

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

TERRITORY OF THE VIRGIN ISLANDS

**BVIHCMAP2021/0023
BVIHCMAP2021/0030
BVIHCMAP2021/0031**

BETWEEN:

MULTIBANK FX INTERNATIONAL CORPORATION

Appellant

and

VON DER HEYDT INVEST SA.

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 and Mr. Hefin Rees KC, with them Mr. Philip 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 – Disclosure – Part 28 of the Civil Procedure Rules 2000 (“CPR”) - Right to inspect and copy documents mentioned in an affidavit - CPR 28.16 - Meaning of “document mentioned” - Specific disclosure - CPR 28.5 - Criteria for ordering specific disclosure – CPR 28.6 – Whether the learned judge erred in the exercise of his discretion by refusing parts of both applications for disclosure

Multibank FX International Corporation (“MBFX”) lodged eight appeals against various interlocutory orders made by the learned judge of the Commercial Division of the High Court. This judgment concerns three of the said appeals which deal with issues of disclosure under Part 28 of the Civil Procedure Rules 2000 (the “CPR”). The facts pertinent to these appeals are that MBFX is a company incorporated in the Territory of the Virgin Islands (the “BVI”) which operates a foreign exchange trading platform. Von Der Heydt Invest SA. (“VDHI”), a Luxembourg corporation, is a fund manager.

A worldwide freezing order was obtained on 26th April 2021 (the “WFO”) against MBFX. MBFX’s application to set aside the WFO was dismissed by the learned judge and the WFO was continued. MBFX subsequently appealed against the continuation of the WFO. On 21st June 2021, a representative order under CPR Part 21 was granted allowing VDHI to represent all the noteholders in these proceedings. MBFX applied to set aside the representative order. In its applications for disclosure, MBFX claimed that the disclosure sought was relevant to the application to discharge the WFO and to its appeal against the continuation of the WFO.

MBFX brought two applications for disclosure. The first (“Disclosure 1”) and the second (“Disclosure 2”) sought the production of documents under CPR 28.16, 28.5 and 28.6. Disclosure 1 filed on 11th August 2021 sought disclosure of documents referred to in the third affidavit of Mr. Olaf Alexander Priess (“Priess 3”). Disclosure 2 filed on 20th September 2021 sought the disclosure of documents referred to in Mr. Priess’ fifth affidavit (“Priess 5”). By a judgment dated 23rd August 2021 (the “August Judgment”) the learned judge ordered disclosure of a letter from the Commission de Surveillance du Secteur Financier (the “CSSF Letter”), but otherwise dismissed the Disclosure 1 application. By a judgment dated 19th October 2021 (the “October Judgment”), the judge refused to order disclosure under CPR 28.5 and 28.6 on the Disclosure 2 application. However, he did order production of five categories of documents sought by MBFX pursuant to CPR 28.16 in Disclosure 2. In so doing, the judge took a restricted view of what constituted a “document mentioned” under CPR 28.16.

Being dissatisfied with these decisions, MBFX filed these three appeals.. he main issue for determination on appeal was whether the learned judge erred in the exercise of his discretion by dismissing parts of MBFX’s applications for disclosure. As to Disclosure 1, MBFX argued that the learned judge erred in his approach since, under CPR 28.16, the court ought to have evaluated whether it was likely that the references in Priess 3 were references to documents and if so, production ought to have been ordered. VDHI countered that these documents were not mentioned in the affidavit within the meaning of that phrase, and therefore the judge was correct not to order their disclosure. As to Disclosure 2, MBFX asserted that the judge failed to exercise his discretion and failed to give his reasons for so doing. They argued that the disclosure sought was relevant to the issues at hand, whilst VDHI countered that they were not, since the court was only dealing with the application to discharge the WFO and not the trial.

Held: allowing the appeals in part, and making the orders set out at paragraph 54 of this judgment, that:

1. Part 28 of the CPR deals with the disclosure and inspection of documents. By CPR 28.2(1), a party's duty to disclose documents is limited to documents which are or have been in the control of that party, meaning that (a) the document is or was in the physical possession of the party, (b) the party has or has had a right to inspect or take copies of the document, or (c) the party has or has had a right to possession of it. Where a party is required by any direction of the court to give standard disclosure, that party must disclose all documents which are directly relevant to the matters in question in the proceedings as per CPR 28.4. Where a party applies for an order under CPR 28.5 and 28.6 for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs, and the order may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings. A party may also apply to the court for an order to inspect and copy documents mentioned in the classes of documents specified at CPR 28.16(10) (a) to (e), which include affidavits, claim forms and statements of case. To make such an order, the judge must be satisfied that the document sought to be produced for inspection and copying was 'mentioned' in one or other of the said classes of documents within the meaning of that expression.
2. Pursuant to the right under CPR 28.16 to inspect and copy documents 'mentioned', the party deploying the document by its mention should be prepared to permit inspection and copying. This "cards on the table" approach to disclosure is, however, not unqualified. The burden rests on the requested party to justify displacing the general right of the requesting party to inspect and copy the documents so mentioned. Accordingly, the requested party may object to their production for inspection on the basis that the document is privileged or was never in their control, or that the mention in the pleadings, affidavit etc. was not to a document. VDHI, as the requested party, did not object to the production of the requested documents on any of the first two grounds. As it pertained to Disclosure 1, the references at paragraph 59 in Priess 3 to "repeatedly signalling" and "signalling" were not mentions of a document. These references therefore did not satisfy the threshold in CPR 28.16 and the judge did not err by refusing that part of the Disclosure 1 application. However, the references at paragraphs 49 and 50 of Priess 3 were to items in, or more likely to be in, documentary form and therefore liable to be produced for inspection and copying. Having regard to the overriding objective, fairness demanded that the parties be placed on an equal footing and the learned judge erred in refusing that part of the Disclosure 1 application. Consequently, the items set forth at sub-paragraph 1 (namely the enclosures to the CSSF Letter which had been referred to at paragraphs 49-50 of Priess 3) and at sub-paragraph 2 (namely the "documents referred to above" in the "slap in the face" email sent 4th December 2020 from Mr. Priess to Mr. Gollits) of Appendix A to Disclosure 1, fell to be disclosed under CPR 28.16.

Renaissance Ventures Ltd. et al v Comodo Holdings Ltd. BVIHCMAP2018/0005 and BVIHCMAP2018/0008 (delivered 13th July 2018, unreported) followed; **Rubin v Expendable Ltd and others** [2008] 1 WLR 1099 applied; **National Crime Agency v Abacha and Others** [2016] EWCA Civ 760 applied.

3. Pursuant to CPR 28.5 and 28.6, an order for specific disclosure requires a party to disclose documents or classes of documents specified in the order or to search for such documents and disclose those so found. Such disclosure will only be ordered where the documents are directly relevant to one or more issues in the proceedings. When deciding whether to order specific disclosure, the court must consider whether disclosure is necessary to dispose fairly of the claim or to save costs. As it pertains to Disclosure 2, the judge treated it as being the same as Disclosure 1 and failed to carry out a weighing exercise. His approach to the determination of the Disclosure 2 application under CPR 28.5 and 28.6 was therefore incorrect, which affected the proper exercise of his discretion. In such circumstances, the Court of Appeal can exercise the discretion afresh. On reviewing the documents sought to be disclosed, the Court was satisfied that some, but not all of them, may be of some relevance to the issues raised in the application to discharge the WFO and the application to set aside the representative order. The Court therefore orders disclosure of the documents listed at 4, 6 and 13 only of Appendix A to the Disclosure 2 application, and refused under CPR 28.5 and 28.6 to order disclosure by inspection and copying of the notes, transcripts and/or documents used to prepare paragraph 39 of Priess 5 specified in Appendix B to Disclosure 2.

Dr. The Honourable Timothy Harris v Dr. The Right Honourable Denzil Douglas SKBHCVAP2019/0026 (delivered 9th December 2021, unreported) followed.

JUDGMENT **(The Disclosure Appeals)**

- [1] **FARARA JA [AG.]:** Multibank FX International Corporation (“MBFX”) appeals against orders contained in decisions by the learned judge, Jack J [Ag.], of the Commercial Court dated 23rd August 2021 (BVIHCMAP2021/0023) and 25th October 2021 (BVIHCMAP2021/0030 and BVIHCMAP2021/0031) respectively. During a special sitting from 25th to 29th April 2022, this Court heard the parties in respect of eight matters, including the said three matters. This judgment concerns the said three matters which were heard together during the special sitting, and which were dealt with together by counsel for the parties in their respective written and oral submissions. They each concern, issues of disclosure under Part 28 of the **Civil Procedure Rules 2000** (the “CPR”). More specifically:

- (i) Appeal BVIHCMAP2021/0023 – **Disclosure 1 (non-specific disclosure)**;

(ii) Appeal BVIHCMAP2021/0030 – **Disclosure 2 (non-specific disclosure)**; and

(iii) Appeal BVIHCMAP2021/0031 – **Disclosure 2 (specific disclosure)**.

Background

- [2] MBFX is a company incorporated in the Territory of the Virgin Islands (the “BVI”) which operates a foreign exchange trading platform. Both MBFX and Mex Clearing Limited (“Mex Clearing”) are subsidiaries of Mex Group Worldwide Ltd (“MGW”), a company incorporated in Hong Kong which operates a financial services group headed by Mr. Naser Taher (“Mr. Taher”). Von Der Heydt Invest SA. (“VDHI”), a Luxembourg corporation, is a fund manager and in particular manages three Luxembourg based UCITS funds. Another entity, Von der Heydt AG (“VDH AG”) is a wealth manager incorporated in Germany and headed by Mr. Michael Gollits (“Mr. Gollits”). Mex Holdings is under the control of Mr. Taher and the Multibank Group.¹ Mex Securities S.A.R.L. (“Mex Securities”), is wholly owned by Stichting Mex Holdings (“Stichting”), a legal entity established in the Netherlands under Dutch law.
- [3] A worldwide freezing order was obtained on 26th April 2021 (the “WFO”) on the basis that MBFX was a participant in an allegedly fraudulent transfer of €36 million from accounts of Mex Securities at MBFX to Mex Clearing. On 21st June 2021, a representative order under CPR Part 21 was granted to VDHI allowing VDHI to represent all the noteholders in these proceedings. MBFX applied to set aside the representative order. An application to discharge the WFO was heard in July and September 2021, and by judgment dated 4th October 2021, the judge dismissed the application and continued the WFO until trial or further order. MBFX has appealed against the dismissal of the discharge application and has applied to set aside the representative order, and claims that the disclosure sought is highly relevant to both applications.

¹ The Multibank Group comprises Mex Group Worldwide Limited (“MGW”), a limited liability company incorporated in Hong Kong, and its numerous subsidiaries.

BVIHCMAP2021/0023 - Disclosure 1

- [4] MBFX brought two applications for disclosure. By application dated 11th August 2021 (known as “Disclosure 1”) MBFX sought the production of documents from VDHI pursuant to CPR 28.16 and CPR 28.5 and 28.6 and/or the court’s inherent jurisdiction. MBFX sought the production of three descriptions of documents under CPR 28.16 and eight categories of documents pursuant to CPR 28.5 and 28.6. These are:

Under CPR 28.16 (at Appendix A to MBFX’s notice of application):

- 1) A letter from the Commission de Surveillance du Secteur Financier (the “CSSF Letter”) said by Mr. Olaf Alexander Priess (“Mr. Priess”) to have been received by VDHI in October 2020 and the enclosures to that letter, which had been referred to at paragraphs 49-50 of the third affidavit of Mr. Priess (“Priess 3”);
- 2) A set of documents, described as the “documents set forth above” referred to in the email from Mr. Priess to Mr. Gollits on 4th December 2020 (referred to as the “slap in the face” email); and
- 3) Documents by which VDHI had “repeatedly signalled” to VDH AG, regulatory issues in the MGW notes, referred to at paragraph 59 of Priess 3.

Under CPR 28.5 and 28.6 (at Appendix B to MBFX’s notice of application):

- 1) The documents set out above under CPR 28.16 (at Appendix A) in the alternative.
- 2) A number of documents which MBFX submits are relevant to its defences or potential defences to the claims brought against it by VDHI and which relate specifically to communications and/or correspondence between VDHI and the CSSF relating to these severe regulatory

deficiencies referred to in the CSSF Letter, and communications and/or correspondence between VDHI and VDH AG concerning the same.

- 3) Communications to Mr. Gollits and from him or his assistant relating to the said “severe deficiencies” or any of them.
- 4) Documents relating to Mr. Gollits and Mex Securities in the period October 2019 to date.
- 5) Notes, transcripts and/or attendances of conference calls between VDHI and the CSSF referred to at paragraphs 51-53 of Priess 3.
- 6) Communications and/or correspondence between VDHI and VDH AG concerning the “severe deficiencies” or any of them referred to in the CSSF Letter regarding, among other things, regulatory issues and investigations and the resignations of the auditors KPMG.
- 7) Notes, transcripts and/or other records of conference calls between VDHI and VDH AG referred to at paragraph 53 of Priess 3; and
- 8) Documents relating to the reasons for KPMG’s resignation, including audit reports referred to at paragraph 55 of Priess 3, and to the auditors of the funds managed by VDHI, and the CSSF severe deficiencies.

[5] The court below determined the Disclosure 1 application ex-parte and by judgment dated 23rd August 2021 (the “August Judgment”),² the learned judge ordered disclosure of the CSSF Letter but otherwise dismissed the disclosure application. Being dissatisfied with that decision MBFX applied for permission to appeal by notice of application dated 1st September 2021. On 12th October 2021, this Court gave MBFX permission to appeal against “the part of the order of Jack J [Ag.] dated 23rd August 2021 in relation to rule 28.16 of the Civil Procedure Rules 2000.”

² Von Der Heydt Invest SA v Mex Clearing Limited et al BVIHC (COM) 2021/0073 and 2020/0215 (delivered 23rd August 2021, unreported) (the “August Judgment”).

BVIHCMAP2021/0030 - Disclosure 2

- [6] By notice of application dated 20th September 2021, MBFX made a further application for disclosure under CPR 28.16 of a number of documents (at Appendix A) mentioned in the fifth affidavit of Mr. Priess filed on 20th September 2021 (“Priess 5”). Alternatively, MBFX sought specific disclosure under CPR 28.5 and 28.6 of all the documents (at Appendix B) under CPR 28.16, and further documents used to prepare paragraph 39 of Priess 5. The judge determined the Disclosure 2 application on a preliminary basis on paper.³ This was subject to the parties indicating by 4:00pm on 21st October 2021 whether they wanted an oral hearing “to revisit these preliminary findings”. If they did not, the implication was that the judge’s preliminary finding would, effectively, be no longer preliminary, and the matter would proceed to the stage of hearing the parties on the issue of costs.⁴
- [7] By his judgment of 19th October 2021 (the “October Judgment”) the learned judge, having observed that the Court of Appeal had not yet granted leave to MBFX to appeal the part of his August Judgment on Disclosure 1 under CPR 28.5 and 28.6, determined the Disclosure 2 application by refusing to order disclosure under CPR 28.5 and 28.6. In refusing disclosure under these rules, the judge stated:

“In these circumstances in my judgment I should follow the view I expressed in my judgment of 23rd August 2021. Disclosure 2 seeks similar relief. The documents sought are different, but MBFX has not in my judgment made out a sufficient case that there is anything which makes this a suitable case for making this unusual order.”

However, the learned judge did order production of all but five categories of documents sought by MBFX pursuant to CPR 28.16.⁵ In doing so, the learned judge considered that a more restricted view of what constitutes a “document mentioned” is appropriate under CPR 28.16, than in relation to the equivalent provisions of both the English Civil Procedure Rules and the Hong Kong Order 24 rule 10. This is

³ Mex Clearing Ltd. v Mex Securities SARL et al BVIHC (COM) 2020/0215, 2021/0003 and 2021/0073 (delivered 19th October 2021, unreported) (the “October Judgment”) at para. 3.

⁴ Supra n. 3 at para. 9.

⁵ Ibid at para. 6.

because the Hong Kong rule limits disclosure to that which is “necessary either for disposing fairly of the cause or matter or for saving costs,” and there is no similar provision applicable to disclosure pursuant to CPR 28.16. He stressed that while he had refused to allow reliance at the substantive hearing on Priess 5, the said affidavit had been filed and he had not made an order striking it out. Accordingly, it was evidence in the case and therefore CPR 28.16(1)(a) applied.⁶ The judge also granted permission to appeal in respect of MBFX’s disclosure application pursuant to CPR 28.16.⁷ This Court on 3rd December 2021 granted MBFX leave to appeal in respect of MBFX’s disclosure application pursuant to CPR 28.5 and 28.6.

No leave granted – Disclosure 1 CPR 28.5-28.6

- [8] VDHI in its submissions⁸ argued that on 12th October 2021, this Court granted MBFX leave to appeal the judge’s decision in Disclosure 1 in relation to its application pursuant to CPR 28.16 only. No leave to appeal was granted to MBFX in respect of its application for specific disclosure pursuant to CPR 28.5 and 28.6 for Disclosure 1.
- [9] In response,⁹ MBFX argued that in its application for permission to appeal, it sought to appeal the judge’s: (i) refusal of disclosure of certain of the documents sought under CPR 28.16, and his (ii) dismissal of the application under CPR 28.5 and 28.6 entirely. MBFX further argued that no order was made either granting or refusing permission on the application for permission to appeal under CPR 28.5 and 28.6.¹⁰
- [10] The order of this Court dated 12th October 2021 specifically stated:
- “The application for leave to appeal against the part of the order of Jack J [Ag.] dated 23rd August 2021 in relation to rule 28.16 of the Civil Procedure Rules 2000, is granted.”

⁶ Supra n. 3 at para. 7.

⁷ Supra n. 5.

⁸ See VDHI’s submissions filed in BVIHCP2021/0031 on 19th April 2022 at paras. 1.c and 2-4.

⁹ See MBFX’s submissions filed in BVIHCP2021/0031 on 20th April 2022 at para. 3.6.

¹⁰ Ibid at para. 3.9.

[11] It is clear that leave to appeal with respect to the decision in Disclosure 1 was only granted in relation to CPR 28.16. Leave was not granted with respect to CPR 28.5 and 28.6. Subsequently, no such leave was sought or granted. As was decided in **Oliver McDonna v Benjamin Wilson Richardson**¹¹ an interlocutory appeal brought without leave where leave is required is a nullity. This Court in **Candey Limited v Russell Crumpler and another**¹² at paragraph 27 stated:

“It is trite that an appeal which is filed without leave of the court when leave is required will result in the appeal being struck out as a nullity.”

[12] It is beyond doubt therefore that MBFX, having not obtained leave to appeal in respect of its application for specific disclosure pursuant to CPR 28.5 and 28.6 for the August Judgment, that part of MBFX’s notice of appeal must be disallowed. Accordingly, there is no need to consider it further in this judgment.

The Appeals

[13] By notice of appeal filed on 3rd November 2021 in appeal BVIHCMAP2021/0023, MBFX appealed the decision of the court below in Disclosure 1 and sought the following orders:

- (1) Directions for adding documents (if any) to the record for the appeal out of the record for the pending applications in the High Court and for service of skeleton arguments within such time as the court may direct.
- (2) Leave to adduce or to rely on the first affidavit of Mr. Salem Kattoura (“Mr. Kattoura”) sworn 1st September 2021.
- (3) An order setting aside the order of Mr. Justice Jack [Ag.] dated 23rd August 2021, save for paragraph 1.
- (4) An order in such terms as may be just and appropriate for the production of documents for inspection and copying under CPR 28.16 and/or for specific disclosure under CPR 28.5, of the auditor’s report,

¹¹ AXAHCVP2005/0003 (delivered 29th June 2007, unreported).

¹² BVIHCMAP2020/0021 (delivered 21st September 2021, unreported).

the documents identified in the full version of the CSSF Letter/report, including in the first and second paragraphs thereof and in the heading, or alternatively such subset of those documents as may be just, the documents enclosed to that letter/report, and/or the full text of the “slap in the face” email from Mr. Priess to Mr. Gollits which is the subject of the 4th December 2020 email from one Mr. Brandl to Mr. Gollits, and the attachments to that email

- (5) An order remitting the balance of the disclosure application under CPR 28.16 and CPR 28.5 to the court below in such terms and to such judge as the court considers just and appropriate
- (6) An order providing for a stay of determination of the application for an order setting aside the *ex parte* representative order until 14 days (or such other period as the court determines is appropriate) after production of documents and resolution of any application for disclosure within matters remitted, and an opportunity to make submissions on the pending applications based on the documents produced; and
- (7) An order providing that the respondent pay the applicant’s costs below and the costs of the appeal.

The conclusion reached at paragraphs 11 and 12 of this judgment will apply to the appeal of the August Judgment in relation to all grounds of appeal concerning CPR 28.5 and 28.6.

- [14] In BVIHCMAP2021/0030, (“Disclosure 2 – non-specific disclosure”) MBFX filed a notice of appeal on 9th November 2021 against the decision contained in paragraph 2 of the order dated 25th October 2021 in Disclosure 2, and sought the following orders:

(1) An order varying paragraph 2 of the order of Justice Jack [Ag.] dated 25th October 2021.

(2) An order pursuant to CPR 28.16 for production by the respondent to the appellant within 7 days of the documents specified at the entries under numbers 4, 6, 10, 12 and 13 of the table at Appendix A to the disclosure application.

[15] By notice of appeal filed on 10th December 2021 in BVIHCMAP2021/0031 (“Disclosure 2 -specific disclosure”) MBFX further appealed against the order dated 25th October 2021 in Disclosure 2, and sought the following orders:

(1) An order varying paragraph 2 of the order of Justice Jack [Ag.] dated 25th October 2021.

(2) An order pursuant to CPR 28.5 and 28.6 for production by the respondent to the appellant within 7 days of the documents specified in Appendix B to the disclosure application.

CPR 28.16 - Documents referred to in statements of case, etc.

[16] CPR 28.16 provides:

- “1. A party may inspect and copy a document mentioned in -
 - a. an affidavit;
 - b. an expert’s report;
 - c. a statement of case;
 - d. a witness statement or summary; or
 - e. the claim form.
2. A party who wishes to inspect and copy such a document must give written notice to the party who, or whose witness, mentioned the document.
3. The party to whom the notice is given must comply with the notice not more than 7 days after the date on which the notice is served.”

The August Judgment: BVIHCMAP2021/0023 - Disclosure 1

[17] The Disclosure 1 application was made in connection with Priess 3, specifically paragraphs 49, 50 and 59. Disclosure was sought by MBFX because (as is the same with the Disclosure 2 application) “[it] believed that documents in the possession of VDHI were highly relevant to the discharge application (in relation to the WFO) and to an application by [it] to set aside a representative party order made on 21st June 2021 by which VDHI was made a representative claimant in the proceedings for all the noteholders.”¹³

[18] The learned judge at paragraphs 13 and 16-19 of his August Judgment stated:

“[13] Mr. Gee QC submits that CPR 28.16 applies to documents mentioned in an exhibit to an affidavit, just as it applies to documents mentioned in the affidavit itself.

...

[16] Hirst J [in *Nissho Iwai Corp v Gulf Fisheries Co WWL* [unreported, 12th July 1988, [1988] Lexis Citation 2379] was willing to treat references in exhibits as coming within the equivalent of CPR 28.16 on the basis that the RSC gave him a broad discretion to order disclosure only where it was “necessary”. Our CPR do not have a similar breadth of discretion. Thus, it would be wrong in my judgment to apply Hirst J’s approach indiscriminately.

[17] It is also important to note that both Megarry and Hirst JJ (sic) agreed that there cannot be “any deemed inclusion of the exhibit in the affidavit for all purposes.” It follows in my judgment that the Court has to stand back and ask itself this question: Does an affidavit which exhibits a document also mention a further document which is mentioned in the document exhibited but which not itself exhibited? This, in my judgment, is a factual question to be decided on the facts of the individual case: does this affidavit mention this further document?

[18] A mechanical rule that exhibiting document A means that document B mentioned in document A automatically results in a duty of disclosure under CPR 28.16 leads to absurdity. If document B refers to document C, then C would be disclosable (even though C was not exhibited). Likewise, document D referred to in document C would be disclosable — and so on, with a potentially infinite chain of documents (subject only to the number of documents within the possession power and control of the disclosing party). This mechanical approach in my judgment is wrong: the individualized consideration of the particular affidavit in question is required.

¹³ Supra n. 9 at para. 6.

[19] I therefore stand back and re-read paras 49, 50 and 59 of Mr. Priess' third affidavit. In my judgment, there is no mention of the disputed documents in those paragraphs. Accordingly, I refuse the application under CPR 28.16 in respect of those documents."

[19] MBFX submits that the approach taken by the judge was wrong and states that:

"50. First, [CPR 28.16] requires the Court to assess whether there is any conceivable way that information referred to in an affidavit as existing or being conveyed could be in any form other than a "document" and, if so, and however unlikely that was, to refuse production." ¹⁴

[20] MBFX contends that the proper course of action would be for the court to evaluate whether it is likely that the reference is a reference to a document. If so, production should be ordered. MBFX asserts that there is no chance of unfairness because the court can order production as long as the document is in the respondent's possession, custody, or control. However, there is no legal obstacle to the court ordering production of a document that is not under either party's possession or control. MBFX argues that if the reference in the affidavit is not to a document but some other form of communication which cannot be produced there is no burden on the respondent.¹⁵

[21] VDHI however argues that "the affidavit must specifically identify or make direct allusion to the document or class of documents in question, and it is insufficient that an affidavit refers to a transaction which on the balance of probabilities will have been effected by the document for which inspection is sought; the document itself needs to be mentioned or directly alluded to."¹⁶

[22] VDHI further argues that the request for disclosure was neither immediate nor prompt, and rather there was considerable delay in pursuing almost all the disclosure sought. Disclosure should have been sought earlier before the commencement of the hearing if they were perceived to be so critical. Additionally,

¹⁴ Supra n. 9 at para. 50.

¹⁵ Ibid at para. 52.

¹⁶ Supra n. 8 at para. 6.

VDHI argued that the court below did not, therefore, err in principle and applied the correct test.

[23] VDHI also argues that, the only other categories of disclosure sought of “signalling” and of “notes, transcripts and/or other records of conference calls between [VDHI] and VDH AG as referred to at paragraph 3 of [Priess 3]” were rightly found by the court not to be references to documents, and therefore not disclosable under CPR 28.16.

[24] MBFX however contends that the CSSF Letter is mentioned and relied upon explicitly in Priess 3 and that Mr. Priess gives evidence as to the context of the letter, what is addressed, and his interpretation of its contents.¹⁷ MBFX submits that the CSSF Letter is not simply a document exhibited to that affidavit but not otherwise referred to in the body of the evidence. MBFX argues that the CSSF Letter should be treated as a component of Priess 3; and that the documents mentioned therein, including the “documents set forth above” are accordingly mentioned for the purposes of CPR 28.16.¹⁸

[25] At paragraph 72 of its skeleton argument,¹⁹ MBFX states that:

“The CSSF Letter:

72.1. Sets out a number of documents such as annual reports, management letters, and reports on activities of VDHI’s funds, including the three Noteholder funds;

72.2. Notes that the auditors have identified “severe deficiencies in relation to the functioning of the Funds” and VDHI’s management;

72.3. Sets out the CSSF’s conclusion as to the “existence of structural deficiencies at the level of the organization of [VDHI] and the orderly functioning of the Funds”;

72.4. Notes that some deficiencies had already been identified in previous annual reports, and not remedied;

¹⁷ Supra n. 9 at para. 70.

¹⁸ Ibid at para. 71.

¹⁹ Supra n. 9.

72.5. Demands a “detailed explanation on the corrective measures... to address the deficiencies” and requires a timetable for remedial action.”

The applicable law

[26] In **Renaissance Ventures Ltd. et al v Comodo Holdings Ltd.**²⁰ at paragraph 27 this Court stated:

“If a party refers to a document in his pleadings or written evidence, he must be taken to be relying on that document and must produce it if requested by any other party in the case. The requesting party under this rule does not have to prove that the document is directly relevant to the case.”

[27] Rix LJ in **Rubin v Expendable Ltd and others**²¹ at paragraph 24 stated:

“The general ethos of the CPR is for a more cards on the table approach to litigation. If a party thinks it worthwhile to mention a document in his pleadings, witness statements or affidavits, I do not see why, subject as I say to the question of privilege, the court should put difficulties in the way of inspection. I look upon the mention of a document in pleadings etc. as a form of disclosure. The document in question has not been disclosed by list, or at any rate not yet, but it has been disclosed by mention in what, for the purposes of litigation, is another important and formal category of documents. If so, then the party deploying that document by its mention should in principle be prepared to be required to permit its inspection, and the other party should be entitled to its inspection.” (Emphasis added)

[28] The English Court of Appeal in **National Crime Agency v Abacha and Others**²² at paragraph 30 stated:

“[T]he right to inspect is not, however, unqualified; it is instead subject to CPR rules based limits, which may be invoked by the party resisting inspection - the burden resting on that party to justify displacing the general rule. Thus, “proportionality” is part of the overriding objective in an appropriate case, it would be open to a party to oppose inspection on the ground that it would be “disproportionate to the issues in the case” In determining any such issue of proportionality, a Court would very likely have regard to whether inspection of the documents was necessary for the fair disposal of the application or action.”

²⁰ BVIHCMAP2018/0005 and BVIHCMAP2018/0008 (delivered 13th July 2018, unreported).

²¹ [2008] 1 WLR 1099.

²² [2016] EWCA Civ 760.

Analysis and Conclusion

- [29] I find agreement with paragraph 53 of MBFX's submissions which states:
- “If in fact the reference in the affidavit was not to a document, but to some other form of communication which cannot be produced, then there is no burden on the respondent. The respondent to an application such as this could also give evidence prior to determination by the Court that no such document in fact exists. Assuming that the Court accepted that explanation, it would be open to it not to order production. It is notable that in this instance, VDHI did not and still has not asserted that, as regards any of the disclosure sought by MBFX, no document exists.”
- [30] Applying the principles above, it should not be necessary for the recipient of a statement of case or witness testimony or affidavit to examine each instance in which a document may be mentioned, determine whether it is credible that the reference refers to an oral or non-written form of communication, and then modify their request accordingly. The party serving the evidence or statement of case, or the affidavit can and should explain clearly whether what may look to be a reference in the evidence to a document is actually not. The recipient should have the right to request the documents that were mentioned.
- [31] This Court in **Renaissance** held that there are ways of objecting to disclosure of referenced documents, for example, the document may be privileged and lack of control may also be raised. In the instant matter, there is no suggestion by VDHI that any of the material sought was privileged; provided orally; is not in documentary form; or is not or was never in their possession or control.
- [32] VDHI submitted, at paragraph 29.b²³ of its skeleton argument, that the court below determined Disclosure 1 on paper and before the deadline for VDHI to respond to it. Accordingly, VDHI filed no evidence in opposition. It argues that this Court:
- “...should not ‘determine’ the underlying disclosure application against VDHI (if it were minded to) without hearing from VDHI in evidence. The only fair outcome possible on the appeal, were this Court to consider that the Court below made the wrong decision, would be to remit the entire application to the Court below for reconsideration, with directions affording

²³ Supra n. 8 at para. 29.b.

VDHI the opportunity to put in evidence and submissions in opposition to it.”

- [33] The judge at paragraphs 9 to 10 of the August Judgment in discussing the merits of an application under CPR 28.16 stated:

“[9] ...The rule is both wide and narrow. It is wide in that a document need only be “mentioned”. If there is a mention, then the Court will not (save in exceptional circumstances) carry out a relevance or materiality examination as it would under the ordinary rules of disclosure in CPR 28.4 to 28.6: **Renaissance Ventures Ltd. [et al] v Comodo Holdings Ltd.**

[10] It is narrow in that there must be mention of “a document”. “Document” is broadly defined as meaning “anything on or in which information of any description is recorded”: CPR 28.1(2). However, there must be mention in the pleading etc. of the document. This in my judgment is fatal to MBFX’s application for the documents “repeatedly signalled” to VDH AG. “Signalling” can be oral. (Indeed, particularly in times gone by, it could be, for example, by Morse code or semaphore.) The fact that the “signalling” here is likely to have been by email is neither here nor there for the application of CPR 28.16. Unless the pleading etc. itself expressly mentions “a document”, there is nothing on which this rule can bite. Accordingly, I refuse this part of the application.”

- [34] In my judgment, the learned judge was correct in the approach which he adopted in relation to disclosure pursuant to CPR 28.16 to the extent that under the said rule, disclosure must relate to a “document mentioned” in an affidavit, statement of case etc. In my judgment, it was open to the learned judge, and he was correct, to conclude, as he did at paragraph 10, that references in paragraph 59 of Priess 3 to “repeatedly signalling” and “signalling” were not references to or the mentioning of a document. These references do not satisfy the test under CPR 28.16 and were therefore not documents to be disclosed based purely on such references. The learned judge was, therefore, correct to refuse that part of the Disclosure 1 application.

- [35] That said, it is important to bear in mind, that CPR 28.16 deals with the right of a party to civil litigation “to inspect and copy documents.” Where a document is “mentioned” in any one of the classes of documents listed at CPR 28.16(1)(a) to (e), the requested party “must comply with the notice.” It follows that the power of the

court under CPR 28.16 is to enforce, by appropriate order, the right of the requesting party to inspect and to copy the documents so mentioned. Also, as a matter of principle, it is for the party who was requested to provide disclosure to indicate the state of the requested documents, that is, are they in written documentary form (whether letter, email or otherwise) or in some other form be it electronic or otherwise. In many instances, it may be quite clear that the likely format is documentary, as for example, communications on issues or matters of importance between a regulatory agency and a regulated entity. Similarly, references to or mentions of audits or audit reports or financial reports are more likely to be kept in documentary form, even where each such documents are also being held in electronic format. Of course, all this is circumscribed by the duty to disclose documents “which are or have been in the control of that party” as per CPR 28.2(1).

[36] I will now turn to the observations of the learned judge at paragraphs 15, 16, 17, 18 and 19 of the August Judgment. Here the judge stated:

“[15]. The practice of exhibiting all documents to a single affidavit in a single exhibit is comparatively recent. The number of documents typically exhibited has also increased very dramatically... it is wholly unrealistic nowadays to treat a 2,000 page exhibit (much of which will never have been read by anybody) as similarly read into the affidavit.

[16] Hirst J was willing to treat references in exhibits as coming within the equivalent of CPR 28.16 on the basis that the RSC gave him a broad discretion to order disclosure only where it was “necessary”. Our CPR do not have a similar breadth of discretion...

[17] It is also important to note that both Megarry and Hirst JJ agreed that there cannot be “any deemed inclusion of the exhibit in the affidavit for all purposes”. It follows in my judgment that the Court has to stand back and ask itself this question: Does an affidavit which exhibits a document also mention a further document which is mentioned in the document exhibited but which not itself exhibited? This, in my judgment, is a factual question to be decided on the facts of the individual case: does this affidavit mention this further document?

[18] A mechanical rule that exhibiting document A means that document B mentioned in document A automatically results in a duty of disclosure under CPR 28.16 leads to absurdity. If document B refers to document C, then C would be disclosable (even though C was not exhibited). Likewise,

document D referred to in document C would be disclosable — and so on, with a potentially infinite chain of documents (subject only to the number of documents within the possession power and control of the disclosing party). This mechanical approach in my judgment is wrong: the individualized consideration of the particular affidavit in question is required.

[19] I therefore stand back and re-read paras 49, 50 and 59 of Mr. Priess' third affidavit. In my judgment, there is no mention of the disputed documents in those paragraphs. Accordingly, I refuse the application under CPR 28.16 in respect of those documents."

[37] I agree that a judge in determining an application for disclosure should exercise constraints of reasonableness and proportionality. However, the judge should not create or impose unnecessary barriers to disclosure. Further CPR 28.1(2) defines "document" as anything on or in which information of any description is recorded. CPR 28.1(4) indicates that a document is "directly relevant" if – (a) the party with control of the document intends to rely on it; (b) it tends to adversely affect that party's case; or (c) it tends to support another party's case.

[38] Upon review of Priess 3, specifically paragraphs 49 and 50, the application for disclosure filed on 11th August 2021 and Appendix A of documents to be disclosed pursuant to CPR 28.16, I am satisfied that most of the documents requested under CPR 28.16 are likely to be in documentary form (and if they are not VDHI can indicate at the appropriate time), and are therefore liable to be produced for inspection and copying. These paragraphs refer to or mention not only the CSSF Letter, but following receipt of that letter, the "extensive communication with the supervisory body [CSSF]", which communications are, in my view, more likely to have been in documentary form coming from a regulator, and therefore caught by CPR 28.16. There is also mention of "auditor's reports on the administered funds" by VDHI, which again are more likely to be documents and to CSSF drawing VDHI's attention, as the management company, "to deficiencies". One would expect any regulator of funds to communicate with or about a regulated entity about such important matters in written format, and thus, these documents are "mentioned" in Priess 3 and are caught by CPR 28.16. This also includes "the documents set forth above" referred to in the "slap in the face" email of 4th December 2020. It is not

correct, in my view, to say that these referenced documents “are not part of the screenshot [of a part of the CSSF Letter], so it is not apparent from the email of 4th December [2020] what they were” as the learned judge said at paragraph 6.

[39] Further, adopting the principles highlighted in the cases above and the “all cards on the table approach” advocated by Rix LJ in **Rubin**, I find that basic fairness and principle in an adversarial system, in accordance with the overriding objective, favors the parties being placed on an equal footing.²⁴ Consequently, I am satisfied that the judge took matters into consideration that he should not have and did not consider matters that he should have and as a result, committed errors of principle, and his decision, in part, was outside the generous ambit within which reasonable disagreement is possible.

[40] I would therefore allow the appeal in BVIHCMAP2021/0023 in relation to the decision on the Disclosure 1 application, save and except for the documents mentioned at paragraph 59 of Priess 3 and requested at Appendix A item 3 (dealt with in paragraph 34 above). I would therefore order disclosure of the documents sought under CPR 28.16 in respect of item 1, namely the enclosures to the CSSF Letter which had been referred to at paragraphs 49-50 of Priess 3, and item 2 of Appendix A to the Disclosure 1 application being “the documents set forth above” in the ‘slap in the face’ email of 4th December 2020.

The October Judgment: BVIHCMAP2021/0030 and BVIHCMAP2021/0031 - Disclosure 2 (specific and non-specific disclosure)

[41] CPR 28.5 and 28.6 state:

“28.5

1. An order for specific disclosure is an order that a party must do one or more of the following things –

- a. disclose documents or classes of documents specified in the order;
- b. carry out a search for documents to the extent stated in the order;
- c. disclose any document located as a result of that search.

²⁴ See *National Crime Agency v Abacha and Others* [2016] EWCA Civ 760 at para. 29.

2. An order for specific disclosure may be made on or without an application.
3. An application for specific disclosure may be made without notice at a case management conference.
4. An application for specific disclosure may identify documents -
 - a. by describing the class to which they belong; or
 - b. in any other manner.
5. An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings.

28.6

1. When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.
2. The court must have regard to –
 - a. the likely benefits of specific disclosure;
 - b. the likely cost of specific disclosure; and
 - c. whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.
3. If, having regard to paragraph (2) (c), the court would otherwise refuse to make an order for specific disclosure, it may nonetheless make such an order on terms that the party seeking the order must pay the other party's costs of such disclosure in any event.
4. If the court makes an order under paragraph (3), it must assess the costs to be paid in accordance with rule 65.12.
5. The party in whose favour such order for costs was made may apply to vary the amount of costs so assessed."

[42] The judge at paragraph 4 of the October Judgment stated:

"So far as the CPR 28.5 and 28.6 point is concerned, the Court of Appeal has not yet granted leave to appeal. In these circumstances in my judgment, I should follow the view I expressed in my judgment of 23rd August 2021. Disclosure 2 seeks similar relief. The documents sought are different, but MBFX has not in my judgment made out a sufficient case that there is anything which makes this a suitable case for making this unusual order. I therefore refuse this second limb of Disclosure 2."

- [43] Disclosure 2 sought disclosure of documents mentioned in Priess 5. In relation to Disclosure 2, MBFX in its submissions, accepts that the judge's refusal of disclosure under CPR 28.5 and 28.6, is a discretionary power. However, MBFX submits that the judge did not exercise his discretion and he failed to explain his reasons for not doing so, as he was required to do.²⁵ Alternatively, if he did, he failed to explain his reasons for doing so, and/or ignored matters he ought to have taken into account, and/or took into account matters he ought not to have.
- [44] MBFX further argues that the documents are crucial to its defence and that the regulatory issues impeach VDHI's fraud allegations. MBFX therefore contends that the test for specific disclosure in the context of an interlocutory application, namely that the documents were necessary for the just disposal of the application, is comfortably met.
- [45] VDHI argues that the disclosure sought by MBFX was irrelevant to the application to be resolved and that the disclosure was therefore unwarranted for the purposes of determining those applications. VDHI however submits at paragraph 29.b-d that if this Court is minded to allow the appeal:
- "The only fair outcome possible on the appeal, were this Court to consider that the Court below made the wrong decision, would be to remit the entire application to the Court below.... However, in considering whether to do that, this Court should admit and give consideration to the Fifth Affidavit of Olaf Alexander Priess (and indeed earlier evidence) which addresses the CSSF issues and letter....this Court should be prepared to admit and consider Priess 5."²⁶
- [46] VDHI also contends that there was no need for the disclosure sought when the court was concerned only with whether there was a good arguable case justifying the continuation of the injunction, or whether there had been a material non-disclosure justifying its discharge. The court below was not finally determining matters arising on the claim or defence as if at trial, thus the pursuit of the disclosure by MBFX at

²⁵ See *English v Emery Reimbold & Strick Ltd* [2002] 3 All ER 385.

²⁶ See VDHI's submissions filed in BVIHCMAP2021/0030 and BVIHCMAP2021/0031 on 19th April 2022.

that stage, would lead to undue costs and delay. VDHI further argues that Priess 5 was not allowed in by the court below for the purposes of the hearing concluding on 21st – 23rd September 2021. Therefore, no unfairness or prejudice arose as a result of the court below not ordering production or disclosure of documents mentioned in that affidavit.²⁷

Analysis and Conclusion

- [47] I find the statement of the English Court of Appeal in **Rafidain Bank v Agom Universal Sugar Trading Co Ltd**²⁸ instructive. There, Nourse LJ stated:

“The party who refers to the documents does so by choice, usually because they are either an essential part of his cause of action or defence or of significant probative value to him. Neither of those functions presupposes that they will be in his possession, custody or power. As Lindley LJ observed in *Quilter v Heatly* (1883) 23 Ch D 42 [at] 50....the material provisions were evidently intended to give the other party the same advantage as if the documents referred to had been fully set out in the pleadings. Why should that advantage be automatically denied to him because the documents are not in the possession, custody or power of the party who refers to them?Doubtless the absence of possession, custody or power will sometimes amount to a good cause. But why should it invariably do so?”

- [48] Part 28 of the CPR, deals with the disclosure and inspection of documents. A party's duty to disclose documents is “limited to documents which are/or have been in the control of that party” as per CPR 28.2(1). Where a party is required to give standard disclosure, that party “must disclose all documents which are directly relevant to the matters in question in the proceedings” as per CPR 28.4. Only documents that are “directly relevant to one or more issues involved in the proceedings” may be subject to a specific disclosure order under CPR 28.5(5). When deciding whether to order specific disclosure, “the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs” as per CPR 28.6.

²⁷ Ibid at paras. 25-27.

²⁸ [1987] 1 W.L.R. 1606.

[49] This Court in **Dr. The Honourable Timothy Harris v Dr. The Right Honourable Denzil Douglas**²⁹ stated:

“[14] When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs. The court must have regard to the likely benefits of specific disclosure; the likely costs of specific disclosure; and whether the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.

[15] For the purpose of disclosure, the relevance of the documents is analysed by reference to the pleadings and the factual issues that would arise for decision at the trial. Disclosure must be limited to documents directly relevant to those issues. In seeking to identify the factual issues which would arise for decision at the trial, the judge is obliged to analyse the pleadings. The critical question is whether the documents are directly relevant, and if they are, the court is enjoined to consider whether the order is necessary to dispose of the case fairly. It is necessary to pay regard to the overriding objective of the CPR which is to enable the court to deal with cases justly; this also engages the issue of proportionality.

[17] The rationale for the discretion to order specific disclosure is that the overriding objective obliges the parties to give access to those documents which will assist the other’s case. The court has discretion as to whether to make an order for specific disclosure and will need to be satisfied that the documents are directly relevant within the parameters of the rule. However, the test for relevance is not a matter for the exercise of discretion. What documents parties are entitled to is a matter of law, not discretion.”

[50] Applying the principles noted above, in my view the judge clearly fell into error and treated Disclosure 2 as being exactly the same as Disclosure 1, despite noting that the documents are different. It does not appear that the judge carried out a weighing exercise in the October Judgment but followed his reasoning in the August Judgment in refusing disclosure pursuant to CPR 28.5 and 28.6. In doing so, he committed an error of principle and was clearly wrong in his approach. Having reached this conclusion, this Court must go on to consider, in the exercise of the discretion afresh, which of the five categories of documents requested under Appendix A to the Disclosure 2 application (specific and non-specific disclosure)

²⁹ SKBHCVP2019/0026 (delivered 9th December 2021, unreported).

ought to be allowed as being necessary to dispose fairly of the claim and to save costs.

[51] The stated purpose of MBFX's Disclosure 2 application (as with its Disclosure 1 application) was that these documents were necessary or relevant in relation to the issues concerning its separate applications to discharge the WFO and the representative order, both of which applications were subsequently refused by the learned judge. The judge's decisions on these two discharge applications were the subject of separate appeals (BVIHCMAP2021/0009 and BVIHCMAP2022/0032), which were heard during the special sitting. The reserved judgment in each of these appeals is to be delivered contemporaneously with this reserved judgment.

[52] I am satisfied that some but not all of the requested documents are or may be relevant to the issues between the parties in relation to MBFX's then pending applications to discharge the WFO and the representative order, both of which are interlocutory applications, and in respect of which disclosure will only be ordered in exceptional cases. Additionally, I am not satisfied, at this stage, that some of the said documents (as identified below) are directly relevant to an issue or issues in the proceedings before the Commercial Court involving these parties, and are therefore liable to be disclosed pursuant to CPR 28.5 and 28.6. The judge's findings and refusal to order production of five categories of documents are set out at paragraph 8 of the October Judgment. The documents listed at Appendix A and B to the notice of application³⁰ and the documents in which disclosure was sought in appeal BVIHCMAP2021/0030 pursuant to CPR 28.16 which the learned judge disallowed, are numbered 4, 6, 10, 12 and 13 of Appendix A. These are:

“4. Priess 5 at [23] Documents by which the findings recorded in the CSSF Letter were reported to the CSSF, as mentioned: “Findings are regularly reported to the CSSF, and as a result are recorded in summary form in the CSSF Letter”.

6. Priess 5 at [24] “the Fund's inventories kept by the depositary”.

³⁰ See Vol. 4 of the Record of appeal at pp. 147-149.

10. Priess 5 at [36] “the additional material” requested by the auditors “which was then insufficient”.

12. Priess 5 at [49] Documents by which VDHI and VDH AG communicated as mentioned: “any communication with or information from the investment manager of the funds, VDH AG, was massively restricted and made more difficult”.

13. Priess 5 at [56] “the domiciliation agreement”.

Having considered the reference to each of these categories of documents in Priess 5, I would allow disclosure of the documents listed at 4, 6, and 13. I refuse those requested at 10 and 12 above, for the reasons given by the learned judge at paragraph 8 of the October Judgment.

[53] In relation to appeal BVIHCMAP2021/0031 and the two categories of disclosure sought in Appendix B to the Disclosure 2 application pursuant to CPR 28.5 and 28.6, I conclude that:

(1) The documents set out at 4, 6 and 13 (above) in Appendix A to the application notice are allowed, as stated above.

(2) In relation to the second category, the notes, transcripts and/or documents from which paragraph 39 of Priess 5 was prepared, this limb is not granted.

At paragraph 39, reference was made to a video conference on 13th January 2021 between the CSSF and representatives of VDHI dealing with “investor protection” with a “focus on Mex certificates and another certificate in the strategy funds and the Eurotax fund.” There is no reference therein to any document whether in printed form or electronic form. Further, it has not been demonstrated, at this stage, that the said video is directly relevant to one or more of the issues in the discharge application or the representative order discharge application or in the substantive proceedings before the Commercial Court. This second limb of Appendix B does not satisfy the requirements for disclosure and inspection under CPR 28.5 and 28.6 or 28.16 and ought not to be allowed at this stage.

Conclusion

[54] For all the reasons given, it is ordered that:

1. The appeals herein are allowed in part.
2. With respect to BVIHCMAP2021/0023 (the Disclosure 1 appeal), disclosure is ordered of the documents listed below sought pursuant to CPR 28.16, namely:
 - (i) The enclosures to the CSSF Letter which had been referred to at paragraphs 49-50 of Priess 3;
 - (ii) A set of documents, described as the “documents set forth above” referred to in the email from Mr. Priess to Mr. Gollits on 4th December 2020 (referred to as the “slap in the face” email).
3. With respect to BVIHCMAP2021/0030 (the Disclosure 2 - non-specific disclosure appeal):
 - (i) Paragraph 2 of the order of Justice Jack [Ag.] dated 25th October 2021 is set aside.
 - (ii) Pursuant to CPR 28.16 disclosure is ordered of the documents specified at the entries under numbers 4, 6, and 13 of the table at Appendix A to the Disclosure 2 application.
4. With respect to BVIHCMAP2021/0031 (the Disclosure 2 – specific disclosure appeal):
 - (i) Paragraph 2 of the order of Justice Jack [Ag.] dated 25th October 2021 is varied.
 - (ii) Pursuant to CPR 28.5 and 28.6 disclosure is not granted in respect of the notes, transcripts and/or documents used to prepare paragraph 39 of Priess 5 specified in the second limb of Appendix B to the Disclosure 2 application.

5. Costs of these three appeals to be paid by VDHI to be assessed by a judge of the Commercial Court, if not agreed within 21 days.

I concur.

Mario Michel

Justice of Appeal

I concur.

Paul Webster

Justice of Appeal [Ag.]

By the Court

Chief Registrar