509.52 ("the MCL Claim").¹³ Mex Securities was sued as the debtor and Multibank as the person holding the claimed monies on behalf of Mex Securities. The meetings in Dubai between the representatives of MGW and Mex Securities continued. It is interesting to note from the transcript of the meeting on 10th December that Mr. Smith and Mr. Taher discussed the merits of entering into a consent order (in the MCL Claim) on the same day that the claim was filed and with no separate representative of Mex Clearing present during the discussion.

[26] On 11th December 2020, Mex Clearing applied for summary judgment on its claim. There were at least three important events on 14th December 2020:

- (i) Terms of settlement of the MCL Claim were agreed and entered as a Tomlin Order ("hereinafter the "Tomlin Order" or "Consent Order") by which it was ordered that Mex Securities would transfer the full amount in the two FE Accounts in its name at Multibank to Mex Clearing and MGW would assign to Mex Securities its potential claims against VDH AG estimated by Mex Securities to have a value well in excess of the amount of the MCL Claim.

¹¹ Transcript of meeting on 10th December 2020 – Bundle 20 pages 227-233.

¹² Bundle 7F (v2) page 197.

¹³ BVIHC(COM)2020/0215.

The Tomlin Order was signed by Mr. Taher on behalf of Multibank, Mr. Smith on behalf of Mex Securities and Mr. Kattoura on behalf of Mex Clearing. Interestingly, Mr. Kattoura is the chief operating officer of Multibank and signed affidavits in the proceedings on behalf of Multibank. Mr. Smith had replaced Mr. Volotovskiy as the director of Mex Securities that same day, apparently for the purpose of signing the Tomlin Order on behalf of Mex Securities.

- (ii) MGW executed a Deed of Indemnity in favour of Mr. Smith promising to indemnify him against any claims arising out of him approving the Tomlin Order. The learned trial judge described this as an extraordinary document if the compromise embodied in the Tomlin order was a bona fide settlement.¹⁴
- (iii) Wallbank J issued an order sealing the court's file in the MCL Claim and anonymised the MCL Claim by ordering that it be listed as 'A v B and C' in any hearing list published by the Court. The sealing application was made by Mex Clearing and was not opposed by the defendants who were represented by counsel at the hearing.

[27] On 18th December 2020, the funds in the two accounts at Multibank were paid out to Mex Clearing pursuant to the terms of the Tomlin Order. Mex Clearing was acquired by Mr. Raed Salahat, ("Mr. Salahat") on 1st March 2021 and later changed its name to Alliance Clearing Ltd. Alliance Clearing Ltd transferred the said funds to Auton Financial Group Ltd, a financial services provider in China said to be a counterparty of Alliance Clearing Ltd for trading and investment purposes. Mr. Salahat, who describes himself as the sole beneficial owner and chief executive officer of Alliance Clearing Ltd, confirmed in an affidavit filed on 31st March 2022¹⁵ that on 3rd May 2021 and 19th October 2021, the said funds were held by Auton

¹⁴ BVIHC (COM) 2021/0073 and 2020/0215 (delivered 4th October 2021 and corrected under the slip rule on 19th October 2021, unreported) ("the Discharge Judgment"), paragraph 36.

¹⁵ Bundle 17 part 4 pages 1226-1231.

Financial Group Ltd in trust for Alliance Clearing Ltd. The affidavit does not state the location of the funds at the date of the affidavit sworn in March 2022, only that their value remains €36, 385,509.52. There is no other evidence updating the location of the funds.

- [28] On 22nd December 2020, the BVI law firm of Conyers Dill & Pearman, instructed by Mex Securities, wrote to Sabals Law, seeking information about the entry of the Consent Order and expressing ‘... concerns about the events surrounding the Funds [the €36.4 million in the FE Accounts] and measures to remove them from Multibank’.¹⁶ By this time the funds had already been removed from the FE Accounts.
- [29] In January 2021, Mex Clearing applied in the BVI in claim number BVIHC(COM)2021/0003 for a freezing injunction against Multibank restraining it from dealing with the balance of the amounts in the FE Accounts (after the removal of the €36.4 million) in support of proceedings it intended to bring against Mex Securities in Luxembourg. Wallbank J granted the freezing order as well as an order sealing the court’s file in the claim.
- [30] On 9th April 2021, Jack J granted an interim injunction in the MCL Claim restraining Mex Securities from disclosing any information about the proceedings that had been commenced by Mex Securities in Luxembourg challenging the Consent Order, and from taking any further steps in those proceedings (“the Luxembourg Proceedings”). Mex Clearing also applied to the High Court in England for mirror orders and on 16th April 2022, Bryan J granted the orders. Further, on 19th April 2021, Jack J amended his order of 9th April 2021 to include ‘persons unknown’ as additional defendants. The amended order was served on VDHI on 21st April 2021. This is how VDHI found out about the Consent Order and that the €36.4 million had been removed from the FE accounts.

¹⁶ Bundle 7F (v2) pages 264-265.

The application for the worldwide freezing order (“the WFO”)

[31] On becoming aware on 21st April 2021 that the €36.4 million had been removed from the FE Accounts, VDHI applied on 23rd April 2021 for relief against Mex Clearing, Mex Securities and Multibank (together “the Defendants”). The interim relief sought included:

- (i) a worldwide freezing injunction against the Defendants;
- (ii) an order that the Consent Order be stayed;
- (iv) an order that the court file be sealed and VDHI be permitted to inspect and take copies of documents filed in the MCL Claim (No. BVIHC (COM) 2020/0215).

[32] VDHI applied on its own behalf and in its capacity as the management company of the three VDHI Managed Funds. The application was heard by Jack J who stated at the commencement of the short hearing that he had read the papers and that he ‘obviously knew much more about the matter than [counsel]’. The Judge’s comment was obviously based on the applications that he had dealt with before by Mex Clearing in the MCL Claim. The Judge heard submissions from Mr. Alex Hall Taylor KC for VDHI and granted the WFO restraining each of the Defendants from disposing of their assets up to a value of €36,385,509.52 for Mex Clearing and €43,378,523.38 for Mex Securities and Multibank. The Judge also ordered the Defendants to disclose details of their worldwide assets exceeding €10,000.00.

[33] VDHI applied on notice to continue the WFO until trial and Multibank and Mex Clearing applied to discharge the WFO.

[34] On 3rd May 2021, Jack J made an order that, inter alia, VDHI be joined as an additional party in the MCL Claim for the limited purpose of being granted access to the court’s E-Litigation Portal and that VDHI be given access to and be permitted to take copies of the documents on the file in the proceedings on the basis of a confidentiality club and otherwise on the strict terms of confidentiality set out in the

order. The seal and gag orders were otherwise maintained. On 28th May 2021 Jack J, having failed to extract reasonable terms from the parties for a workable confidentiality club, directed VDHI to file and serve its claim form and statement of claim by 4 pm on 21st June 2021 and gave VDHI full access to the court file in the MCL Claim ‘... without which settling pleadings would be difficult.’¹⁷ The learned judge also made a without notice representation order appointing VDHI as the representative of the holders of the Notes. An appeal against that order was also heard in April 2022 and a judgment dismissing the appeal will be delivered contemporaneously with the delivery of this judgment.

- [35] The discharge and continuation applications were heard over a period of five days in July and September 2021 by Jack J. They were heavily contested. The Judge reserved his decision and delivered a written judgment on 4th October 2021 dismissing the discharge application and continuing the WFO until trial.

The appeal

- [36] Multibank appealed against the Judge’s decision. The notice of appeal lists 27 grounds of appeal, some with sub-grounds. The issues that arise from the Judge’s key findings, the notice of appeal and the submissions of counsel that will be considered in this appeal are:

- (i) VDHI’s standing on the ex parte application to bring claims for the €36.4 million;
- (ii) Whether VDHI made out a good arguable case against Multibank;
- (iii) Whether there was a real risk that Multibank would dissipate its assets;
- (iv) Whether it was just and convenient to grant and/or continue the WFO;
- (v) Whether VDHI committed material non-disclosure at the ex parte application; and

¹⁷ The Discharge Judgment, paragraph 57.

(vi) The application by Multibank for permission to adduce fresh evidence.

I will also deal with (a) the application filed by VDHI on 27th January 2023 to adduce fresh evidence;¹⁸ (b) general principles about freezing orders; and (c) the approach of the Court of Appeal to findings of fact and the exercise of discretion by a trial judge.

Appellate interference

[37] The appeal is against the Judge's decision not to discharge the WFO previously granted ex parte. This is an evaluative exercise based on the material before the Judge and the exercise of discretion in arriving at his decision. The starting point is section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act ("Supreme Court Act")**¹⁹ which provides that the court may grant an interim injunction '*...in all cases in which it appears to the Court or Judge to be just or convenient*'. This involves the exercise of discretion by the Judge. The principles that guide this Court in considering the Judge's exercise of discretion are well known and have been repeated in numerous decisions of this Court and the courts of England. The leading case in the Eastern Caribbean **Dufour and Others v Helenair Corporation Ltd and Others**²⁰ in which the Chief Justice Sir Vincent Floissac gave the following guidance:

"We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."²¹

¹⁸ Discussed at paragraphs 121- 129 below.

¹⁹ Cap. 80 of the Laws of the Virgin Islands.

²⁰ (1996) 52 WIR 188.

²¹ Ibid at 190.

The test is in two stages: (1) the Judge must have made an error in principle and (2) as a result, his decision is outside the generous ambit of reasonable disagreement and is blatantly wrong.

- [38] The limited role of the appellate court in reviewing the exercise of discretion by a judge in the context of an appeal challenging the grant or refusal of an injunction is reflected in the judgment of Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and another**:²²

“An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge’s grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships’ House, is not to exercise an independent discretion of its own. It must defer to the judge’s exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently.”²³

- [39] A further consideration is that this is an appeal from an interlocutory order and there was no oral evidence. The Judge had to assess the printed evidence and make findings of fact and law, such as whether the evidence established a good arguable case. In carrying out this evaluative exercise:

“The Court [of Appeal] will only interfere with a finding as to whether a good arguable case exists where it is plain that the judge below was wrong. As Longmore LJ said in *Lakatamia Shipping Co Ltd v Su* [2012] EWCA Civ 1195 at [27] (Lord Neuberger MR and Sullivan LJ concurring):

‘[I]t must be remembered that applications for freezing injunctions made on the basis of a good arguable case come before the commercial judges all the time. Derived from their time in practice they have developed what is perhaps best described as an instinct as to what is well arguable and what is not. That instinct should be respected by those in this court without the everyday experience of granting and refusing freezing injunctions unless it is plain that the judge is wrong.’²⁴

²² [1983] 1 A.C. 191.

²³ Ibid at 220.

²⁴ Per Haddon-Cave LJ in *Lakatamia Shipping Company Ltd v Morimoto* [2019] EWCA Civ 2203 at paragraph 78.

[40] To these well-known principles I would add the pithy statement of Lord Briggs in **Ming Siu Hung and others v J F Ming Inc and another**²⁵ - '[t]he question whether a judge has failed to take something into account is not answered by an over-zealous dissection of the language of the judgment'.

[41] I am guided by the principles in the authorities on how to approach the exercise of the Judge's decision to dismiss the application to discharge the WFO and to continue it until trial.

Freezing injunctions

[42] A freezing injunction is an interlocutory order of the court granted in aid of enforcement of a present or future judgment. It restrains the person enjoined from dealing with or disposing of its own assets. The injunction does not restrain the person from dealing with its assets in the normal course of its business and it is not designed to provide security for the enforcement of the claimant's judgment. Its purpose is to preserve the assets of the defendant in circumstances where the court thinks that such preservation is necessary so that the assets can be available, if necessary, to satisfy a money judgment obtained by the claimant. The court also has the power to freeze assets in the name of a third party (a non-cause of action defendant or "NCAD") if it is satisfied that the assets of the NCAD are beneficially owned by a person against whom a substantive claim is asserted²⁶ (the cause of action defendant). To do this, the court must have personal jurisdiction over the NCAD but it is not necessary to have a cause of action against that person. What is necessary is that the NCAD has assets that are beneficially owned by the cause of action defendant, and those assets may be available to satisfy a future judgment against the cause of action defendant. I will elaborate on these basic principles when I discuss below the current state of the law on freezing injunctions.

²⁵ [2021] UKPC 1 at paragraph 22.

²⁶ TSB Private Bank International SA v Chabra and another [1992] 2 All ER 245.

[43] The test for the grant of a freezing injunction is in three stages – the applicant must prove that:

- (i) it has a good arguable claim in the amount sought to be frozen;
- (ii) there is a real risk that the respondent will dispose of his assets in such a manner that a judgment against him will go unsatisfied; and
- (iii) it is just and convenient to make the order sought.

All three conditions must be satisfied.

Condition 1 – Good arguable case

[44] The threshold for establishing a good arguable case is not a high one. A good arguable case is one that 'is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success'.²⁷

[45] Multibank challenged VDHI's assertion that it had a good arguable case in three ways:

- (a) VDHI did not have standing to bring the claim in its own right or conceivably as a representative of the Noteholders. This is referred to in the submissions of counsel as 'the standing issue' and I will do the same. This issue encompasses the question of whether VDHI has a sufficient interest, as a third party to the MCL Claim, to challenge the Consent Order.
- (b) The claim or claims against the Defendants were not being or capable of being issued immediately or at least within a defined period after the application was heard. This is referred to as 'the existing claims issue'.
- (c) The claims could not result in a money judgment in VDHI's favour. This is referred to as 'the money claims issue'.

²⁷ Per Mustill J in *Ninemaria Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen* [1984] 1 All ER 398.

[46] I will deal with these issues in turn. In discussing them I will refer, for convenience only, to the ex parte application for the WFO as “Stage 1” and the inter partes application to discharge or continue the WFO as “Stage 2”.

Standing – (a) VDHI as a representative claimant

[47] Mr. Hodge Malek KC appeared as lead counsel for Multibank. His starting position on the issue of standing was that it is a threshold issue and VDHI had to prove that it had standing when it applied for the WFO at Stage 1. Mr. Tim Penny KC, lead counsel for VDHI, responded by submitting that the Stage 2 hearing was a hearing de novo and once it was established at that hearing based on the totality of the evidence that VDHI had standing, that was sufficient to continue the injunction. There is merit in Mr. Malek KC’s submission. If VDHI did not have standing at Stage 1, the WFO should not have been granted. This certainly was the view of Jack J who said at paragraph 83 of the Discharge Judgment that ‘[s]tanding had to exist as at 26th April’ which is the date of the Stage 1 hearing. If at Stage 2 Jack J was satisfied that VDHI did not have standing at Stage 1, but there was sufficient evidence at Stage 2 to establish standing, the proper course would have been to discharge the WFO and, if appropriate, re-grant it. However, on the material that was before Jack J at Stage 1, and having regard to the modern approach to freezing injunctions as set out below,²⁸ I am satisfied that VDHI had standing to apply for the WFO. My reasons for so finding follow.

[48] The issue of VDHI’s standing as a party representing Noteholders can be looked at in two ways. Firstly, VDHI manages three funds which in turn invested in the Notes. Mr. Priess’ evidence at Stage 1 is that VDHI brought the claim as the management company of the three funds as it was entitled to do under the governing law of the Notes – Luxembourg.²⁹ Whether this is correct as a matter of Luxembourg law is a matter for the trial on the basis of expert evidence.

²⁸ See discussion under the heading “The existing claims issue” in paragraphs 61 - 79 below.

²⁹ Bundle 6 (v2) First affidavit of Mr. Priess, page 79 at paragraphs 6-7.

[49] Secondly, VDHI informed Jack J that it intended to bring the claim on behalf of and for the benefit of the Noteholders (which includes the three funds). Mr. Priess deposed in his affidavit in support of the application for the WFO that VDHI intended to hold an extraordinary general meeting (“EGM”) of the Noteholders to secure proper authorisation to represent them. However, it would take time to convene the meeting which required at least 21 days’ notice to the Noteholders. Applying the principles from **Fourie v Le Roux and others**³⁰ and **Convoy Collateral Ltd v Broad Idea International Ltd**,³¹ analysed and set out below under “The existing claims issue”,³² this was evidence that the learned judge could have relied on at Stage 1 to satisfy the requirement of VDHI’s standing to represent the Noteholders. If VDHI did not secure authorisation from the Noteholders, the issue of representing them would likely be resolved against VDHI. As it turned out, the EGM was held, the Noteholders passed the required resolution, and on 21st June 2021, Jack J made an order on VDHI’s without notice application authorising it to represent the Noteholders. An appeal against the representation order was heard by the Court at the special sitting in April 2022 and, as stated above, a decision dismissing the appeal will be delivered contemporaneously with this judgment.

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

³⁰ [2007] UKHL 1.

³¹ [2022] 2 WLR 703.

³² Paragraphs 61 – 79 below.

Standing – (b) VDHI as a third party to the MCL Claim

[51] A further consideration on the issue of standing is whether the court's jurisdiction to set aside its own order, regularly entered, can be invoked by a person who was not a party to the original claim. Mr. Penny KC submitted that the court has this jurisdiction and relied on several cases for this point including **Roshan v Singh and others**³³ and **Smagin v Yegiazaryan and another**.³⁴

[52] In **Roshan v Singh** two of the defendants had obtained a declaration in earlier proceedings regarding the ownership of a Sikh temple or gurdwara. The claimant, though not a party in the earlier proceedings, brought a representative action on behalf of the members of the gurdwara to strike out the declaration on the ground that it was obtained by fraud. The defendants contended that representative action was an abuse of the process of the court and applied to set aside the new claim. Mr. Simon Monty KC, sitting as a deputy judge, granted the defendants' application and struck out the new claim on the facts because the evidence of fraud was available and should have been deployed at the first trial. However, the learned deputy judge commented on the issue of fraud. At paragraph 31 he noted:

"I can see no basis for concluding that as a matter of principle a judgment obtained by fraud can only be set aside by a party to that earlier action. It might well be that where a judgment is sought to be impeached it would be a rare case where a non-party can say to the court that because a judgment in a case to which he was not a party was obtained by fraud it should be set aside; it might be said that the non-party had no personal (as opposed to a more general public-spirited or general) interest in that happening. However, it seems to me that the present case is different. If Mr Roshan is right (and subject to other points made by Mr Boyd about delay and acquiescence, which I will deal with below), then he and the members of the Gurdwara have been cheated out of their beneficial ownership of the Property because of a fraud, and the courts ought not to allow a judgment obtained by fraud to stand; it would deprive them of their rights."

[53] **Smagin** bears an even closer resemblance to the instant appeal. Messrs. Yegiazaryan and Gogokhia obtained a consent order in the original proceedings.

³³ [2017] EWHC 176 (Ch).

³⁴ [2021] EWHC 1383 (Comm).

Mr. Smagin brought proceedings to set aside the consent order on the ground that it was obtained by the defendants' fraud and that the order prejudiced his legitimate attempts to enforce an award of amounts in excess of \$136 million due to him. The nature of the alleged fraud was that the defendants falsely represented that the consent order disposed of a genuine claim, whereas Mr. Smagin contended that the true position was that the original claim leading to the consent order was a sham. The matter came before Cockerill J on an application by the defendants to strike out Mr. Smagin's claim on the ground that the court did not have jurisdiction to try the claim. The learned judge dismissed the defendants' application finding that the court had jurisdiction to entertain Mr. Smagin's claim and the issue of his standing and the court's jurisdiction should be resolved at the trial, and not at this preliminary stage. The following paragraphs from the learned judge's judgment are noteworthy:

"39 So there are effectively two limbs to the standing argument:

- 1 He [counsel for the defendants] says that it is wrong in law in that third parties have no rights in this circumstance as a matter of law; and
- 2 He says it is wrong in facts.

40 Now in relation to this, of course we are currently at the stage of a jurisdiction argument, and what has to be established on behalf of Mr. Smagin is not that he is right about these points, but that there is a serious issue to be tried – that the claim is arguable.

41 In relation to both of these limbs of the standing argument, I am entirely satisfied that the appropriate hurdle has been surmounted on behalf of the claimant."

[54] I am guided by the reasoning and conclusions in these two cases, and other cases cited by Mr. Penny KC, and I find that the lower court has jurisdiction to entertain a claim by VDHI to set aside the Consent Order on the ground that it was obtained by fraud, and that a person who was not a party to the MCL Claim could have standing to bring such proceedings. To his credit, Mr. Malek KC did not dispute any of these principles. His contention was that on the facts, VDHI

did not have a sufficient interest in the Notes, either on its own behalf or on behalf of the Noteholders, to bring a claim to set aside the Consent Order.

[55] Mr. Penny KC submitted that what is required is that VDHI and/or the Noteholders must have a sufficient interest in the MCL Claim to have standing to apply to set aside the Consent Order. The expression 'sufficient interest' is not a term of art and is not used in any of the cases to which the Court has been referred, but it seems to me to be a good way to describe the interest that a non-party must have in order to set aside a judgment entered by the court. There is no gain saying that the court has an interest in bringing litigation to an end and as Simon Monty KC said in **Roshan v Singh** it is a rare case that a non-party can persuade a court to set aside a judgment on the ground of fraud.

[56] The interest of the claimant in **Roshan v Singh** was that the earlier judgment deprived him and the members of their beneficial ownership of the temple. The court did not make a specific finding that this was a sufficient interest because the judge struck out the claim on the ground that the allegation of fraud could, with reasonable diligence, have been pursued at the original trial.

[57] In **Smagin**, the judge allowed the claim to proceed because there was at least an arguable case that the consent judgment was an attempt to frustrate the enforcement of the judgment for \$136 million due to Mr. Smagin. By implication, the court found that this was a sufficient interest.

[58] What is clear is that there is no clear test of what interest, arguably, will be sufficient to set aside a judgment. Each case must be decided on its own facts.

[59] In this case, Mr. Penny KC relied on the fact that the interest of the Noteholders in the Notes has been adversely affected by the fact that the funds transferred out of the FE Accounts represented approximately 80% of the value of the Notes and they have a sufficient interest to recover this value. Further, there is expert evidence that the entry of the Consent Order against Mex Securities is an event

within the meaning of article 5.3 of the Terms and Conditions of the Notes that could trigger a compulsory redemption of the Notes by the issuer, Mex Securities. This would produce a low return on the Notes because of the missing €36.4 million. VDHI's interest in setting aside the Consent Order is that they manage three funds that invested in the Notes. They must act to protect the interests of the Noteholders which have been adversely affected by the Consent Order and the misappropriation of the funds in the FE Accounts.

- [60] I am satisfied that that VDHI, in its own capacity and as a representative of the Noteholders, has met the threshold required by **Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen**,³⁵ and has sufficient interest in the MCL Claim to apply to set aside the Consent Order.

The existing claims issue

- [61] VDHI sought to establish that it had a good arguable case against Multibank at Stage 1 by reference to the terms of the application for the WFO, the evidence in support of the application, and the relevant legal principles. The evidence in support of the application is contained in the first affidavit of Mr. Priess, a director of VDHI.³⁶ Mr. Priess outlined the background to the application along the lines of the brief summary that I provided in paragraphs [10]-[30] under the heading "Background to the Discharge Appeal", but excluding the events immediately before the filing of the MCL Claim in December 2020 and the meetings between Messrs. Taher, Duthie and Smith in Dubai in December 2020. These details became known to VDHI later in the proceedings. At the conclusion of his evidence, Mr. Priess, on behalf of VDHI, proffered the usual cross-undertaking in damages appropriate to the grant of a worldwide freezing injunction, and, significantly for the purposes of this appeal, further undertakings in the following terms –

"UNDERTAKING TO ISSUE APPLICATION TO SET ASIDE CONSENT ORDER

³⁵Supra note 27 and see paragraph 44 above

³⁶ Bundle 6 (v2) pages 77-95.

72. VDH Invest therefore seeks a stay of the consent order pending the return date or further order of the court. VDH Invest undertakes that, if such a stay is granted, it will apply for an order to set aside the consent order with the intention that the application will be heard at the return date.

UNDERTAKING TO ISSUE PROCEEDINGS

73. It is anticipated and undertaken that, assuming all necessary injunctive restrictions are lifted and resolutions are passed as anticipated, then proceedings will be issued on behalf of all Noteholders following an EGM, by way of intervening in the Luxembourg Proceedings on their behalf and/or by claiming (by the appropriate procedural means) in the BVI against, at least, Mex Clearing, Mex Securities and Multibank for (at least) unlawful means conspiracy. If for whatever reason such proceedings are not issued following the EGM, VDH Invest undertakes to issue on behalf of the Funds (by the appropriate procedural means) a claim in the BVI against, at least, Mex Clearing, Mex Securities and Multibank for (at least) unlawful means conspiracy. There may also be claims against other participants in the fraud, and there may also be other causes of action relied upon including dishonest assistance in breach of trust, knowing receipt, and unjust enrichment. I believe that there may also need to be related proceedings in other jurisdictions, depending on what is uncovered about the recipient(s) (or onward recipient(s)) of the misappropriated funds, and their current location.”³⁷

[62] Mr. Hall Taylor KC repeated VDHI’s offer of these undertakings in paragraph 42 of his written submissions for the WFO.³⁸ Mr. Hall Taylor KC, as well as Mr. Priess at paragraph 57 of his first affidavit, informed the Court in writing that VDHI intended to get full Noteholder participation by a resolution passed at an EGM. I dealt with this issue under the heading “Standing- (a) VDHI as a representative claimant”.³⁹ The claim form and statement of claim were issued the day after VDHI secured a representation order.

[63] The giving of the undertakings was obviously sufficient for Jack J to be satisfied that VDHI would issue proceedings along the lines set out in the undertakings, that is to say, claims in tort against the Defendants for unlawful means conspiracy, a claim under the court’s inherent jurisdiction to set aside the Consent Order, and, if

³⁷ Bundle 6 (v2) tab 5 page 91.

³⁸ Bundle 5 (v2) tab 1 page 11.

³⁹ Paragraph [47] above.

necessary, claims for knowing receipt and unjust enrichment. The fact that the undertakings that were proffered were not included in the WFO, with a further undertaking to issue the proceedings by a specified date as required by rule 17.2(5) of the **Civil Procedure Rules, 2000** ("CPR"), was acknowledged by the Judge at the Stage 2 hearing. He noted in paragraph 94 of the Discharge Judgment that the failure to give the undertaking did not rob the court of jurisdiction (in the strict sense) to grant an injunction and that the court can correct procedural errors under CPR 26.9. He also said that he should have insisted on a shorter period for issuing the claim but did not do so on account of the difficulties that VDHI was facing as a result of the seal and gag orders. He concluded on this point that 'it would not in my judgment be in accordance with the overriding objective to discharge the freezing order on this ground'. This is a case management decision made by the Judge having conduct of the proceedings in the lower court based on the material before him and there is no basis for this Court to interfere with his finding.

[64] The thrust of Mr. Malek KC's submission that VDHI did not have an existing cause of action, is that the pleaded action in the application for the WFO is based on a proprietary claim by VDHI on behalf of the Noteholders for the return of the funds removed from the FE Accounts. These funds belong to Mex Securities and the only person who has the right to sue for their return is Mex Securities itself, or the Noteholders in a derivative claim. This would have been possible in Luxembourg under the governing law of the Notes in a form of a derivative claim known as '*action oblique*'. However, the Noteholders and VDHI did not indicate that they intended to pursue an *action oblique* in Luxembourg, and they have not applied for leave to bring a derivative claim in the BVI. They rested their case at Stage 1 on the unlawful means conspiracy claim as pleaded in the application for the WFO.

[65] I agree that the only claim pleaded in the application for the WFO was a proprietary claim by VDHI on behalf of the Noteholders for the recovery of the funds removed from the FE Accounts at Multibank. However, the issue of VDHI's standing must be viewed in the context of the evidence and the current state of the law as to how

an applicant for a freezing injunction must prove that it has a cause of action and therefore standing to apply for a freezing injunction.

[66] It is trite law that the applicant must show at Stage 1 that it has a cause of action. However, that which constitutes a cause of action in this context has acquired a very wide meaning and requires examination in the context of an application for a freezing injunction. Mr. Malek KC relied on the decision of the House of Lords in **Fourie v Le Roux** to support his position that an application for a freezing injunction must be based on either an existing claim or a claim that the applicant can institute immediately or within a specified time.⁴⁰ The claimant, Mr. Fourie, obtained a freezing injunction from a High Court judge at a time when he had not instituted or formulated proceedings for substantive relief. The freezing injunction was discharged by a deputy judge and the claimant's appeal to the Court of Appeal against the discharge was dismissed. On further appeal to the House of Lords, Their Lordships confirmed that the court has jurisdiction in appropriate cases to grant a freezing order before substantive proceedings are commenced on a proper undertaking being given to do so. However, the deputy judge was correct to discharge the freezing injunction on the facts because Mr. Fourie had not formulated a proper claim and the order did not give directions for the filing of the claim. At paragraph 45 of Their Lordships' opinion, Lord Rodger of Earlsferry stated -

“...it is all too clear that, at the time when he made the application to Park J, the claimant had neither brought proceedings nor worked out what proceedings he was going to bring to which the freezing order would be relevant. That being so, one of the important safeguards was missing and so, even if he had the power to do so, the judge ought not to have granted the order at that stage.”

The House affirmed the deputy judge's decision to discharge the freezing injunction.

[67] Mr. Malek KC submitted that the circumstances in the instant appeal are no different from those in **Fourie v Le Roux** – the claim was not properly formulated at Stage 1

⁴⁰ Submissions Bundle (v3) page 15, paragraph 50.

and the WFO did not give directions for the filing of the claim. While I agree that the facts in **Fourie v Le Roux** bear some similarity to the instant appeal, the principles in the case do not detract from how the court should assess the WFO for, at least, the following reasons –

- (a) The House of Lords in **Fourie v Le Roux** recognised and confirmed the court's power to grant a freezing injunction before the commencement of substantive proceedings in appropriate cases.
- (b) There were clear undertakings to commence the proceedings and Jack J did give directions to file the substantive claim, albeit after the WFO was granted.
- (c) The seal and gag orders in the MCL Claim and the Mex Claim in London made gathering information about what had happened difficult.
- (d) Their Lordships, and in particular Lord Scott of Foscote, recognised that the law and practice had not stood still since the decision in **Siskina (Cargo Owners) v Distos Cia Naviera SA, The Siskina**.⁴¹

[68] In short, I do not think that **Fourie v Le Roux** laid down a rule that an applicant for a freezing injunction must have an existing claim or a claim that he can institute immediately or within a specified time. A more accurate way to describe what the case stands for on this issue is what Lord Scott said at paragraph 30 –

“My Lords, these authorities show, in my opinion, that, provided the court has in personam jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction, in the strict sense, to grant it.”

This is in substance Mr. Penny KC's position with which I will now deal.

⁴¹ [1979] AC 210.

[69] Mr. Penny KC included in his submissions the recent developments in the law relating to freezing injunctions in **Broad Idea**,⁴² a decision of the Privy Council on appeal from this Court. The relevant facts are that Broad Idea International Ltd., a BVI company, owned assets that the claimant, Convoy Collateral Ltd., alleged were beneficially owned by Mr. Choi Kwai Chee, a Hong Kong resident and the majority shareholder of Broad Idea. In anticipation of bringing proceedings in Hong Kong for substantial damages against Mr. Choi, Convoy applied in the BVI for a freezing injunction against Broad Idea to restrain it from dealing with its assets so that these assets could be available to satisfy any judgment obtained against Mr. Choi in the Hong Kong proceedings. No claim was made against Broad Idea. The sole purpose of the BVI proceedings was to freeze Broad Idea's assets in support of the intended proceedings in Hong Kong. A judge of the Commercial Court granted the freezing injunction on the principle in **Black Swan Investment I.S.A. v Harvest View Limited et al**⁴³ that the court can grant a freezing injunction against a person over whom it has jurisdiction but against whom no claim is made, to preserve the assets of that person in aid of foreign proceedings. The Court of Appeal set aside the injunction finding that the judge of the lower court did not have jurisdiction to grant an injunction against Broad Idea when no claim or cause of action was asserted against it.

[70] The appeal to the Privy Council was heard by a panel of seven judges. Their Lordships took the opportunity to review the law and practice relating to freezing injunctions. The majority opinion was delivered by Lord Leggatt (with whom Lord Briggs, Lord Sales and Lord Hamblen agreed). In a carefully reasoned opinion, Lord Leggatt set out the history and essential characteristics of the freezing injunction (formerly Mareva injunction). He noted that –

“...the essential purpose of a freezing injunction is to facilitate the enforcement of a judgment or order for the payment of a sum of money by preventing assets against which such a judgment could potentially be

⁴² [2022] 2 WLR 703.

⁴³ BVIHCV2009/0399 (delivered 23rd March 2010, unreported).

enforced from being dealt with in such a way that insufficient assets are available to meet the judgment.”⁴⁴

[71] Lord Leggatt summed up the essential nature of the freezing injunction at paragraphs 101 and 102 as follows –

“101. In summary, a court with equitable and/or statutory jurisdiction to grant injunctions where it is just and convenient to do so has power – and it accords with principle and good practice – to grant a freezing injunction against a party (the respondent) over whom the court has personal jurisdiction provided that:

- (i) the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;
- (ii) the respondent holds assets (or, as discussed below, is liable to take steps other than in the ordinary course of business which will reduce the value of assets) against which such a judgment could be enforced; and
- (iii) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied.

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

- (i) There is no requirement that the judgment should be a judgment of the domestic court - the principle applies equally to a foreign judgment or other award capable of enforcement in the same way as a judgment of the domestic court using the court’s enforcement powers.
- (ii) Although it is the usual situation, there is no requirement that the judgment should be a judgment against the respondent.
- (iii) There is no requirement that proceedings in which the judgment is sought should yet have been commenced nor

⁴⁴ Supra note 42, paragraph 85.

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)." (Emphasis added)

[72] He also stated at paragraph 90 that:

"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."

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

[74] My summary of **Broad Idea** is that the case did not take away the need for an applicant for a freezing injunction to establish that he has a good arguable case – what the case does is to emphasise the true nature of a freezing injunction. It is a way of facilitating the enforcement of a judgment by freezing assets in the name of the enjoined person against which a judgment against the true owner of the assets (the cause of action defendant) may be enforced. In doing this, the court does not require the applicant to have an existing cause of action. He only has to satisfy the court to a sufficient degree of certainty that he will bring proceedings, in the BVI or elsewhere, against the owner of the asset sought to be frozen. If the court is not satisfied that such proceedings will be brought within a reasonable time, it will not grant the injunction. The person sought to be enjoined does not have to be the person against whom a cause of action is alleged (as in **Broad Idea** itself). The court's jurisdiction will be engaged once it is satisfied that it is an appropriate case

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

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

- (i) reference to the Luxembourg proceedings which itself includes allegations that the funds removed from the FE Accounts were misappropriated and the MCL Claim is a stunt and a farce orchestrated by Mr. Taher and his companies, and that he and his associates 'orchestrated an absurd trial through a kangaroo court case';
- (ii) the funds in the accounts were fraudulently transferred on the basis of a purported consent order and fraudulent manoeuvres; and
- (iii) the compromise in the MCL Claim makes no legal sense.

VDHI also proffered the undertakings set out in paragraphs [61] and [62] above.

[76] Jack J was obviously satisfied, to a sufficient degree of certainty at the Stage 1 hearing, that, notwithstanding the absence of a pleaded claim, even in draft, VDHI had claims against the Defendants. Those claims, apart from the allegation of unlawful means conspiracy, had not yet been properly formulated or pleaded, but undertakings were given to issue the claims; there was evidence that the Consent Order was entered in circumstances that were questionable and required further investigation; there was also an urgent need to find out what had happened to the funds that were in the FE Accounts at Multibank; and the Judge recognised that there was a dearth of information to which VDHI had access because of the sealing of the court files and the gagging orders in the claims brought by Mex Clearing in

the BVI and in London. The Judge therefore granted the WFO and later, on 28th May 2021, gave VDHI access to the court file in the MCL Claim.

[77] Having considered the material that was before Jack J on 26th April 2021, I am satisfied, to the threshold required by **Niedersachsen** that the learned Judge did not err in finding that at Stage 1, VDHI had a good arguable case for claims for at least the tort of unlawful means conspiracy and for setting aside the Consent Order under the inherent jurisdiction of the court.

[78] The issue of VDHI having existing claims was put on a better foundation by the time the proceedings got to Stage 2. By then the evidence was more complete and the claims were pleaded out in the claim form and statement of claim. In addition to the pleaded claim for unlawful means conspiracy, there were pleaded claims for:

- (a) An order setting aside the Consent Order (which was alluded to in the application for the WFO);
- (b) a declaration that the funds transferred out of the FE Accounts be held on a constructive trust for Mex Securities and/or the Noteholders
- (c) an order requiring the parties to the Consent Order to restore the funds transferred to the accounts at Multibank;
- (d) restitution and equitable compensation;
- (e) damages and other relief.

[79] The underlying theme of the claim in the statement of claim is that the Defendants used and abused the process of the BVI court in a fraudulent manner to misappropriate the funds in the FE Accounts, and that fraud unravels everything.⁴⁵

⁴⁵ HIH Casualty and General Insurance Ltd and others v Chase Manhattan Bank and others (conjoined appeals) [2003] 1 All ER (Comm) 349.

Relying on this principle, Mr. Penny KC submitted that VDHI has causes of action against Multibank and that the BVI court has jurisdiction to set aside the Consent Order that was obtained by fraud and to restore the misappropriated funds to the two accounts at Multibank.

The money claim issue

[80] It is uncontroversial that the purpose of a freezing injunction is to facilitate the enforcement of a judgment or order for the payment of a sum of money,⁴⁶ and that '[m]areva relief is suitable only when the claimant's claim is one that would result in him being able to enforce the judgment against the defendant's assets'.⁴⁷ Thus, the claim must result in a judgment for the payment of a sum of money and in default of payment the judgment creditor can enforce the judgment against the assets that have been frozen by the injunction. A claim for general damages will suffice.⁴⁸

[81] The claims in this matter include damages for unlawful means conspiracy against the Defendants which, if successful, will result in a monetary award to VDHI on behalf of the Noteholders. There are also claims for the Defendants to pay '€36,383,509.52 or such other sum as may seem to the court to be just or appropriate'. If the claim for a declaration setting aside the Consent Order is granted, this could lead to a further order for the repayment of the funds transferred out of the accounts following the entry of the Consent Order. These claims are money claims for the purposes of applying for a freezing injunction.

[82] I am satisfied that the claims pleaded in the statement of claim meet the requirement of being capable of producing money judgments for the purposes of a freezing injunction.

⁴⁶ See for example Lord Leggatt in *Convoy Collateral Ltd v Broad Idea International Ltd* at paragraph 85.

⁴⁷ *Commercial Injunctions* – Steven Gee QC 6th edition paragraph 3 – 030.

⁴⁸ *Allen and others v Jambo Holdings Ltd. and others* [1980] 1 WLR 1252.

Summary of good arguable case

- [83] Pulling the strands together, I am satisfied on the facts in this case and the current state of the law that the Noteholders had a good arguable case when VDHI applied for the WFO based on evidence before Jack J at the Stage 1 hearing and the undertakings offered by VDHI. Further, that VDHI had standing to bring these claims in its own right and on behalf of the Noteholders, a situation that was reinforced by the grant of the representation order on 21st July 2021. Finally, at least some of the claims asserted by VDHI in the claim form and statement of claim can result in a judgment for the payment of specific sums of money and therefore qualify as money claims for the purpose of applying for a freezing injunction. There is no basis to interfere with Jack J's finding that VDHI has shown a good arguable case of fraud.⁴⁹ This takes me to the risk of dissipation.

Condition 2 - Risk of dissipation

- [84] In paragraph [42], I set out a brief outline of the purpose of a freezing injunction as an interlocutory order of the court, granted in aid of execution of a present or future judgment that restrains the person enjoined from dealing with or disposing of its own assets unjustifiably, resulting in the judgment remaining wholly or partially unsatisfied. There are several elements packed into this short description of the risk of dissipation and more elaborate descriptions are set out in the numerous authorities dealing with the principle. Jack J relied on a passage from the judgment of Michel JA in **Green Elite Limited (in liquidation) v Mr. Fang Ankong et al**⁵⁰ which sets out the relevant principles in paragraphs [56] and [57] and I can do no better than to repeat them –

“[56] In **Broad Idea International Limited v Convoy Collateral Limited**, this Court approved the test as stated by Gloster LJ in **Holyoake v Candy**, as follows:

‘...the threshold in relation to conventional freezing orders is well established. There must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. But it is not every risk of a judgment being

⁴⁹ The Discharge Judgment paragraph 80.

⁵⁰ BVIHCMAP2019/0030 (delivered 11th June 2021, unreported).

unsatisfied which can justify freezing order relief. Solid evidence will be required to support a conclusion that relief is justified, although precisely what that entails in any given case will necessarily vary according to the individual circumstances.'

[57] On assessing whether there was a real risk of dissipation, Males J, at paras 69 to 70 in **National Bank Trust v Yurov**⁵¹ had this to say:

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

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

- (a) The claimant must demonstrate a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant's assets.
- (b) That risk can only be demonstrated with solid evidence; mere inference or generalised assertion is not sufficient.
- (c) It is not enough to rely solely on allegations that a defendant has been dishonest; rather it is necessary to scrutinise the evidence to see whether the dishonesty in question does justify a conclusion that assets are likely to be dissipated.
- (d) The relevant inquiry is whether there is a current risk of dissipation; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held.
- (e) The nature, location and liquidity of the defendant's assets are important considerations.
- (f) Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant.

⁵¹ [2016] EWHC 1913.

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

[85] The factors listed in the preceding paragraph from the authorities constitute a comprehensive but not necessarily exhaustive list of the matters that the court will consider in an application for a freezing injunction. Each case must be decided on its own facts and it is the function of the court to decide whether the defendant should be restrained from dealing with his assets unjustifiably. This is an evaluative exercise by the court and an appellate court will be guided in its review of the judge's decision by the principles for appellate interference set out in paragraphs [37] – [40] above.

[86] I should mention by way of emphasis, not addition, that cogent evidence of the risk of dissipation must go to the defendant's propensity to dissipate his assets unjustifiably. It is not enough to prove that he has the ability to dissipate his assets. In the final analysis, there must be evidence, whether in the alleged fraud itself or by other evidence, of a propensity to dissipate, from which the court can infer a serious risk of dissipation. This is why Popplewell J said in **Fundo Soberano De Angola and others v Santos and others**:⁵²

“It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets are likely to be dissipated.”

[87] Applied to this case, Mex Clearing is a part of the MGW group of companies and it undoubtedly has the ability to dispose of its assets in the normal course of its business and to put them beyond the reach of the enforcement of the judgment obtained by VDHI against Multibank. Jack J and this Court have found that there is a good arguable case of fraud against the Defendants. However, that is not necessarily cogent evidence to infer a risk of dissipation. Jack J dealt with this aspect of the case at paragraphs [112]-[113] of the Discharge Judgment as follows:

⁵² [2018] EWHC 2199 (Comm).

“[112] I start my consideration by reminding myself that MBFX [Multibank] is wholly under the control of Mr. Taher, against whom a good arguable case of fraud has been made. He has a conviction for contempt of court and appears to have been happy to manipulate the processes of this Court in the current set of three proceedings. MGW has a web of some thirty-two subsidiaries in many different countries into which Mr. Taher is able to move assets from MBFX. By the nature of its business in foreign exchange MBFX can (and must regularly) move assets out from this jurisdiction very readily indeed. If necessary, Mr. Taher has the means readily to create new companies held in non-transparent ways, so as to hide any assets moved from MBFX.

[113] In my judgment, there is a real risk of a judgment against MBFX going unsatisfied because its assets will be transferred away. There is solid evidence to that effect. Mr. Taher removed the €36.4 million from MBFX very shortly after the Tomlin order was made. That was an overt act of the alleged conspiracy. The money has disappeared. In my judgment the assets of MBFX are likely to be at risk of dissipation. That is a current risk. MBFX’s assets, as I have said, are extremely easy to move around the globe. There is no evidence of their being secured or otherwise difficult to transfer. Mr. Taher’s behaviour in relation to 2020/0215, 2021/0003 and 2021/0073 enhances the risk.”

[88] The learned Judge’s reasoning appears to be that he accepted that there was a good arguable case of fraud against the Defendants, including Multibank, and that they had the ability to dissipate assets unjustifiably. He inferred the propensity to dissipate amounting to a risk of dissipation from the fact that Mr. Taher has de facto control of Multibank, he has a conviction for contempt of court, and he is happy to manipulate the processes of the court. Further, that he caused the removal of the €36.4 million from the FE Accounts at Multibank and ‘the money has disappeared’.⁵³ His finding that the money has disappeared is supported by the evidence of Mr. Salahat that the €36.4 million was transferred to Auton Financial Group in China on trust for Alliance Clearing Ltd. His evidence falls short of saying where the money is now located.⁵⁴ This is evidence on which the Judge, in the exercise of his wide discretion, could rely to infer a real risk of dissipation.

[89] On a finding of fraud, it does not take a lot to infer the risk of dissipation. For example, in **Lakatamia Shipping Company Ltd v Morimoto**⁵⁵, Madam Su, the

⁵³ The Discharge Judgment paragraph 113.

⁵⁴ See paragraph 27 above.

⁵⁵ Supra note 24.

mother of the defendant in previous proceedings, committed a single act of transferring assets owned by her son in breach of a freezing injunction granted against her son in the first case. On an application to continue a second freezing order in fresh proceedings against Madam Su and three other persons the Court of Appeal found, reversing the decision of the trial judge, that Madam Su's single act of breaching the first freezing injunction was powerful evidence of a real risk of dissipation and continued the second freezing injunction against the defendants including Madam Su.

[90] The facts in the instant appeal do not involve a finding of a breach of an existing injunction as in **Lakatamia**, but the principle applies that on a finding of a good arguable case of fraud it does not take a lot more to infer risk of dissipation. Haddon-Cave LJ said at paragraph 51:

“In my view, in the light of the authorities which I consider in detail below, the correct approach in law should be formulated in the following two propositions:

- (1) Where the court accepts that there is a good arguable case that a respondent engaged in wrongdoing against the applicant *relevant to the issue of dissipation*, that holding will point powerfully in favour of a risk of dissipation.
- (2) In such circumstances, it may not be necessary to adduce any significant further evidence in support of a real risk of dissipation; but each case will depend upon its own particular facts and evidence.”

[91] Applied to this case, there is a finding of a good arguable case of an unlawful means conspiracy against the Defendants. There is also evidence that the €36.4 million in the accounts at Multibank was transferred to Mex Clearing within a week of the Consent Order, and later transferred to an account of a third of party in China, and no confirmatory evidence that the money is still held by that party. This is evidence related to the issue of dissipation on which Jack J could have relied to infer that there was a real risk of dissipation by the Defendants including Multibank.

[92] Mr. Malek KC submitted that Jack J did not take into consideration that Multibank is a part of MGW which is a highly regulated group of companies with an impeccable reputation, 320,000 customers and trading in over a hundred countries. In short, it is a highly successful enterprise and it is unlikely that it would allow a judgment against one of its subsidiaries, Multibank, to go unsatisfied. It may very well be that MGW would satisfy a judgment for approximately €36 million against itself that it is not contesting, but this is not a claim against MGW. It is a claim against Multibank which is a separate legal entity and a judgment against Multibank cannot be enforced against the assets of MGW. Being a part of a successful group of companies is not, by itself, an answer to an application for a freezing injunction. It is only a factor to be considered in the evaluative exercise.

[93] In summary, there was evidence to support the finding of a good arguable case of an unlawful means conspiracy to misappropriate the €36.4 million. Multibank was a part of the conspiracy and the €36.4 million had disappeared. There was sufficient evidence before the Judge at Stage 1 to satisfy him that there was a real risk of dissipation and a fortiori at Stage 2 when he had a more complete picture of the evidence and the benefit of counsels' submissions.

Condition 3 - Just and convenient

[94] The third part of the test for a freezing injunction is that the court must be satisfied that it is just and convenient to make the order. This requirement, which applies to all interim injunctions, is derived from section 24 of the **Supreme Court Act** (section 37 of the UK Supreme Court Act 1981) which uses the same wording except that the expression in section 24 is 'just or convenient'. The section has been interpreted in practice as requiring the applicant to prove to the required standard that granting the freezing injunction, which has been described as a nuclear weapon, will be just and convenient. Like Mr. Malek KC, I will use the statement of Lord Kerr in **Niedersachsen** to describe what just and convenient means in the context of a freezing injunction:

“The ultimate test for the exercise of the jurisdiction is whether, in all the circumstances, the case is one in which it appears to the court “to be just

and convenient” to grant the injunction: see section 37 of the *Supreme Court Act 1981* which we have already set out. Thus, the conduct of the plaintiff may be material, and the rights of any third parties who may be affected by the grant of an injunction may often also have to be borne in mind: see *Galaxia Maritime SA v Mineralimportexport, The Eleftherios* p1981] 1 All ER 796, [1982] 1 WLR 539. Further, it must always be remembered that if, or to the extent that, the grant of a *Mareva* injunction inflicts hardship on the defendant, his legitimate interests must prevail over those of the plaintiff, who seeks to obtain security for a claim which may appear to be well founded but which still remains to be established at the trial.”

- [95] Mr. Malek KC submitted that Jack J did not deal with this important limb of the test for a freezing injunction. It is correct that the learned Judge did not deal with just and convenient expressly in his judgment. However, Mr. Penny KC submitted that Jack J is an experienced commercial judge who is accustomed to dealing with applications for freezing injunctions on a regular basis and it is apparent from his judgment that he considered justness and convenience. For example, Mr. Malek KC’s main complaint on just and convenient is that the Judge did not deal with the effect of the WFO on Multibank’s business as a trading company and the company’s reputation. However, when dealing with the risk of dissipation at paragraph [110] of the Discharge Judgment, the Judge referred to the submissions of counsel for Multibank and noted that Mr. Gee KC ‘[s]poke very eloquently about the potential effect of a freezing order on the reputation of a trading company like [Multibank]’. This shows that the Judge considered the effect of the WFO on Multibank’s business, albeit in the section of the Discharge Judgment dealing with the risk of dissipation. The Judge even suggested in paragraph [114] that Multibank could have minimised any risk to its commercial reputation by paying the amount frozen into court or providing a bank guarantee. Whether one agrees with this suggestion in the context of heavily contested litigation is not the point. What it shows is that the Judge considered the effect of the WFO on Multibank’s reputation and business.
- [96] However, considering the effect of the WFO on the business and reputation of Multibank is not the same as determining whether it is just and convenient to

continue the WFO. The effect on Multibank's business and reputation is only one of the factors, albeit an important one, in the evaluative exercise of deciding whether it is just and convenient to continue the WFO. Mr. Malek KC suggested that the practical way of dealing with this omission by the Judge is for this Court to consider the issue and make a finding. I agree with this suggestion.

[97] The starting point is to remind myself that a freezing injunction can have a serious effect on a company's business. The ultimate question is whether it is just and convenient to grant a freezing order, bearing in mind that it has 'the nuclear effect of prohibiting the affected party from dealing with its assets'.⁵⁶ The Court must therefore be satisfied, even in a case where a good arguable case and a risk of dissipation have been established, that the grant or continuation of an injunction is not automatic. The court must be satisfied that it is just and convenient to grant or continue the injunction.

[98] Mr. Malek KC submitted that Multibank is a substantial and established trading company operating internationally and the stigma attached to a freezing injunction against the company is damaging to its commercial interest and should weigh heavily in the assessment of just and convenient.⁵⁷ A more accurate description of Multibank was given by Mr. Yahya Taher, chief executive officer of Multibank, in his first affidavit filed on 5th May 2021 disclosing the assets of Multibank. He stated that Multibank is a part of the MGW group of companies and its role in the Multibank Group is as a 'vehicle which is used to hold client funds and to regularise payments for investment purposes only'.⁵⁸ It seems therefore that Multibank is not a trading company in the popular sense of being a company engaged in the buying and selling of goods. This should limit the claimed reputational loss.

[99] I also consider the findings above that VDHI has a good arguable case for, inter alia, unlawful means conspiracy against the Defendants and that the funds in the FE

⁵⁶ *Petroceltic Resources Limited v Archer* [2018] EWHC 671 (Comm) per Cockerill J at paragraph 21.

⁵⁷ Submissions Bundle (v3) page 34 paragraph 115.

⁵⁸ Bundle 6 (v2) page 122 paragraph 10.

Accounts were removed and were last heard of as being in a third party's account in China. The Judge's word is that the funds have 'disappeared'.

[100] In the circumstances I find that it is just and convenient to continue the WFO until trial or further order.

[101] Mr. Malek KC also complained, as a part of his submissions on just and convenient, about the absence of the expected safeguards in continuing a WFO. His complaints are:

- (a) The Judge should not have heard Stage 1 as an ex parte application. This complaint is surprising in the context of the disappearance of the €36.4 million and the Mex Clearing claims here and abroad which were conducted in private and without reference to the Noteholders who are beneficially entitled to the €36.4 million.
- (b) The absence of an undertaking in the WFO to issue proceedings. This was dealt with in paragraph [92] of the Discharge Judgment and paragraph [63] above.
- (c) The issue of no existing cause of action at Stage 1 was dealt with extensively in paragraphs [61] – [79] above.
- (d) The claimed inadequacy in the cross-undertaking in damages and the need for fortification were dealt with by the Commercial Court and this Court. On 15th July 2022, Wallbank J ordered VDHI to fortify the WFO by paying \$20 million into court by 4 pm on Friday, 12th August 2022, failing which, the WFO would be discharged. VDHI appealed against the learned Judge's order and by a judgment delivered contemporaneously with this judgment, the appeal was allowed and the fortification order set aside. Nothing further needs to be said about the so-called inadequacy of the cross-undertaking in damages and fortification.

[102] I would dismiss these complaints by Multibank.

Material non-disclosure

[103] The principles relating to the failure by an applicant applying for an injunction without notice to give full and frank disclosure to the party to be enjoined, are well known and have been dealt with by this Court on numerous occasions. The locus classicus is **Brink's Mat Ltd v Elcombe and others**⁵⁹ where Ralph Gibson LJ set out the principles which were quoted with approval by Jack J in his judgment at paragraph [99]. Mr. Malek KC set out in paragraph 127 of his submissions a good summary of the basic principles in the following terms:

“127. The principles relating to full and frank disclosure and fair presentation will again be familiar to the Court. The Judge identified the principles, as follows:

- (1) The applicant is required to make a full and fair disclosure of all material facts;
- (2) The material facts are those which it is material for the Judge to know in determining the application, and materiality is to be determined by the Court [not counsel];
- (3) The applicant must make proper enquiries before making the application;
- (4) An applicant who has obtained an order on the basis of material non-disclosure will generally be deprived of the benefit of that order (though not every non-disclosure will result in the discharge of the injunction); and
- (5) Whether a non-disclosure is material depends on the importance of the fact to the issues to be decided by the judge on the ex parte application.”⁶⁰

⁵⁹ [1988] 1 WLR 1350.

⁶⁰ Submissions Bundle (v3) pages 37-38.

[104] Jack J also referred to the observations of Toulson J in **Crown Resources AG v Vinogradsky and others**⁶¹ relating to non-disclosure in the context of applications for freezing injunctions which I find are apposite to this case. Toulson J (as he then was) said:

“Starting from that basis, issues of non-disclosure or abuse of process in relation to the operation of a freezing order ought to be capable of being dealt with quite concisely. Speaking in general terms, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself.”⁶²

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

“By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly, in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the *Rex v. Kensington Income Tax Commissioners* [1917] 1 K.B. 486 principle as a tabula in nafragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.”⁶³

[105] I approach the issue of material non-disclosure in this case bearing in mind the general principles in **Brink’s Mat Ltd** and other cases and the observations of Toulson J and Balcombe LJ cited in the previous paragraphs, as well as the important factual considerations that this was an urgent application and VDHI was hampered in its preparation by the seal and gag orders in the MCL Claim and in

⁶¹ [2001] Lexis Citation 08.

⁶² Ibid pages 4-5 of the transcript.

⁶³ Supra note 59 at page 1359.

the proceedings in London. In the words of Mr. Penny KC in paragraph 145.3 of his written submissions:

“These were urgent proceedings commenced around 4 days after VDHI learnt about the misappropriation of funds and the settlement of the MCL Claim. The court itself had far more information (as the Judge acknowledged), and VDHI was extremely hampered in what it could properly know and do, as it made clear to the court.”⁶⁴

I also consider that Jack J was familiar with the background to the application at Stage 1 based on his previous handling of other applications brought by Mex Clearing in the MCL Claim and the Judge’s own statement that he was more familiar with the background than counsel (see paragraph [32] above).

[106] There are numerous allegations of material non-disclosure raised by Multibank. I will address the following four main items or categories:

- (i) failure to report Multibank’s defences;
- (ii) failure to mention that VDHI and/or the Noteholders had an alternative claim for action oblique in Luxembourg;
- (iii) failure to mention important documents; and
- (iv) failure to make proper enquiries.

[107] VDHI’s treatment of Multibank’s defence at Stage 1 should not be seen as a material non-disclosure. At the time, VDHI had limited information about the MCL Claim. VDH AG had provided them with a copy of the claim form and statement of claim in late March and on 21st April 2021 they were served with a copy of the order made on 19th April 2021 which, inter alia, restrained disclosure of any information about the Luxembourg proceedings. It was only upon being served with the 19th April 2021 order that VDHI became aware of the consensual settlement of the MCL Claim and the disappearance of the €36.4 million from Mex Securities accounts at Multibank. At this time, it would have been reasonable for VDHI to assume that Multibank’s defence of the intended claim would be centred around the matters pleaded in its

⁶⁴ Submissions Bundle (v3) page 101.

statement of claim in the MCL Claim which were exhibited to Mr. Priess' affidavit in support of the application for the WFO. In the limited time available, VDHI should not be unduly criticised for not raising defences that were open to Multibank that were inconsistent with the pleaded claim for repayment of a loan. Mr. Penny KC also relied on the statement of the Court of Appeal in **Konamaneni and others v Rolls-Royce Industrial Power (India) Ltd and others**⁶⁵ that the duty of full and frank disclosure does not extend to disclosing defences or points against the applicant which have 'not been raised by the other side and in respect of which there is no reason to anticipate that the other side would raise such points if it were present and represented'. I do not find that there was material non-disclosure in not elaborating on other potential defences open to Multibank.

[108] Multibank also submitted that VDHI should have disclosed to the Judge that the Noteholders had an alternative claim that it could pursue in Luxembourg as a derivative claim (action oblique). This is answered by the fact that VDHI is pursuing claims governed by BVI law for setting aside an order made by the BVI court, unlawful means conspiracy, BVI statutory claims and other claims under BVI law, against a BVI company and two other defendants who have already submitted to the jurisdiction of the BVI in the MCL Claim. This is the effect of the Judge's finding at paragraph [102] of the Discharge Judgment. In the circumstances it was not incumbent on VDHI to inform the Judge of the existence of a potential claim under Luxembourg law.

[109] The statement of claim disclosed that Mex Clearing, on assignment of a debt from MGW, had sued for the return of the €36.4 million, being the repayment of monies due under loans made to Mex Securities. VDHI should not be criticised now for failing to bring to the Judge's attention the new defence by Multibank that MGW had advanced the €36.4 million and more to Mex Securities to support the Notes. This was a complete turnaround in Multibank's pleadings and case that emerged after the application for the WFO.

⁶⁵ [2002] 1 WLR 1269 at paragraph 180.

- [110] Similar arguments apply to the alleged failure to disclose the Letter of Undertaking and Deed of Affirmation. These documents support Multibank's new position that the monies advanced to Mex Securities by MGW were to support the Notes. These documents are relevant only as background to the MCL Claim as pleaded in December 2020 and the fact that VDHI did not deal with them specifically is not a material non-disclosure.
- [111] Finally, Multibank complained that VDHI failed to make proper enquiries before issuing the without notice application at Stage 1. In particular, they should have consulted VDH AG and Mr. Gollits. Any failure on VDHI's part to make these enquiries is explained by the chain of events. On 14th December 2020, Mex Clearing had obtained an order sealing the court file in the MCL Claim. Later, on 7th April 2021, they obtained a seal and gag order in the MCL Claim restraining any disclosure of the proceedings in Luxembourg where allegations were made by Mex Securities that the BVI Consent Order was fraudulently obtained. Mex Clearing then took that order to London where they got a similar order from Bryan J on 16th April 2021. Both orders named VDH AG as a party to be served. The BVI seal and gag order was amended on 19th April 2021 to restrain 'persons unknown'. Both orders were served on VDHI on 21st April 2021. It was only then that VDHI became aware of the Consent Order and that the € 36.4 million had been removed from the accounts at Multibank. They then started urgent preparation of the application for the WFO. It follows that any attempt to communicate with VDH AG or Mr. Gollits about the issues in the MCL Claim or the Luxembourg claim would have been in breach of the seal and gag orders. The suggestion that they should have made enquiries about the Consent Order is at best, without merit. It appears that VDHI did the best that they could with the limited amount of information that was available to prepare the application for the WFO in the limited time available.
- [112] The allegations of non-disclosure, whether considered individually or cumulatively, do not amount to material non-disclosure and are not sufficient to discharge the

WFO. If I am wrong and there was material non-disclosure by VDHI in applying for the WFO, and the non-disclosure was deliberate to the extent that the WFO should be discharged, I would discharge and re-grant the WFO pending the trial of the action or further order. I would do so because of my findings that there is a good arguable case of fraud and a real risk of dissipation against Multibank.

The first fresh evidence application

[113] On 22nd April 2022, Multibank applied for permission to adduce as new evidence in the appeal the 19th affidavit of Mr. Kattoura. The affidavit exhibits a report from K2 Integrity dated 21st April 2022 that shows that there was an ongoing business relationship between Mr. Smith (of Mex Securities) and VDH AG during the period leading up to the Stage 1 application. Mr. Malek KC submitted that this evidence is important because it shows that Mr. Smith had a continuing business relationship with VDH AG. Had the Judge been aware of it, he would not have come to the conclusion that the Consent Order was ‘clearly collusive’⁶⁶ because Mr. Smith could not have been colluding with the Defendants to defraud persons with whom he (Mr. Smith) had a continuing business relationship. The new evidence would have shown the Judge that Mr. Smith is not, as alleged, a Multibank Group person. VDHI opposed the application.

[114] The test for admitting fresh evidence on appeal is well-known and uncontroversial. The three limbs of the test as derived from the decision of **Ladd v Marshall**,⁶⁷ are: (i) it must be shown that the new evidence could not have been obtained with reasonable diligence for use at the trial in the lower court; (ii) the evidence is such that if admitted it would probably have an important influence on the result of the appeal, though it need not be decisive; and (iii) the evidence must be apparently credible though it need not be incontrovertible.

⁶⁶ The Discharge Judgment paragraph 75.

⁶⁷ [1954] 3 All ER 745.

- [115] The **Ladd v Marshall** principles are not disputed, neither is the fact that the court applies a more relaxed approach to applications to admit new evidence in interlocutory appeals.⁶⁸
- [116] Mr. Malek KC submitted that the first limb of the test was satisfied because the K2 Integrity report was not available at the Stage 2 hearing. Mr. Penny KC responded by submitting that while the report itself was not available, the allegation that Mr. Smith and his company, CSM, had a business relationship with VDH AG was known to Multibank before the Stage 2 hearing. He referred to the 1st affidavit of Mr. Kattoura filed on 27th May 2021 on behalf of Multibank where the deponent spoke of VDH AG co-operating and working with Mr. Smith.⁶⁹ Mr. Kattoura's 19th affidavit in support of the fresh evidence application also referred to two emails dated 23rd April 2021 (one in the German language) from a Mr. Theodoridi of VDH AG to Mr. Smith and copied to Mr. Gollits about management fees which suggests an ongoing business relationship between Mr. Smith and VDH AG. The two emails were also exhibited to Mr. Kattoura's 1st affidavit filed shortly after the WFO was granted. Mr. Penny KC's point is that the emails show an apparent continuing business relationship between Mr. Smith and VDH AG of which Multibank was aware and could, with reasonable diligence, have investigated before the Stage 2 hearing. An application for permission to adduce fresh evidence, especially coming so late after the hearing and just one business day before the hearing of the appeal, takes Multibank outside the parameters of the first limb of **Ladd v Marshall**.
- [117] Mr. Smith's business relationship with VDH AG was not being conducted in private. It was known to Multibank since at least April 2021 and they could have investigated the matter long before the hearing at Stage 2. The K2 Integrity report was fresh in the sense of being recently prepared, but the evidence that it contains is not fresh within the meaning of the first limb of **Ladd v Marshall**.

⁶⁸ Gregory Gilpin-Payne and another v Stephen First and another (delivered 21st July 2020, unreported).

⁶⁹ Bundle 6 (v2) page 168 paragraph 76.

[118] It is not necessary to deal with the other two limbs of the test but I will say something about the second limb. What the court needs to be satisfied about is that the new evidence, if allowed, would probably have an important influence on the result of the appeal, though it need not be decisive. In my opinion the proposed new evidence at its highest shows a business relationship between VDH AG and Mr. Smith which has not been shown to have a direct impact on the dispute between the parties to this appeal. The existence of such a relationship does not mean that Mr. Smith did not participate in the alleged conspiracy with the Defendants.

[119] The second limb of the test also fails and, in the circumstances, it is not necessary to deal with the third limb. I will only mention Multibank's submission that the existence of the relationship between Mr. Smith and VDH AG should have been disclosed to the Judge at Stage 1. I do not accept this because there is no evidence that VDHI was aware of the relationship at the time.

[120] In all the circumstances, including considering the more relaxed approach to fresh evidence applications in interlocutory appeals, I would dismiss the application by Multibank for permission to adduce fresh evidence.

The second fresh evidence application

[121] On 27th January 2023, VDHI applied for permission to adduce fresh evidence in the appeal to be considered before the delivery of judgment in the Discharge Appeal and the Fortification Appeal. The application seeks leave to rely on the Eighteenth Affidavit of Olaf Priess filed on 18th January 2023 and the Nineteenth Affidavit of Olaf Priess filed on 25th January 2023, and it is supported by the Sworn Fourth Affidavit of Sarah Malik filed 30th January 2023.

[122] The principles relating to the admission of fresh evidence on appeal are set out in paragraphs [114]-[115] above relating to the first fresh evidence application. In

summary, all three limbs of the test in **Ladd v Marshall** must be satisfied but the application of the test is more relaxed in interlocutory appeals than in appeals from final judgments after trial.

[123] I should also mention that the Court did not invite oral submissions on the application having regard to the timing of the application and the need to deliver the judgments in the eight appeals and applications that were heard by the Court at the special sitting in April 2022 and the Fortification Appeal that was heard in November 2022. The Court has full submissions from counsel for the parties and considered the application on the papers.

[124] VDHI's position on the application is that the new evidence was not available at the special sitting of the Court in April 2022. They received it from VDH AG on the 12th and 17th January 2023, considered it, and proceeded with due dispatch to file the application. They say that the new evidence shows that Mr. Taher and the Multibank Group owned and controlled Mex Securities which is an important issue in the Discharge Appeal and the Fortification Appeal. If the allegation is made out it will show that all the parties to the MCL Claim and the Tomlin Order were controlled by Mr. Taher and/or the Multibank Group at the material time in December 2019. Further, the new evidence contradicts statements made by Mr. Taher in his sworn evidence in the proceedings as well as allegations made by Multibank in its pleadings.

[125] I have reviewed the proposed new evidence. It consists of emails showing that Mr. Taher and the Multibank Group were involved in the incorporation of Mex Securities, corresponded with the professional organisations doing the incorporation, Allen and Overy (solicitors) and TMF (incorporation agents), and paid fees and expenses for setting up of the company. The emails were exchanged during the period March – June 2018, long before the material events in this appeal in December 2019.

[126] On the issue of ownership and control, the evidence shows that Mex Securities was owned at all material times by a Dutch Stichting, which, as a matter of Dutch law, does not have shareholders or members. The directors of the company are three employees of TMF which, unsurprisingly, does not show who actually controls the company. VDHI is inviting the Court to infer that Mr. Taher and/or the Multibank Group is or was the real owner and controller of Mex Securities. This is disputed by Multibank who say that the company is owned by the Stichting and is controlled by Mr. Gollits and VDH AG.

Analysis

[127] I will start my brief analysis with the second limb of the **Ladd v Marshall** test – that the new evidence is such that if admitted it would probably have an important influence on the result of the appeal, though it need not be decisive. As indicated in the preceding paragraph, the real ownership and control of Mex Securities is unclear. This issue will, if necessary, be resolved at the trial following disclosure and cross examination. For now, while it is relevant to the continuation or discharge of the WFO, it is not a matter that this Court can resolve at this interlocutory stage. I am satisfied that the new evidence relating to ownership and control does not have an important influence on the result of the appeal. A fortiori, the new evidence that challenges Mr. Taher’s credibility is quintessentially an issue to be resolved at the trial. In fact, at paragraph [3] of the Discharge Judgment, Jack J referred to the skeleton argument of VDHI where VDHI said that the ownership and/or control of Mex Securities at the material time ‘is not a matter which the Court can decide on an interlocutory application – it will have to be determined at trial following disclosure and cross examination’.⁷⁰

[128] I find that the new evidence does not satisfy the second limb of the **Ladd v Marshall** test and that is sufficient to dispose of the application. However, I would go further and point out that by the time the application was made in late

⁷⁰ Bundle 5 (v2) page 56, paragraph 24.

January 2023 the decision on the Discharge Appeal had been agreed in draft by the Court and I can say (with certainty) that the new evidence did not have an important effect on the result of the appeal.

[129] I would dismiss the second fresh evidence application filed on 27th January 2023 with costs to Multibank.

The recusal appeal

[130] One of the eight appeals that the Court heard at the special sitting in April 2022, was Multibank's appeal against Jack J's order dismissing an application for him to recuse himself from hearing any further applications in the proceedings in the court below (BVI High Court Claims Nos. BVIHC(COM) 2020/0215, 2021/0003 and 2021/0073). We allowed the appeal and ordered that the Judge ought to have recused himself from all future proceedings in claims BVIHC(COM) 2020/0215, 2021/0003 and 2021/0073 on account of apparent bias, with written reasons to follow. Notwithstanding this finding, I am satisfied, as stated above, that there was sufficient material before the Judge at Stage 1 for him to have found that there was a good arguable case of fraud against Multibank, and a real risk of dissipation of its assets, and to have continued the WFO at Stage 2.

Conclusion and disposal

[131] Reminding myself of the principles for appellate interference, I would not interfere with Jack J's findings that VDHI had established a good arguable case to the required standard for the grant and continuation of the WFO. Accordingly, I would make the following orders:

- i) The appeal is dismissed.
- ii) The first application for permission to adduce fresh evidence by Multibank is dismissed.
- iii) The second application to adduce fresh evidence by VDHI is dismissed.
- iv) Multibank shall pay the costs of the appeal and of the first application for permission to adduce fresh evidence to VDHI.

- v) VDHI shall pay Multibank's costs of the second application to adduce fresh evidence.
- vi) All costs to be assessed by a judge of the Commercial Court if not agreed within 21 days.

Delay in delivery of this judgment

[132] This appeal is one of eight appeals that were heard by the Court at a special sitting in April 2022. The first draft of this judgment was prepared in July 2022, but the Court was asked by counsel in early August to defer delivery of the reserved judgments until Multibank's application for fortification of the undertaking in damages in support of the WFO was heard and determined. The Fortification Appeal was heard on 11th November 2022 and judgment was reserved. I pointed out in paragraph 101(d) above that the Fortification Appeal was determined by a judgment of the Court delivered contemporaneously with this judgment. There was a further delay when VDHI filed the second fresh evidence application on 27th January 2023 which had to be determined before the delivery of this judgment.

[133] Finally, I acknowledge the helpful oral and written submissions of leading counsel on both sides and those assisting them.

I concur.
Mario Michel
Justice of Appeal

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

By the Court

Chief Registrar