

THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0032

BETWEEN:

MEX CLEARING LIMITED

Claimant

and

MEX SECURITIES S.A.R.L

First Defendant

MULTIBANK FX INTERNATIONAL CORPORATION

Second Defendant/Applicant/Appellant

VON DER HEYDT INVEST S.A.

Third Defendant/Respondent

NASER TAHER

Ancillary Defendant

Before:

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mr. Paul A Wester

Justice of Appeal [Ag.]

The Hon. Mr. Gerard St.C Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Hodge Malek KC and Mr. Hefin Rees KC, with them Mr. Philip Hinks for the Appellant/Applicant Multibank FX International Corporation

Mr. Tim Penny KC, with him Mr. Alexander Cook and Mr. Simon Hall for the Respondent Von der Heydt Invest SA

2022: April 25, 26, 27, 28 and 29;

2023: February 21.

Commercial appeal – Representative parties – Part 21 of the Civil Procedure Rules 2000 - Whether the learned judge erred in determining that the Noteholders had actionable claims against the Ancillary Defendants – Whether the learned judge erred in failing to consider properly or at all, whether the Representative Order was justified or appropriate, including as to the prejudice caused to MBFX by the Noteholders not being party to the proceedings

in terms of disclosure, the effectiveness of adverse costs orders and the undertaking in damages – Whether the learned judge erred by taking into account irrelevant matters and failing to take into account relevant matters, to the extent that the judge did consider whether VDHI was a fit and proper representative – Whether the learned judge erred in concluding that VDHI was entitled to make its application for the Representative Order ex parte

This appeal called ‘the Representative Appeal’ is one of eight connected matters heard by the Court at a special sitting in April 2022.

On 10th December 2020, Mex Clearing Limited (“Mex Clearing”) commenced claim No. 215 of 2020 against Mex Securities S.A.R.L (“Mex Securities”) and Multibank FX International Corporation (“MBFX”) for the sum of €36,385,509.52. This sum was said to be the outstanding balance due on certain loans made by Mex Group Worldwide Limited (“MGW”) for the benefit of Notes issued in or about the month of December 2019 by Mex Securities that were intended to be used as part of a foreign exchange trading strategy managed by Von der Heydt Invest S.A. (“VDHI”), which Notes were applied to acquire notes issued by Ardilla Segur S.A. and Suncap Scoop S.A., companies incorporated in Luxembourg.

On 14th December 2020, a Tomlin Order (Consent Order) was made by Wallbank J staying proceedings in Claim No. 215 of 2020 on the terms of a confidential schedule to the order. The confidential schedule was signed for and on behalf of Mex Clearing, Mex Securities and MBFX. It provided, inter alia, for Mex Securities to procure, in full and final settlement of this claim, the transfer by MBFX to Mex Clearing of the outstanding amount of €36,385,509.52 on or before 11th December 2020 from Mex Securities’ accounts at MBFX. These terms also provided for Mex Clearing to assign to Mex Securities the benefit of claims and causes of action which Mex Clearing allegedly has against VDHI. On 18th December 2020, the sum of €36.4 million was paid out of MBFX to Mex Clearing.

On 26th April 2021, a judge of the Commercial Division (Jack J) granted ex parte a Worldwide Freezing Order (“WFO”) against Mex Clearing, Mex Securities and MBFX, freezing their assets in the BVI up to the value of €36,385,509.52 until the return date or further order. The application for the WFO was made prior to the commencement of the claim in No. 73 of 2021. On 4th October 2021, the applications by Mex Clearing and MBFX to discharge the WFO were refused by Jack J and the WFO continued until trial of the claim in No. 73 of 2021 or further order. MBFX’s appeal from the order dismissing the application to discharge the WFO is one of the eight appeals heard during the April 2022 special sitting. The judgment in that appeal (and the other appeals) are to be delivered contemporaneously with the judgment in this the Representative Appeal.

By an order made ex parte on 21st June 2021 (“the Representative Order”), VDHI was appointed as a representative party pursuant to CPR Part 21 to act as claimant in proceedings before the Commercial Division of the High Court involving these parties on behalf of: (a) the holders of Multibank Group Index Linked Notes due 27th December 2027 issued by Mex Securities acting on behalf of its fiduciary estate 2 (“FE 2”) pursuant to a private placement memorandum dated 27th December 2019 (“the Multibank Index Notes”); and (b) the holders of Alpha FX II Index Linked Notes due 31st December 2026 issued by

Mex Securities acting on behalf of its fiduciary estate 3 ("FE 3") pursuant to a private placement memorandum dated 27th December 2019 ("the Alpha Index Notes").

Claim No. 73 of 2021 was commenced by VDHI in the Commercial Division by Claim Form issued on 22nd June 2021 against Mex Clearing, Mex Securities and MBFX as defendants. This claim was brought by VDHI in three capacities. The first, on its own behalf; the second, as management company for and on behalf of several funds; and thirdly, as representative party (pursuant to the order of Jack J dated 21st June 2021). The claim is for, inter alia, an order setting aside the Consent Order (Tomlin Order) dated 14th December 2020 in Claim No. 215 of 2020 to which the defendants were a party.

On 26th October 2021, VDHI (in the same three capacities) brought an ancillary claim in Claim No. 215 of 2020 against Mex Clearing, Mex Securities and MBFX (collectively "the Ancillary Defendants"). MBFX, in its statement of defence filed on 11th February 2022, denied all claims brought against it by VDHI, including the claim to set aside the Tomlin Order on the basis that it was obtained by fraud and/or collusion. The Ancillary Claim was amended on 23rd March 2022 to add Mr. Naser Taher as an ancillary defendant. By this ancillary claim (amended), VDHI seeks, inter alia, an order setting aside the Tomlin Order dated 14th December 2020 to which all three ancillary defendants, except Mr. Taher, were a party. The other reliefs as sought remained the same as claimed in the Ancillary Claim Form.

On 6th July 2021, MBFX brought an application to set aside the Representative Order. After a hearing in March 2022 dealing with several applications, Jack J, in a written judgment delivered on 28th March 2022, dismissed MBFX's application to set aside the Representative Order ("the Dismissal Order"). Being dissatisfied with the judgment and Dismissal Order, MBFX sought leave to appeal the decision of the learned judge.

MBFX's 6 grounds of appeal in its Notice of Appeal were distilled into four main grounds which were considered on appeal. These are whether the learned judge erred: (i) in determining that the Noteholders had actionable claims against the Ancillary Defendants; (ii) in failing to consider properly or at all, whether the Representative Order was justified or appropriate, including as to the prejudice caused to MBFX by the Noteholders not being party to the proceedings in terms of disclosure, the effectiveness of adverse costs orders and the undertaking in damages; (iii) by taking into account irrelevant matters and failing to take into account relevant matters, to the extent that the judge did consider whether VDHI was a fit and proper representative; and (iv) in concluding that VDHI was entitled to make its application for the Representative Order ex parte.

Held: dismissing the appeal and ordering MBFX to pay VDHI's costs, such costs to be assessed by a judge of the Commercial Division of the High Court, if not agreed within 21 days, that:

1. MBFX has satisfied the test of a real (as opposed to fanciful) prospect of success and permission is granted to MBFX to appeal the order of Jack J dated 18th March 2022 (and judgment dated 28th March 2022) dismissing MBFX's application filed on 6th July 2021 to set aside the Representative Order made ex parte on 21st June 2021 appointing VDHI as a representative claimant in No. 73 of 2021. Further,

MBFX's draft notice of appeal submitted with its leave application is deemed filed and will be treated as its notice of appeal from the said dismissal order and judgment.

Othneil Sylvester v Faelleseje Civil Appeal No. 5 of 2005 (delivered 20th February 2006, unreported) followed.

2. The issue raised by MBFX in its application to set aside the Representative Order of whether the underlying claims made in the Amended Ancillary Claim Form and Amended Statement of Ancillary Claim were actionable, is nothing short of a collateral attack on the ancillary claim made. This issue is more appropriately raised by way of an application to strike out the Ancillary Claim against Mex Securities and MBFX; or, as was done, in the application brought by MBFX to discharge the WFO on the basis that no cause of action (as pleaded) arises or is actionable by the Noteholders before the courts in BVI. This issue having been raised and rejected by the judge below, which refusal is subject to MBFX's appeal against the judge's refusal to set aside the WFO on that ground, it is not appropriate for MBFX to raise this issue by way of an application to set aside the Representative Order made *ex parte* on notice to MBFX. Accordingly, it was not open to MBFX to raise this issue either in its application to set aside the Representative Order or on appeal against the judge's order refusing the said application.
3. In any event, the learned judge cannot be faulted for the way in which he disposed of this issue. In considering an application by MBFX to set aside the Representative Order the judge need only have satisfied himself, at that stage in the proceedings, that, as pleaded, VDHI had made out an actionable cause of action under BVI law. In this regard, the judge was clearly satisfied that VDHI had done so on the basis, *inter alia*, of a conspiracy by to defraud the Noteholders of their investment by entering into the Tomlin (Consent) Order which led to the sum of €36.4 million being paid out of Mex Securities' accounts at MBFX to Mex Clearing. It was not for the learned judge at that stage to go further and to conclusively determine this issue in a summary way, particularly as he was not then considering an application to strike out the Ancillary Claim or for summary judgment on the basis that the Ancillary Claim was unsustainable in law, or that VDHI and/or the Noteholders had no standing to bring such a claim whether by virtue of clause 7.2(d) of the Terms and Conditions of the Private Placement Memorandum ("PPM"), or that they had not brought an *action oblique* under the laws of Luxembourg, or some other form of derivative action. Accordingly, this first ground of appeal provided no basis upon which this Court could set aside the Dismissal Order.
4. Rule 21.1(1) of the Eastern Caribbean Civil Procedure Rules ("EC CPR") uses the term 'same or similar' to define the kind of interest in proceedings that persons of the class must have in order to invoke the court's jurisdiction to make an order appointing a representative party in the said proceedings. By rule 21.1(2) the court may appoint either one or more of such persons of that class with the same or a similar interest or a body having a 'sufficient interest' in the proceedings as a representative party. Accordingly, the threshold requirement under EC CPR 21.1(1)

is wider than the threshold requirement under the corresponding English CPR rule 19.6(1) where members of the class must have the 'same interest'. This provision in the EC CPR 21.1(1), like the corresponding provision in the English CPR 19.6(1), must be given a purposive interpretation. It gives the courts in this jurisdiction a wider scope and discretion when considering whether it is proper to make a representative order in civil proceedings.

Lloyd v Google [2021] UKSC 50 applied.

5. Part 21 of the CPR is silent on the question of the distribution of the realized proceeds of a money judgment to members of a represented class. However, where a representative claimant is successful in the claim and damages or some other monetary compensation is awarded and recovered from the defendant(s), the representative party can approach the court under CPR 26.1(2)(w) for directions as to how the money recovered ought properly to be distributed to the persons comprising the class of persons represented. While some circumstances may present a practical difficulty in accurately or fully identifying all members of the class, this does not prevent a court from making an order appointing a representative party to proceedings provided the court is satisfied that there is an identifiable class which have a common or similar interest in the litigation.

Rule 26.1(2)(w) of the **Civil Procedure Rules 2000** applied; **Lloyd v Google** [2021] UKSC 50 applied.

6. There was sufficient evidence before the learned judge to satisfy the threshold requirement under EC CPR 21.1(1) that the members of the class must have 'the same or a similar interest' in the proceedings. Clearly, the three Funds managed by VDHI, as investors in the Notes, have the same or similar interest in having the Tomlin (Consent) Order set aside and in the recovery of the funds transferred out of the accounts (FE 2 and FE 3) in the name of Mex Securities at MBFX to Mex Clearing. Likewise, the other Noteholders have the same or a similar interest as the three Funds in doing so. Additionally, VDHI had, at the time of making the Representative Order, a 'sufficient interest' in the extant proceedings before the court below to be appointed the representative claimant of the Funds and the other Noteholders constituting the class of Noteholders with the same or a similar interest in bringing the claims. Giving the expression 'sufficient interest' a purposive interpretation, VDHI, both in its capacity as the manager of the three Funds which invested in the Notes, and as the entity authorized by the resolution passed at the EGM to represent the wider body of Noteholders in the said proceedings, also satisfies this basic requirement of CPR 21.1(2)(a).

Lloyd v Google [2021] UKSC 50 applied.

7. Three conditions must be satisfied for the appointment of a representative party. These are: (i) the parties or the class of persons must have the same or a similar interest in the proceedings; (ii) they must have a common grievance; and (iii) the relief sought must be beneficial to all members of the class. VDHI, as manager of

the Funds, and the Noteholders have the same or a similar interest in the Ancillary Claim. That claim seeks to set aside the Tomlin (Consent) Order on various grounds, including alleged fraud by Mex Clearing and MBFX. Likewise, the Funds managed by VDHI and the Noteholders have a common grievance, which is that the Tomlin (Consent) Order was entered by these parties as part of an alleged fraudulent scheme, said to involve Mex Securities, Mex Clearing and MBFX, to defraud the Funds and the Noteholders of their investments in the Notes up to the sum of €36.4 million. Accordingly, there is no relevant conflict of interest between VDHI and the Noteholders in these proceedings, as they have the same or similar interest in the claims against the Ancillary Defendants (Mex Securities, Mex Clearing and MBFX). The concern that Noteholders may also have claims or potential claims against VDHI and/or VDH AG, which claims are not part of the proceedings in No. 73 of 2021, is irrelevant to the question of whether VDHI is an appropriate representative party in the said proceedings.

Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1989] 1 Lloyd's Rep 568 applied; **Bedford (Duke) v Ellis** [1901] AC 1 applied.

8. CPR 21.2(5) permits applications for the appointment of a representative claimant to be made without notice. However, this is not determinative of the application proceeding without notice before the court, as the judge, in the exercise of his discretion, has the power to direct that notice of such an application be given to any person. An application to appoint a representative claimant is not of the genesis of 'an order to be made against' a defendant (such as injunctions) but is more in the nature of 'an administrative exercise' to enable proceedings to be brought, proceeded with or defended by a representative, in circumstances where there is a class of claimants or defendants having the same or a similar interest in the proceedings. Accordingly, the learned judge did not commit any error of principle in deciding to ultimately proceed with the application ex parte.

Rule 21.2(5) of the **Civil Procedure Rules 2000**; **Re First Express Ltd** [1992] BCLC 824 distinguished; **National Bank of Jamaica Ltd v Olint Corp Ltd (Practice Note)** [2009] 1 WLR 1405 distinguished.

9. The sale by VDH KG of its interest in VDHI in February 2022 to an entity ultimately controlled by Mr. von Boetticher, whilst material and whilst not disclosed by VDHI at the discharge stage of the proceedings in the court below or during the April 2022 Special Sitting, does not render VDHI unsuitable to be appointed or to continue as the representative claimant in the proceedings below. This change in its ownership does not go to the threshold requirement that VDHI must have a sufficient interest in the proceedings below in order to be appointed as the representative claimant of the class or classes of Noteholders seeking the setting aside of the Tomlin (Consent) Order and recovery of the monies transferred from the accounts of Mex Securities with MBFX following such order being made. Accordingly, the question of a re-grant of the Representative Order does not arise for consideration. However, if it did, this Court, in exercising the discretion afresh, would order the regrant of the Representative Order appointing VDHI as the representative claimant in the

proceedings below for the reasons set out at paragraphs 82,83 and 137 of the judgment.

JUDGMENT

(The Representative Appeal)

Introduction

- [1] **FARARA JA [AG.]:** This matter concerns an application filed on 6th April 2022 by Multibank FX International Corporation (“MBFX” or “the appellant”) for permission to appeal and, if granted, the hearing of the substantive appeal itself against the interlocutory judgment and order of the learned judge (Jack J) of the Commercial Court delivered 28th March 2022 (“the dismissal order”). By the dismissal order, the learned judge dismissed MBFX’s application filed on 6th July 2021 to set aside a representative order (“the Representative Order”) made *ex parte* on notice on 21st June 2021 in Claim No. BVIHC (COM) 73 of 2021.
- [2] At a special five-day sitting from 25th to 29th April 2022, this Court heard full argument in eight matters, including the Representative Appeal - No. 32 of 2022. Broadly, the eight matters consisted of (i) applications for leave to appeal and, if granted, the appeals themselves; and (ii) appeals from interlocutory orders in respect of which permission to appeal had previously been granted, either by the judge below or by a single judge of this Court. Of these eight matters, MBFX is the applicant/appellant in all but one (No. 30 of 2022 - “the NT Substituted Service Appeal”). In that matter, the sole applicant/appellant is Naser Taher (the Ancillary Defendant in the proceedings below). In four of the matters (Nos. 9 of 2021, 23 of 2021, 30 of 2021, and 31 of 2022), Von der Heydt Invest S.A. (“VDHI”) is the sole respondent. In the other four matters (Nos. 1 of 2022, 24 of 2022, 30 of 2022, and 32 of 2022), Mex Clearing Limited (“Mex Clearing”) and Mex Securities S.A.R.L (“Mex Securities”) are also respondents, along with VDHI. Also, in Nos. 24 of 2022 and 32 of 2022, Mr. Naser Taher is a named Ancillary Defendant albeit not participating in the said appeals.

[3] The eight matters (appeals) heard at the April 2022 Special Sitting are:

- (1) No. 9 of 2021 – **the Discharge Appeal** – an appeal by MBFX against the judge’s judgment and order dated 4th October 2021 (corrected under the slip rule on 19th October 2021) dismissing MBFX’s application to discharge a Worldwide Freezing Order (“the WFO”) dated 26th April 2021;
- (2) No. 23 of 2021 – **Disclosure 1 (non-specific disclosure) Appeal** – an appeal by MBFX with leave against the judgment and order made by the judge below dated 23rd August 2021 under Civil Procedure Rules (“CPR”) 28.16 and 28.5;
- (3) No. 30 of 2021 – **Disclosure 2 (non-specific disclosure) Appeal** – appeal by MBFX against the order made by the learned judge below dated 23rd August 2021;
- (4) No. 31 of 2021 – **Disclosure 2 (specific disclosure)** – appeal by MBFX with leave of a single judge of this Court against the order made by the judge dated 25th October 2021 pursuant to CPR 28.5-6;
- (5) No. 1 of 2022 – **the Recusal Appeal** – application by MBFX for leave to appeal and, if granted, its appeal against the judgment and order of the judge below (Jack J) dated 17th December 2021 dismissing MBFX’s application that he recuse himself from any further participation in the matters before the Commercial Court involving these parties;
- (6) No. 24 of 2022 – **the Adjournment Appeal** – application by MBFX for leave to appeal and, if granted, to appeal against the order of the judge below dated 18th March 2022 refusing an application by MBFX to adjourn the trial set for 11th July 2022;
- (7) No. 30 of 2022 – **the NT Substituted Service Appeal** – application by Mr. Naser Taher for leave to appeal and, if granted, to appeal against paragraphs 1 to 3 of a case management order made by the judge below

on 18th March 2022 granting permission pursuant to CPR 7.8A to serve Naser Taher as an Amended Ancillary Claim by email and to deem the said claim served on the day following its service on him by email and to dispense with the need for Mr. Taher to file an acknowledgement of service;

- (8) No. 32 of 2022 – **the Representative Appeal** – application by MBFX for leave to appeal and, if granted, to appeal against the judgment and order of the judge below dated 28th March 2022 dismissing MBFX’s application to set aside the Representation Order made *ex parte* 21st June 2021 in BVIHC (COM) 73 of 2021 appointing VDHI as the representative party for the noteholders of Luxembourg issued notes.

- [4] At the conclusion of the Special Sitting on 29th April 2022, the Court gave its decision (in brief) in two of the eight applications/appeals, with written reasons to follow. These are No. 1 of 2022 (“the Recusal Appeal”) and No. 24 of 2022 (“the Adjournment Appeal”). The Court granted the applications for leave to appeal and allowed the appeals, in both matters, with reasons to follow. It made an order in the Adjournment Appeal that the trial date is adjourned to a date to be fixed by the Registrar of the High Court in the Territory of the Virgin Islands (“the BVI”) during the first term of the new Law Year beginning January 2023. In the Recusal Appeal, the Court ordered that the learned judge (Jack J) of the High Court is recused from presiding further over any of the matters in the court below involving these parties; and that those matters are to be further case managed by a different judge of the Commercial Division of the High Court in the BVI on an expedited basis. The Court reserved its decision in the other six applications/appeals.

Developments after April Special Sitting

- [5] Since the April 2022 Special Sitting, there have been several developments concerning the proceedings before the Commercial Division of the High Court in the BVI and before the Court of Appeal involving these parties. These developments,

which include an application by MBFX for directions to rely on “New Materials” in both the Discharge Appeal and the Representative Appeal, have had a knock-on effect with respect to the delivery of the reserved judgments in those two appeals. Most notably these developments include the learned judge (Wallbank J) in the Commercial Court fixing a trial date in the year 2024 in Claim No. 73 of 2021; and also fixing the 6th to 8th December 2022 for the hearing before him of an application, filed by VDHI on 7th July 2022 in Claim No. 73 of 2021, to strike out parts of the defences filed by MBFX and Mex Clearing, and for summary judgment. The said judge also, by order dated 18th November 2022, refused an application by MBFX to delist the said December 2022 hearing dates pending the determination by this Court of the Discharge Appeal and Representative Appeal. Of significance is that, on 15th July 2022, Wallbank J granted MBFX’s application and made an order for VDHI to provide fortification in the sum of US\$20 million of its cross-undertaking in damages (“the Fortification Order”) given when VDHI obtained a Worldwide Freezing Order (“WFO”) on 26th April 2021 against MBFX and Mex Clearing in Claim No. 73 of 2021. VDHI appealed the Fortification Order to this Court.

- [6] These developments also include an application by MBFX dated 5th August 2022 for directions (“the Directions Application”) to admit certain ‘Update Material’ in both the Discharge Appeal and the Representative Appeal, for this Court to reopen and hear further argument in both appeals, and to defer delivery of its judgment in both appeals until after a determination of the said application to admit the update material, and for further argument. The Update Material for the Representative Appeal includes new material that VDHI’s parent, Bankhaus von der Heydt GmbH (“VDH KG”), sold all its interest in its wholly owned subsidiary, VDHI, to an entity, Cambria GmbH & Co KG (“Cambria”), beneficially owned by Mr. von Boetticher in February 2022.
- [7] By its order dated 17th October 2022, this Court considered that this new material relating to the sale by VDH KG of its interest in VDHI in February 2022, ‘coming to light after the April 2022 Special Sitting although it was known to MBFX before the

Sitting, should be considered by the Court. Thereafter, the Court will decide if this material should be considered in the Representative Appeal.’ The remainder of the Update Material was not allowed in the Representative Appeal or the Discharge Appeal. Accordingly, it was ordered that the Directions Application to admit the Update Material and to reopen the hearing of the Special Sitting Appeals is dismissed, ‘except the Update Material relating to the sale of VDHI in February 2022 will be considered in the [Representative] Appeal’; and MBFX was granted leave to file and serve on or before 21st October 2022 in the Representative Appeal the Update Material relating to the sale of VDHI. Leave was also granted to VDHI to file and serve on or before 28th October 2022 in the Representative Appeal evidence in reply to the Update Material relating to the sale of VDHI.

[8] In compliance with the 17th October 2022 order, MBFX filed the 29th Affidavit of Salem Kattoura on 25th October 2022 (“Kattoura 29”) exhibiting (as “SK29”) the Update Material relating to the sale of VDHI in February 2022, alleging material non-disclosure of this material by VDHI, and providing, *inter alia*, the reasons why it says the said information or material is/was relevant¹ to (i) the appointment of VDHI as a representative claimant in these proceedings; and to the issues whether (ii) VDHI will be able to meet its cross-undertaking in damages; (iii) fortification of the said cross-undertaking; and (iv) VDHI can meet its liability for adverse costs orders. VDHI, in compliance with the 17th October 2022 order, filed the 16th affidavit of Olaf Priess on 28th October 2022 (“Priess 16”). By order dated 24th January 2023, this Court ordered that Kattoura 29 and Priess 16 ‘be admitted into evidence in the Representation Appeal and considered by the Court.’

[9] The hearing of VDHI’s appeal of the Fortification Order (No. 8 of 2022) was expedited, and the Fortification Appeal was heard by this Court on 11th November 2022 after which the decision was reserved. A decision dismissing the Fortification Appeal will be delivered contemporaneously with this judgment. There is also an

¹ Para 19 of the 29th Affidavit of Salem Kattoura.

application (No. 61 of 2022) filed on 6th October 2022 by MBFX for leave to appeal the judge's refusal to delist the VDHI strike out and summary judgment application in Claim No. 73 of 2021. This application for leave to appeal was granted on paper by a single judge of this Court on 18th November 2022. Finally, MBFX filed on 19th October 2022 in the Representative Appeal, an application for a stay of the VDHI strike out and summary judgment application ("the VDHI SO/SJ Application"). This stay application was heard on an expedited basis on 28th November 2022, and an order made staying the hearing of the VDHI SO/SJ Application, pending the determination of the Representative Appeal.

- [10] As stated above, this judgment deals with the Representative Appeal. If allowed, the decision will have important consequences for the determination of the other six appeals heard during the April 2022 Special Sitting in respect of which judgment was reserved, especially the Fortification Appeal and Discharge Appeal. It could also have a significant effect on how the proceedings in Claim No. 73 of 2021 before the Commercial Court is to be progressed. With that said, the intention of the Court is to deliver its judgments in the Discharge Appeal, the Representative Appeal, and the Fortification Appeal together during a sitting of the Court in this term.

Background to the Representative Appeal

- [11] The *dramatis personae* and much of the relevant background facts and procedural history concerning this dispute, has been helpfully summarized in the judgment to be delivered in the Discharge Appeal, which I have had the benefit of reading and gratefully adopt. However, so far as it may be necessary to put the issues raised in this appeal in their proper context, I set out in brief below certain relevant factual and procedural matters.
- [12] On 10th December 2020, Mex Clearing commenced in the Commercial Division, as assignee, Claim No. 215 of 2020 against Mex Securities and MBFX, respectively, the first and second defendants.² The claim was for the sum of 36,385,509.52 euros

² Consolidated appeal bundle, Vol. 2 pp 67-70.

'being the total of the sums advanced, as loans, by the Assignor of [Mex Clearing] to [VDHI] which sums are held by [MBFX] to the order of [Mex Securities] ...' The said sum was said to be the outstanding balance due on certain loans made by Mex Group Worldwide Limited ("MGW") for the benefit of Notes issued in or about the month of December 2019 by Mex Securities 'that were intended to be used as part of a foreign exchange trading strategy managed by [VDHI] of Frankfurt, Germany', which Notes 'were applied to acquire notes issued by Ardilla Segur S.A. and Suncap Scoop S.A., companies incorporated in Luxembourg.'³ It was pleaded by Mex Clearing, that Mex Securities holds monies derived from the loans in accounts at VDHI thereby constituting Mex Securities as a creditor of VDHI for the said sums.⁴ It was also pleaded that 'for good and valuable consideration', MGW had assigned unconditionally the benefit of this entire debt due from Mex Securities to Mex Clearing by deed dated 9th December 2020, by virtue of which assignment Mex Clearing became entitled to payment of the outstanding debt from Mex Securities to MGW.⁵ The said claim alleged that wrongfully and in breach of the terms of the loans, Mex Securities had failed to repay the outstanding balance of the said loans as demanded by MGW by letter dated 4th December 2020.⁶

- [13] On 14th December 2020, a Tomlin Order was made by Wallbank J staying proceedings in Claim No. 215 of 2020 on the terms of a confidential schedule to the order. The confidential schedule was signed for and on behalf of Mex Clearing, Mex Securities and MBFX. It provided, inter alia, for Mex Securities to procure, in full and final settlement of this claim, the transfer by MBFX to Mex Clearing of the outstanding amount of 36,385,509.52 euros on or before 11th December 2020 from Mex Securities' accounts at MBFX. These terms also provided for Mex Clearing to assign to Mex Securities the benefit of claims and causes of action which Mex Clearing has against VDHI as contained in the Deed of Affirmation of Mr. Michael Gollits, the Chief Executive Office of VDHI, dated 17th May 2020 'estimated by [Mex

³ Consolidated appeal bundle, Vol. 2 pp 71-72, paras 4 and 5 of the Statement of Claim.

⁴ Ibid, para 6.

⁵ Supra note 3, para 8.

⁶ Supra note 3, paras 7 and 9.

Securities] to have a potential value well in excess of the [said] Outstanding amount.⁷ On 18th December 2020, the sum of 36.4 million euros was paid out of MBFX to Mex Clearing.

[14] On 12th January 2021, Mex Clearing issued proceedings in No. 3 of 2021 against MBFX seeking a freezing order over the remaining monies held by MBFX in favour of Mex Securities. By these proceedings, Mex Clearing alleged that Mex Securities had repudiated the settlement agreement embodied in the Tomlin Order, and that it was therefore entitled to payment from Mex Securities of the 'residual claims' amounting in toto to 2,777,007.54 euros, which residual claims were to be commenced by Mex Clearing in Luxembourg. On 18th January 2021, Wallbank J granted a seal and gag order and an interim freezing order in the sum of 20 million euros in No. 3 of 2021. This freezing order was, on 28th January 2021, extended pending the determination of the substantive Luxembourg proceedings. However, on 2nd March 2021, a Luxembourg avocat, Maître Maillot, sent a draft claim on behalf of Mex Securities to Mr. Duthie in which it was asserted that the Tomlin Order in No. 215 of 2020 was part of a fraudulent charade. A copy of these proposed proceedings came into the possession of VDHI AG whose lawyers, on 25th March 2021, sent a written demand to MBFX requiring the payment of US\$26,032,324.79 to Mex Securities. No payment was made. On 9th April 2021, Jack J granted an anti-suit injunction in respect of the Luxembourg proceedings. This anti-suit injunction was extended by Jack J on 19th April 2021 to also include a similar injunction against 'persons unknown'. A mirror anti-suit injunctive order was made by Bryan J on 16th April 2021 (to include 'persons unknown') on the application of Mex Clearing in the English High Court.

[15] On 26th April 2021, Jack J of the Commercial Division granted *ex parte* a worldwide freezing order ("WFO") in Claim No. 73 of 2021 against Mex Clearing, Mex Securities and MBFX, freezing their assets in the BVI up to the value of 36,

⁷ Consolidated appeal bundle, Vol. 3 pp 4-5, paras 7-10.2.

385,509.52 euros until the return date or further order.⁸ The application for the WFO was made prior to the commencement of the claim in No. 73 of 2021. The WFO was continued by order dated 3rd May 2021 until further order of the court and a further hearing listed for 28th May 2022.⁹ On 4th October 2021 the applications by Mex Clearing and MBFX to discharge the WFO were refused by Jack J and the WFO continued until trial of the claim in No. 73 of 2021 or further order.¹⁰ The refusal to discharge the WFO is the subject of the Discharge Appeal No. 9 of 2021. To date, Mex Securities has taken no part in those proceedings. A decision dismissing the Discharge Appeal will be delivered contemporaneously with this judgment.

[16] By an order made *ex parte* on 21st June 2021 (“the Representative Order”), VDHI was appointed as a representative party pursuant to CPR Part 21 to act as claimant in proceedings No. 73 of 2021 on behalf of:

(a) the holders of Multibank Group Index Linked Notes due 27th December 2027 issued by Mex Securities acting on behalf of its fiduciary estate 2 pursuant to a private placement memorandum dated 27th December 2019 (“the Multibank Index Notes”); and

(b) the holders of Alpha FX II Index Linked Notes due 31st December 2026 issued by Mex Securities acting on behalf of its fiduciary estate 3 pursuant to a private placement memorandum dated 27th December 2019 (“the Alpha Index Notes”).

[17] Claim No. 73 of 2021 was commenced by VDHI in the Commercial Division by Claim Form issued on 22nd June 2021 against Mex Clearing, Mex Securities and MBFX as defendants.¹¹ This claim was brought by VDHI in three capacities. The first, on its own behalf; the second, as management company for and on behalf of several

⁸ Consolidated appeal bundle, Vol. 3, pp 27-37.

⁹ Consolidated appeal bundle, Vol. 3, pp 39-42.

¹⁰ Consolidated appeal bundle, Vol. 3 pp 186-187.

¹¹ Consolidated appeal bundle, Vol. 2 pp 2-6.

funds; and thirdly, as representative party (pursuant to the order of Jack J dated 21st June 2021). The claim is for, inter alia, an order setting aside the Consent Order (Tomlin Order) dated 14th December 2020 in Claim No. 215 of 2020 to which the defendants were a party.

- [18] The claim in No. 73 of 2021 is also for a declaration that the sum of 36,385,509.52 euros together with all monies, property, income, and business derived from the said sum are held on constructive trust for Mex Securities and/or the Noteholders, and for an account, restitution, equitable compensation, and for certain injunctive relief and damages. It was accompanied by a statement of claim filed on the same date. By order dated 12th October 2021, Claim Nos 215 of 2020, 3 of 2021 and 73 of 2021 were consolidated for hearing by a single judge of the Commercial Division.
- [19] On 26th October 2021, VDHI (in the same three capacities) brought an ancillary claim in No. 215 of 2020 against Mex Clearing, Mex Securities and MBFX (collectively “the Ancillary Defendants”).¹² This was accompanied by an Ancillary Statement of Claim filed the same day.¹³ MBFX filed its statement of defence on 11th February 2022.¹⁴ It denied all claims brought against it by VDHI, including the claim to set aside the Consent Order on the basis that it was not obtained by fraud and/or collusion.¹⁵
- [20] The Ancillary Claim was amended on 23rd March 2022¹⁶ to add Mr. Naser Taher as an ancillary defendant. By this ancillary claim (amended), VDHI seeks, inter alia, an order setting aside the Consent Order dated 14th December 2020 (the Tomlin Order) to which all three ancillary defendants, except Mr. Taher, were a party. The other reliefs as sought remained the same as claimed in the Ancillary Claim Form. VDHI

¹² Consolidated appeal bundle, Vol. 2 p 75.

¹³ Ibid, p 80.

¹⁴ Consolidated appeal bundle, Vol. 2A pp 2-83.

¹⁵ Ibid, para 235.1.

¹⁶ Consolidated appeal bundle, Vol. 2A pp 84-164.

filed its reply to MBFX's defence on 11th April 2022¹⁷ and Mr. Taher filed his defence on 24th April 2022.¹⁸

Dismissal of MBFX's Application to Discharge Representative Order

[21] On 6th July 2021, MBFX brought an application to set aside the Representative Order.¹⁹ This application was supported by the Eighth and Eleventh Affidavits of Olaf Alexander Priess.²⁰ In the notice of application, MBFX relied on five grounds. These are: (i) the application for the Representative Order having been made *ex parte* MBFX is entitled to have it set aside pursuant to CPR 11.16; (ii) VDHI is not an appropriate representative party as it is in a position of conflict of interest in representing the noteholders, it does not have a sufficient interest in the proceedings, it is subject to regulatory investigation, and it is not representing 5 or more persons with the same interest; (iii) the Representative Order was obtained on the basis of material non-disclosures, misrepresentations and failures of fair presentation on an *ex parte* application; (iv) there was no proper basis upon which to proceed with the application *ex parte* without notice to MBFX; and (v) it is just and convenient that the Representative Order be set aside.

[22] After a hearing on 8th, 9th and 10th March 2022 dealing with several applications, Jack J, in a written judgment delivered on 28th March 2022, dismissed MBFX's application to set aside the Representative Order.²¹ MBFX applied on 6th April 2022 for leave to appeal the said order on the two main grounds. The first is that its prospective appeal has a real prospect of success. In support of this ground, it relies on six points. Its second main ground for leave to appeal the dismissal order is that there is otherwise a compelling reason why the appeal should be heard to determine the issue of whether the Noteholders should themselves be joined as parties to

¹⁷ Consolidated appeal bundle, Vol. 2A pp 184-239.

¹⁸ Consolidated appeal bundle, Vol. 2A pp 240-367.

¹⁹ Consolidated appeal bundle, Vol. 15 pp 646-652.

²⁰ Consolidated appeal bundle, Vol. 15, Tabs 14 and 16.

²¹ *Ibid*, Tab 6 p 56.

these proceedings in place of VDHI as a representative party.²² Exhibited to the application for leave is a draft notice of appeal which sets out six grounds of appeal.

Determination of Application for Leave to Appeal

- [23] Having heard full arguments on the application for permission to appeal and on the various grounds of appeal, it is our considered view that MBFX has satisfied the test laid down by this Court in **Othneil Sylvester v Faelleseje**,²³ of a real (as opposed to a fanciful) prospect of success. Accordingly, it is hereby ordered that permission is granted to MBFX to appeal the order of Jack J dated 18th March 2022 (and judgment dated 28th March 2022) dismissing MBFX's application filed on 6th July 2021 to set aside the Representative Order made *ex parte* on 21st June 2021 appointing VDHI as a representative claimant in No. 73 of 2021. Further, MBFX's draft notice of appeal submitted with its leave application is deemed filed and will be treated as its notice of appeal from the said dismissal order and judgment.

Notice of Appeal

- [24] In its notice of appeal, MBFX appeals the learned judge's refusal on 18th March 2022 to set aside the Representative Order dated 21st June 2021 in Claims No. 215 of 2020, 3 of 2021 and 73 of 2021 on six grounds. At paragraph 4 of MBFX's skeleton argument filed on 20th April 2022 in the Representative Appeal, it identifies two relevant questions for this Court's consideration. These are:

- (1) Were the grounds for a representative order made out, particularly whether VDHI was a fit and proper party to act as a representative pursuant to EC CPR 21 and whether an order should be made in all the circumstances; and
- (2) Was VDHI entitled to apply for the Representative Order *ex parte*.

- [25] At paragraph 16 of its skeleton argument, MBFX distills its six grounds of appeal into four main grounds. These four grounds are:

²² Ibid, pp 26-29.

²³ Civil Appeal No. 5 of 2005 (delivered 20th February 2006, unreported).

- (1) The judge erred in determining (insofar as he reached any determination in this respect) that the Noteholders had actionable claims against the Ancillary Defendants;
- (2) The judge erred in failing to consider properly or at all, whether the Representative Order was justified or appropriate, including as to the prejudice caused to MBFX by the Noteholders not being party to the proceedings in terms of disclosure (including from Mr. Gollits as a Noteholder), the effectiveness of adverse costs orders and the undertaking in damages. Instead, the judge determined that MBFX's application could be dismissed on 'case management grounds' alone;
- (3) To the extent that the judge did consider whether VDHI was a fit and proper representative, the judge erred by taking into account irrelevant matters and failing to take into account relevant matters; and
- (4) The judge erred in concluding that VDHI was entitled to make its application for the Representative Order ex parte.

[26] This judgment addresses each of these four (distilled) grounds in sequential order. Before doing so, I will consider the provisions of Part 21 of CPR and the salient principles, as gleaned from the modern case law, applicable to applications for a representative order in proceedings.

CPR Part 21

[27] CPR Part 21 deals with the appointment by the court of representative claimants and defendants in various civil proceedings. It applies to any proceedings, except those falling within rule 21.4 (none of which categories are germane). Part 21 applies where 5 or more persons have '*the same or a similar interest*' in the proceedings. It is therefore a 'threshold requirement' that the members of the class

to be represented must have 'the same or a similar interest' in the proceedings.²⁴ By rule 21.1(2), the court may appoint, either a body having a sufficient interest in the proceedings or one or more of the (minimum) five persons with the same or a similar interest in the proceedings, to represent all or some of the persons with the same or similar interest. A representative party appointed under Part 21 may be either a claimant or a defendant.²⁵

[28] Pursuant to rule 21.2(1), an application for a representative order may be made at any time, including a time before proceedings have been started. In these proceedings, the Representative Order was made on 21st June 2021 and the claim form in Claim No. 73 of 2021 was issued on 22nd June 2021. Furthermore, on 23rd April 2021 (prior to commencement of Claim No. 73 of 2021), VDHI applied for and was granted *ex parte* on 26th April 2021 a WFO.

[29] An application for a representative order may be made by a party, or by a person or body who wishes to be appointed as a representative party, or a person or body who wishes to be appointed as a representative party, or by a person who is likely to be a party to proceedings.²⁶ The latter is made pellucid by rule 21.2(7) which states: 'If the court directs that a person not already a party is to be a representative defendant, it must make an order adding that person as a defendant.' The effect of these provisions is that a person seeking to be appointed a representative party must be one of at least 5 persons who have 'the same or a similar interest' in the proceedings already underway, or which are likely to be commenced. In the case of a body applying to be appointed a representative in proceedings underway or to be commenced, that body must have 'a sufficient interest' in the proceedings.

[30] Significantly, rule 21.2(3) stipulates that an application to appoint a representative defendant must be on notice to the claimant. By contrast, rule 21.2(5) permits an

²⁴ The Attorney General and The Minister of Finance v The Grenada Bar Association GDAHCVAP2021/0018 (delivered 21st September 2022, unreported).

²⁵ Rule 21.1(3) of the CPR.

²⁶ Rule 21.2(2) of the CPR.

application to appoint a representative claimant to be made without notice. While it is not obligatory that an application to appoint a representative claimant should be made or determined without notice, it is entirely permissible for it not to be made on notice. This is subject to rule 21.2(6) which provides that a court may direct that notice of an application (whether to appoint a representative claimant or defendant) be given to such persons as it thinks fit. Thus, an application to appoint a representative claimant made without notice may, at the court's discretion and in the exercise of its case management powers, be proceeded with and determined *inter partes* on notice to the defendant.

[31] In the instant matter, the effect of rule 21.2(5) is that it was permissible for the application filed on 18th June 2021 by VDHI to be appointed a representative claimant in Claim No. 73 of 2021 to be made *ex parte*, that is, without notice to MBFX or to Mex Clearing or Mex Securities. It was then open to the judge hearing the application to decide whether, in the proper exercise of his discretion and case management powers, to proceed to hear and determine the said application without notice to MBFX and or Mex Clearing and Mex Securities. However, as matters turned out, and as the learned judge observed at paragraph 37 of his judgment below, while VDHI's application was made and did proceed on an *ex parte* basis, learned counsel, Mr. Gee KC, representing MBFX at the time, was present at the hearing on 21st June 2021. Also, it appears that Mr. Gee was aware of the said application prior to the hearing on 21st June 2022 and had prepared a skeleton argument explaining why a representative order should not be made. Accordingly, the upshot of this is that the application to appoint VDHI as a representative claimant for the Noteholders, was made 'ex parte upon notice' to MBFX.

[32] VDHI having elected to proceed with its application on an *ex parte* basis, it was incumbent on and obligatory of VDHI, to comply fully with any applicable rules of court and with the duties of fairness and of full and frank disclosure applicable to a party proceeding without notice to the other parties to the proceedings. More will be said later about such applicable rules and duties, whether VDHI failed to comply

with any of them, and whether the learned judge below committed an error of law or of principle when he proceeded to hear and determine the Representative Application on a without notice basis. These are issues which MBFX have raised at ground 6 (in particular) of its notice of appeal.

Principles applicable to appointment of representative party

[33] I have considered above the specific provisions and requirements under Part 21 of the CPR, concerning an application for a representative order. The leading authority on the English equivalent of a Part 21 application is the very recent decision of the Supreme Court in **Lloyd v Google**.²⁷ This authority was not cited before the learned judge below and accordingly he did not address it in his written judgment dated 28th March 2022.

[34] **Lloyd v Google** concerned a claim brought by Mr. Lloyd, an Apple iPhone user, against Google for compensation for damage under section 13 of the Data Protection Act 1998 (UK) for breach of its duties as a data controller. The claim alleged that Google had secretly tracked the internet activity of millions of Apple iPhone users and used the data collected for commercial purposes without the users' knowledge or consent. In bringing the claim, the claimant purported to act in a representative capacity for everyone resident in England and Wales who owned an Apple iPhone at the relevant time and whose data had been so obtained and used. This group was estimated at more than 4 million people. CPR 19.6 (UK) provided for representative actions where more than one person had the 'same interest' in a claim. The claimant accepted that he could not use the CPR 19.6 procedure to claim compensation on behalf of other iPhone users where their recoverable compensation fell to be individually assessed by the court, but contended that under section 13 of the 1998 Act, as a matter of law compensation could be awarded without proof of material damage or distress. Google contested an application to serve the claim form on it out of the jurisdiction on grounds that (i) the claim was not suitable to proceed as a representative action and (ii) damages

²⁷ [2021] UKSC 50.

could not be awarded under section 13 of the Act for 'loss of control' without proof of financial damage or distress. The High Court's decision on both issues in favour of Google, were reversed on appeal. The Supreme Court upheld the High Court's ruling on both issues and reversed the decision of the Court of Appeal.

[35] The judgment of the Supreme Court (UK) was delivered by Lord Leggatt. This judgment is very instructive. Firstly, it distinguishes between three types or categories of 'collective redress' permissible under the current English rules and practice. The first is 'group actions' (or opt in proceedings), which are brought pursuant to a Group Litigation Order made pursuant to rule 19.11 whereby any judgment or order (unless the court ordered otherwise) is binding on all claimants included in the group register established under rule 19.12(1)(a). The second is 'collective proceedings' known as 'opt out proceedings' available in the field of competition law. These are proceedings brought by a 'representative' claimant on behalf of a specified class of persons as 'collective proceedings' under section 47B of the Competition Act 1998, combining two or more claims to which section 47A applies, and which proceedings have been certified by the Competition Appeal Tribunal as satisfying the criteria set out in section 47B and in the Competition Appeal Tribunal Rules.

[36] The third category are 'representative actions' brought under CPR 19.6. This is essentially the parallel rule under the English CPR with the EC CPR 21. However, while of a similar tenure, the EC CPR Part 21 is wider than the corresponding English rule 19.6.

[37] The English rule 19.6 states:

- "(1) Where more than one person has the **same interest** in a claim –
 - (a) the claim may be begun; or
 - (b) the court may order that the claim be continued,by or against one or more of the persons who have the **same interest** as representatives of any other persons who have **that** interest.
- (2) The court may direct that a person may not act as a representative.
- (3) Any party may apply to the court for an order under paragraph (2).

- (4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule –
 - (a) Is binding on all persons represented in the claim; but
 - (b) May only be enforced by or against a person who is not a party to the claim with the permission of the court....” (emphasis mine)

[38] The origin of the English rule 19.6 was explained by Lord Leggatt at some length at paragraphs 34 to 40. Suffice it to be said that the evolution to the current English CPR rule 19.6 was based on two broad but fundamental principles of the exercise by a court of its jurisdiction and its constitutional role to determine legal disputes between contesting parties. The first is that as a general rule, all persons materially interested in the subject matter of an action should be made parties to the action, either as claimants or as defendants, so as to ensure that the rights of all persons interested are finally and conclusively determined and settled in a single judgment. The second is that where the persons materially interested in the subject matter of a claim are so numerous that you could never make them all parties to the litigation so as to effectively ‘come to justice’, the solution adopted by the courts was not to abandon the aim or objective of settling the rights of all materially interested parties in a single proceeding, but rather to relax the joinder rule by allowing one or more claimants or defendants to represent all others who have the same interest as them. Accordingly, the approach adopted, initially by the Court of Chancery, to meet this challenge was to relax the rules to permit representative parties, whether claimants or defendants, given their common interest and a common grievance. This approach ultimately became enshrined in Order 16, r. 9 of the Rules of the Supreme Court made under the Supreme Court Judicature Act 1873, as the forerunner to the current rule 19.6 in which the requirement in Order 16, r. 9 for ‘numerous parties’ was replaced and reduced to ‘more than one’ party. Order 16, r. 9 stated:

“Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued or may be authorized by the Court to defend in such action, on behalf or for the benefit of all parties so interested.”

[39] In **Lloyd v Google**, Lord Leggatt also reviewed the approach adopted by the courts of Australia, Canada and New Zealand to representative actions.

[40] As to the '*same interest*' requirement in rule 19.6, the English Supreme Court adopted a purposive interpretation in light of the overriding objective and the rationale for the representative procedure. Lord Leggatt opined –

“[71] The phrase ‘the same interest’, as it is used in the representative rule, needs to be interpreted purposively in light of the overriding objective of the civil procedure rules and the rationale for the representative procedure. The premise for a representative action is that claims are capable of being brought by (or against) a number of people which raise a common issue (or issues): hence the potential and motivation for a judgment which binds them all. The purpose of requiring the representative to have ‘the same interest’ in the claim as the persons represented is to ensure that the representative can be relied on to conduct the litigation in a way which will effectively promote and protect the interest of all members of the represented class. That plainly is not possible where there is a conflict of interest between class members, in that an argument which would advance the cause of some would prejudice the position of others. *Markt* and *Emerald Supplies* are both examples of cases where it was found that the proposed representative action, as formulated, could not be maintained for this reason.”

[41] By contrast, the EC CPR 21.1(1) uses the expression '*same or similar*' to define the kind of interest in the proceedings which persons of the class should have in order to invoke the court's jurisdiction to appoint one or more of them as a representative party of the class or a body which has a '*sufficient interest*' in the proceedings. Accordingly, the threshold requirement under EC CPR 21.1(1) is wider than the threshold requirement under the corresponding English CPR rule 19.6(1) where members of the class must have the '*same interest*'. This gives the courts in this jurisdiction a somewhat wider scope and discretion when considering whether it is proper to make a representative order in civil proceedings.²⁸ In my opinion, the effect of this is that the 'purposive approach' as adopted by Lord Leggatt in **Lloyd v Google**, is even more apt when construing the expression '*same or similar*' interest in the proceedings as prescribed in EC CPR rule 21.1(1).

²⁸ Supra note 24 at paragraph 18.

[42] Another important difference between the EC Part 21 and the English Part 19.6 is that while the English CPR rule 19.6(1) empowers one or more persons with 'the same' interest to represent the other members of the class with that 'the same' interest in the claim, the EC CPR r. 21.1(2) empowers the court to appoint either (a) a body 'having a sufficient interest' in the proceedings or (b) one or more of the members of the class with the same or a similar interest in the proceedings to represent that class of persons. In the instant matter, VDHI is not itself a noteholder and thus not a member of the class to be represented in the proceedings before the Commercial Court. The critical question, therefore, is whether VDHI has a 'sufficient interest' in the proceedings as to warrant its appointment as the representative claimant of the Noteholders constituting the class of persons with the same or a similar interest in the said proceedings.

[43] On the issue of a conflict of interest (existing or anticipated) and the modern context in which the role and function of representative parties is to be viewed, Lord Leggatt further states:

"[72] As Professor Adrian Zuckerman has observed in his valuable book on civil procedure, however, a distinction needs to be drawn between cases where there are conflicting interests between class members and cases where there are merely divergent interests, in that an issue arises or may well arise in relation to the claims of (or against) some class members but not others. So long as advancing the case of class members affected by the issue would not prejudice the position of others, there is no reason in principle why all should not be represented by the same person: see *Zukerman on Civil Procedure: Principles of Practice* (4th edn, 2021), para 13.49. As Professor Zuckerman also points out, concerns which may once have existed about whether the representative party could be relied on to pursue vigorously lines of argument not directly applicable to their individual case are misplaced in the modern context, where the reality is that proceedings brought to seek collective redress are not normally conducted and controlled by the nominated representative, but rather are typically driven and funded by lawyers or commercial litigation funders with the representative party merely acting as figurehead. In these circumstances, there is no reason why a representative party cannot properly represent the interests of all members of the class, provided there is no true conflict of interest between them."

[44] These extracts from the judgment of the Supreme Court in **Lloyd v Google** are illustrative of and serve to underscore that, in determining applications to appoint a representative party, whether as a claimant or as a defendant, and in the exercise of its undoubted discretion to do so, the courts are required to adopt a purposive interpretation and a pragmatic approach. This approach is justified in that the court is seeking to apply a more modern rule of court which had been expanded and reformulated as a direct and consequential result of a relaxed approach to the existing provisions applicable to ‘joinder of parties’. This more relaxed approach is in keeping with the realities and modalities of a ‘modern context’ in which, among other relevant factors, the digital world has presented the challenge of providing, effectively, for the representation of potentially very large numbers of persons who have a common interest or the same interest in the subject matter of litigation, and to ensure, so far as is practicable, that these same or very similar rights are determined by a single definitive judgment binding on all such persons.

[45] Importantly, as to the exercise of the court’s discretion to make a representative order in proceedings, Lord Leggatt stated –

“[75] Where the same interest requirement is satisfied, the court has a discretion whether to allow a claim to proceed as a representative action. As with any power given to it by the Civil Procedure Rules, the court must in exercising its discretion seek to give effect to the overriding objective of dealing with cases justly and at proportionate costs. See CPR 1.2(a). Many of the considerations specifically included in that objective (see CPR 1.1(2)) – such as ensuring that the parties are on an equal footing, saving expense, dealing with the case in ways which are proportionate to the amount of money involved, ensuring that the case is dealt with expeditiously and fairly, and allotting to it an appropriate share of the court’s resources while taking into account the need to allot resources to other cases – are likely to militate in favour of allowing a claim, where practicable, to be continued as a representative action rather than leaving members of the class to pursue claims individually.”

[46] In **Lloyd v Google**, Lord Leggatt also identified and addressed four important features of the English CPR 19.6. These are:

(i) *No requirement to consent*: There is no requirement for the persons being or to be represented in the litigation to consent to the appointment by

the court of the representative party. Indeed, ordinarily there is no requirement for a person to be represented to take any positive step to countenance the applicant being appointed a representative party, or even for them to be aware of the existence of the action in order to be bound by the result therein. Likewise, a represented person cannot opt out of the proceedings, albeit it in theory they could apply to the court for an order or direction that they not be represented by the appointed representative party in the said proceedings or that any judgment in the said proceedings not be binding upon them. This however is subject to the court's case management powers which are 'flexible' or can be exercised in a flexible fashion so as to meet the particular circumstances of each case. Accordingly, the judge managing the case may impose a requirement for the representative party to notify members of the class of the proceedings or steps taken to or to be taken in the proceedings by the representative on their behalf or to establish a simple procedure for opting out or to limit the class to only those who have positively opted in.²⁹

(ii) *The class definition*: This feature speaks to circumstances where there may be difficulties in defining the class of persons to be represented. Any consideration starts from the premise that it is plainly desirable that the class of persons to be represented should be clearly defined. However, where there may be certain difficulties with being able to do so with precision, it becomes a matter for the court in exercising its discretion, to determine whether it is just and convenient to allow the claim to proceed on a representative basis, or to make the achievement of the desired level of precision of definition, a precondition to the application of rule 19.6 (or EC CPR rule 21).³⁰

²⁹ See para 77 of *Lloyd v Google*.

³⁰ See para 78.

(iii) *Liability for costs*: The general position is that persons of the represented class who usually will not themselves be parties to the proceedings (and indeed may not even be aware of the existence of the proceedings) will not ordinarily be liable to pay any costs incurred by the representative party in pursuing or defending the claim. However, the court may, in the interest of justice, make an order requiring a represented person to pay or contribute to costs and giving permission for the enforcement of the order pursuant to the English CPR 19.6(4)(b), set out above. The equivalent provision under EC CPR Part 21 is rule 21.3 which, in effect, is on all fours with the English rule 19.6(4), states-

- (1) If there is a representative claimant or defendant, an order of the court binds everyone whom that party represents.
- (2) It may not however be enforced against a person not a party to the proceedings unless the person wishing to enforce it obtains permission from the court.
- (3) An application for permission must be supported by evidence on affidavit and must be served on the person against whom it is wished to enforce the judgment.

These provisions notwithstanding, Lord Leggatt stressed³¹: 'It is difficult, however, to envisage circumstances in which it could be just to order a represented person to contribute to costs incurred by a claimant in bringing a representative claim which the represented person did not authorize.' It is to be noted also that the position will be different in the case of a commercial litigation funder who finances unsuccessful proceedings who is likely to be ordered by the court to pay the successful party's costs at least to the extent of the funding; and likewise, where the proceedings financed are a representative action.

³¹ See para 79.

(iv) *The scope for claiming damages*: It is not a bar to a representative claim that each represented person has in law a separate cause of action or that the relief claimed consists of or includes damages or some other monetary relief. What limits the scope for claiming damages in representative proceedings is the compensatory principle on which damages for a civil wrong are awarded with the object of putting the claimant – as an individual – in the same position as best money can do it, as if the wrong had not occurred. Ordinarily, the application of this compensatory principle necessitates an individualized assessment which raises no common issue as between those who are within the class being represented. Where this is the case, a representative action is not a suitable vehicle for such an exercise.³² However, there may nevertheless be advantages in the interest of justice and efficiency in adopting a bifurcated process – as was done, for example, in the *Prudential* case – whereby common issues of law and fact are decided through a representative claim, leaving any issues which require individual determination – whether they relate to liability or the amount of damages – to be dealt with at a subsequent stage of the proceedings.³³

[47] Lord Leggatt also observed at paragraph 83, that the English rule 19.6 is silent on the important question of the distribution of the realized proceeds of a money judgment to members of the class. I would observe that the EC CPR Part 21 is also silent on this important matter. It may well be, however, that where a representative claimant is successful in the claim and damages or some other monetary compensation is awarded and recovered from the defendant(s), the representative party can approach the court for directions as to how the money recovered ought properly to be distributed to the persons comprising the class of persons represented. However, I am mindful that there may, in the circumstances of a case, be some particular issue or factor or practical difficulty in accurately or fully

³² See para 80.

³³ See para 81.

identifying all members of the class. For example, there may be issues of inheritance relative to members of the class who are deceased, which may delay or prevent the complete distribution of the judgment proceeds to all persons of the class. However, none of these 'practical' difficulties serve necessarily to prevent a court from appointing a representative party to proceedings provided the court is satisfied that there is an identifiable class which have a common or very similar interest in the litigation.

Ground 1 – Actionability of the underlying claims

MBFX's Submissions

- [48] MBFX submits that VDHI has no claim in its own right against the Ancillary Defendants (Mex Securities, MBFX and Mr. Taher), and no such claims have been identified in its Statement of Ancillary Claim ("SAC"). All claims being pursued against the Ancillary Defendants belong to the Noteholders. MBFX also points out that up to the hearing of its application to set aside the Representative Order, it had proceeded on the basis that the claims advanced by VDHI on behalf of the Noteholders were all Luxembourg law derivative claims called *actions obliques*, and that it had proceeded on this basis for the three reasons which they set out (in some detail) at paragraphs 20 to 22 of MBFX's skeleton argument in the appeal.
- [49] The first is that the Noteholders are, self-evidently, the holders of certain notes described in the Private Placement Memorandums ("PPMs") which gave rise to the Notes, to '*constitute unsecured unsubordinated obligations of the Issuer [Mex Securities] and rank pari passu and rateably among themselves.*' MBFX contends that the Notes comprise debt obligations governed by the terms of the PPMs, that are owed to Mex Securities (as debtor) in favour of the Noteholders (as creditors). It is submitted, therefore, that the only claims which might be available to Noteholders against third parties such as MBFX arising from their alleged interference with Mex Securities' assets, were claims brought derivatively on behalf of Mex Securities.³⁴ The second reason is that prior to amendments made to the

³⁴ Para 20 of MBFX's Skeleton Argument.

SAC on 23rd March 2022 (after the case management conference), VDHI advanced *action oblique* claims by the Noteholders against the Ancillary Defendants.³⁵ The third reason is that the fact that Noteholders have no direct cause of action against third parties and, conversely, only derivative claims (*actions oblique*) are available, is put beyond doubt in the PPMs, in particular at clause 7.2(d) – set out in full at paragraph 22 of MBFX’s skeleton argument. The most material parts of this clause state: ‘Consistent with the Fiduciary Act 2003, Noteholders have no direct right of action against any obligor to enforce their rights under the Notes...each Noteholder is entitled to institute indirect legal action (action oblique) in accordance with the relevant provisions of the Luxembourg civil code against the obligor in lieu of the Issuer and on its behalf.’

[50] MBFX referenced the contention by VDHI (for the first time) in its skeleton argument dated 6th March 2022 for the CMC, that it does not assert on behalf of the Noteholders any derivative claims by way of *actions oblique*, but instead: ‘*All of the claims and causes of action asserted by VDHI on the Noteholders’ behalf are asserted (i) in their own capacity, not on behalf of Mex Securities, and (ii) under BVI law*’. This led the learned judge at paragraph 35 of his written judgment to conclude that he did not need to consider further MBFX’s submission that the Noteholders had no actionable claims, as: ‘Instead, they sue on ordinary BVI common law causes of action. That is sufficient in my judgment to dispose of this point.’ It is MBFX’s submission that in so concluding the learned judge erred in law and in failing to find that ‘no ordinary common law causes of action’ are in fact vested in the Noteholders. This means that the Noteholders could not bring a damages claim against MBFX for any loss in relation to collateral assets.

[51] In support of this submission, MBFX relies on three points.³⁶ The first is that MBFX’s Luxembourg law expert, Mr. Cedric Schirrer (“Mr Schirrer”), opined (in effect) that Noteholders have no direct right of action against any obligor to enforce their rights

³⁵ Paras 11 and 33.21 of the Amended Statement of Ancillary Claim.

³⁶ Para 26 of MBFX’s Skeleton Argument.

under the Notes; and under Luxembourg law, contracts are only binding upon the parties and have no effect towards third parties. Accordingly, agreements between Mex Securities and other parties such as MBFX under their Client Agreement, only have effect between these parties. Moreover, Mr. Schirrer also opined that shareholders of a company have no direct liability action (“*action individuelle*”) against any party that would be liable towards the company that they are a shareholder of, and such actions must be triggered either directly by the company itself or indirectly by a shareholder by *action oblique*. Also, MBFX contends, VDHI’s Luxembourg law expert, Denis Philippe (“Mr. Philippe”), did not state or conclude in any of his four reports, that direct claims were available to the Noteholders. Accordingly, in this respect, Mr. Schirrer’s evidence is uncontroverted. Mr. Schirrer’s analysis is also consistent with the terms of the PPMs themselves (as set out above).

- [52] The second point relied on by MBFX is that in light of the fact that the Noteholders have no direct claims under Luxembourg law, the learned judge erred in concluding that the Noteholders (by VDHI) can sue on ordinary BVI common law causes of action, without first determining whether or not such direct claims were available to the Noteholders and, as mere creditors of Mex Securities, ‘it is axiomatic that no such claims are available.’³⁷ The third point is that since VDHI has confirmed that it only asserts direct claims (and not derivative claims) on behalf of the Noteholders, and since no such claims are in fact available to the Noteholders, the learned judge ought to have found that the making of the Representative Order served no purpose, as there was no point in appointing a representative to represent the Noteholders ‘because the Noteholders have no actionable claims against the Ancillary Defendants.’³⁸

³⁷ Para 27 of MBFX’s Skeleton Argument.

³⁸ Para 28 of MBFX’s Skeleton Argument.

VDHI's Submissions

[53] In response to this ground of appeal and MBFX's submissions in relation thereto, VDHI first asserts the preliminary point that this ground, which they muse appears to be a strike out application by another route and has nothing to do with whether a representative order ought to be made, is not now open to MBFX to raise.³⁹ In support of this preliminary point, which VDHI submits is sufficient to dispose of ground 1, it argues that it is well established that a party is not to be permitted to advance on appeal a point or argument which it might have advanced before the court below and did not do so, or to mount a collateral attack on a prior judgment which essentially disposed of the very same point. In this regard, VDHI relies on two authorities. These are **Koza Ltd v Koza Altin**⁴⁰ and **Orb v Ruhan**.⁴¹ VDHI contends that the court below has already considered and rejected MBFX's submission that the Noteholders can only assert an *action oblique* under Luxembourg law and, therefore, have no standing to bring any other claim. It points to paragraph 102 of the lower court's judgment on MBFX's application to discharge the WFO where it is stated that:

“the thrust of VDHI's case is that there was a conspiracy to defraud. That is and was the main case against MBFX and Mex Clearing. The setting aside of the Tomlin Order, which was entered pursuant to the alleged fraudulent conspiracy, is subject to BVI law.”

[54] VDHI also argues that MBFX did not contend in making its jurisdictional challenge, which was dismissed, that there was no serious issue to be tried in respect of all the claims identified in VDHI's SAC, accordingly they must be considered to have conceded that issue, and cannot now seek to make what is effectively the same contention by way of ground 1 of this appeal.⁴² VDHI summarizes (at paragraph 11.4 of its skeleton argument) its position on this preliminary point. It argues that this point is dispositive of ground 1 of MBFX's appeal, which ground is 'particularly misguided' as it is inconsistent with its position as stated at paragraph 39 of its

³⁹ Para 11 of VDHI's Skeleton Argument.

⁴⁰ [2021] 1 WLR 170 at [30] - [42].

⁴¹ [2016] EWHC 850 (Comm) at [82] citing the decision of the English Court of Appeal in *Chanel v Woolworth*.

⁴² Para 11.3 of VDHI's Skeleton Argument.

skeleton argument in this appeal. There MBFX states: ‘the proper course is for the claim to proceed in the conventional way with the Noteholders (the total of which is only 76: see paragraph [6]) who wish to pursue the claim being joined as Claimants.’ Additionally, at paragraph 11.4 of its skeleton, VDHI encapsulates its position on this issue in this way (in the main part): -

“Accordingly, MBFX has either run all arguments to the effect that VDHI/the Noteholders has no good arguable claim and lost, or they could and should have brought all their evidence and arguments to bear on this issue at the 5-day contested injunction hearing, but did not do so. It is not – and was not at the hearing of MBFX’s application to set aside the Representative Order – open to MBFX to reargue this issue. The judge was therefore right to proceed – and this Court should also proceed – on the basis that there is at least a serious issue to be tried in respect of all these claims.”

[55] VDHI submits that, in any event, MBFX is wrong to suggest (at paras.19 – 24) that its case had changed over time and MBFX was right to proceed on the basis that VDHI was advancing an indirect or derivative claim on behalf of the Noteholders against the Ancillary Defendants – the so-called *action oblique*. It was and has been made clear that VDHI does not assert on behalf of the Noteholders any claims or causes of action by way of *action oblique*, although it expressly reserved the right to do so at paragraph 11 of its Amended Statement of Ancillary Claim (“ASAC”). It reiterates that all claims which it brought on behalf of the Noteholders are asserted: (i) in their own capacity; and (ii) under BVI law. It emphasizes that the claim on behalf of the Noteholders is made under the BVI court’s inherent jurisdiction to set aside the Consent Order, cannot possibly be understood as being a Luxembourg law *action oblique* claim; and it was incorrect for MBFX to contend that prior to the amendments to the SAC, VDHI had ‘advanced *action oblique* claims by the Noteholders.’⁴³

[56] VDHI submits that it is also wrong to contend (as MBFX has) that the Noteholders have no actionable claims before the BVI court, as no ‘ordinary BVI common law causes of action are vested in the Noteholders’. The various causes of action were

⁴³ Paras 14-15 of VDHI’s Skeleton Argument.

summarized at paragraph 21 of its skeleton argument before the court below, and at paragraphs 94.3 to 94.4 of its Reply to MBFX's Defence. It submits that the availability of these causes of action, and VDHI's/the Noteholders' standing to bring them, is governed by BVI law. A poignant example (it argues) is that VDHI's claim on behalf of the Noteholders to set aside the Consent Order depends on whether the Noteholders can establish that they have a sufficient interest in doing so, within the tests set out in **Roshan v Singh**⁴⁴ at paragraph 31 and **Smagin v Yagiazaryan**⁴⁵ at paragraphs 36 – 44. All such claims can properly be asserted by a representative claimant; see the remarks of Lord Leggatt in **Lloyd v Google** at paragraphs 40 – 58 and 80 – 83.

[57] Regarding the expert evidence of Luxembourg law provided by Mr. Schirrer, VDHI argues that he did not purport to establish that the Noteholders had no causes of action available to them under BVI law and, in so far as he relied on clause 7.2(d) of the Terms and Conditions ("T&Cs") of the Notes, this was misplaced to the extent that he seeks to suggest that this clause prohibits a cause of action under BVI law. This clause is concerned with claims in contract under the Notes and has no application to and does not prohibit a cause of action to set aside an order or judgment of the BVI court on the ground of fraud under the BVI court's inherent jurisdiction.⁴⁶ It is also contended that the judge did not fail to consider or determine whether direct claims were available to VDHI, since this issue was conceded or determined before, and it is therefore impermissible for MBFX to raise it again now. The judge clearly proceeded on the basis that VDHI/Noteholders had such claims under BVI law, and to criticize the judge on the basis that 'as mere creditors of Mex Securities, it is axiomatic that no such claims are available', is merely a bald assertion and an incorrect statement which does not stand up to scrutiny.⁴⁷

⁴⁴ [2017] 4 WLR 46.

⁴⁵ [2021] EWHC 1383 (Comm).

⁴⁶ Para 17.1 of VDHI's Skeleton Argument.

⁴⁷ Para 17.2 of VDHI's Skeleton Argument.

[58] VDHI also submits that MBFX was wrong to contend that the learned judge ought to have concluded that (i) no claims under BVI law are available; and (ii) that making a representative order served no proper purpose. To the contrary, 'it served a very plain representative and case management purpose, at a time when MBFX was seeking both to push VDHI to issue and serve a pleaded claim, and to prevent VDHI from telling the Noteholders about it.'⁴⁸

Analysis and conclusion on ground 1

[59] In my considered view, VDHI's preliminary point has merit, and this ground of appeal fails on that point alone. The issue of whether the underlying claims made in the Amended Ancillary Claim Form⁴⁹ and ASAC⁵⁰ were actionable, is nothing short of a collateral attack on the ancillary claim made. This attack has not been made by way of a strike-out application on the basis that the ancillary claim is unsustainable or it discloses no cause of action or is an abuse of the process of the court, but in the context of MBFX's challenge, by way of a set-aside application, to the merits and appropriateness of the Representative Order appointing VDHI to act as a representative claimant in Claim No. 73 of 2021.

[60] The Ancillary Claim (as amended) was brought by VDHI in No. 73 of 2021 (i) on its own behalf; (ii) as a management company (registered in the Grand Duchy of Luxembourg) for and on behalf of the Funds (being the three funds specified at para. 8.2); and as a representative party on behalf of the Noteholders (defined at para. 1 as 'various innocent third-party noteholder investors and to also include the Funds').⁵¹ The Ancillary Claim (as amended) was brought to set aside a Consent Order (including, for the avoidance of doubt, the purported agreement set out in the Schedule to the order) entered on 14th December 2020, and which resulted in some 36.4 million euros being paid out of Mex Securities' accounts with MBFX on 18th December 2020 to Mex Clearing, together with such consequential orders as the

⁴⁸ Para 17.3 of VDHI's Skeleton Argument.

⁴⁹ Consolidated appeal bundle, Vol. 2A p84.

⁵⁰ Ibid, p89.

⁵¹ Paragraphs 1 and 8 of the Amended Statement of Ancillary Claim.

Court thinks fit. The Ancillary Claim (as amended) was brought under the BVI court's inherent jurisdiction, on the grounds that the Consent Order (including the Schedule thereto) is a sham, is not a binding or enforceable contract in law as it is unsupported by consideration and was procured by fraud. Specifically at paragraph 120 of the ASAC, VDHI invokes the BVI court's inherent jurisdiction to set aside a judgment or order of the said court on the basis that it was obtained by fraud or collusion between the parties. Also, at paragraph 122, it is averred that the Consent Order, including the agreement set out in the Schedule thereto, was a sham, and was obtained by fraud and/or collusion carried out by at least the Multibank Participants (defined in the ASAC to include MBFX).

[61] VDHI, on behalf of the Noteholders, also seeks an order under section 81 of the Conveyancing and Law of Property Act 1961 and/or under the Fraudulent Conveyances Act 1571, setting aside the transaction by which the 36.4 million euros was paid to Mex Clearing and/or the Multibank Group, an account, restitution, and equitable compensation. At paragraph 11 of the ASAC, VDHI on behalf of the Noteholders, expressly 'reserves the right to make claims, including proprietary claims, by way of derivative action on behalf of Mex Securities. Further, or in the alternative, VDHI, or another of the Noteholders, may be the proper claimant by way of an "action oblique" (see paragraph 33.21 below). This Ancillary Claim is pleaded without prejudice thereto.'

[62] The issue raised by MBFX in ground 1 of its appeal, as to whether the Ancillary Claim (as pleaded) is properly made under BVI law, or put differently, whether the Noteholders have standing notwithstanding clause 7.2(d) of the T&Cs of the PPMs, to bring such a claim in BVI, has been considered and rejected by the court below. Moreover, this issue is more appropriately raised by way of an application to strike out the ancillary claim against Mex Securities and MBFX; or, as was done, in the application brought by MBFX to discharge the WFO on the basis that no BVI cause of action (as pleaded) arises or is actionable by the Noteholders. This issue having been raised and rejected by the judge below, and subject to the outcome of MBFX's

appeal against the judge's refusal to set aside the WFO on that ground, it is wholly inappropriate for MBFX to raise this issue now by way of an application to set aside the Representative Order made *ex parte* on notice to MBFX. Accordingly, I hold that it is not open to MBFX to raise this issue either in its application to set aside the Representative Order or on appeal against the judge's order refusing the said application.

[63] If I am not correct in upholding VDHI's said preliminary point or that it is dispositive of ground 1 of MBFX's appeal, I turn to consider the merits of ground 1 itself. By ground 1 MBFX contends that the only cause of action available to the noteholders being an indirect or derivative claim, the so-called *action oblique* under Luxembourg law, the learned judge erred in finding that the Noteholders can bring a claim under BVI common law and, accordingly, the Ancillary Claim is not actionable and cannot be brought in a representative capacity by VDHI. MBFX also argues that the learned judge erred in concluding that the ancillary claims are BVI common law causes of action, and in not going on to determine whether the only claim available to the Noteholders is some form of derivative action, such as the *action oblique* under Luxembourg law, brought in the name of Mex Securities.

[64] VDHI has made clear in its ASAC and in its skeleton arguments in the court below and in this appeal, that the Ancillary Claim is not being advanced as an *action oblique* under Luxembourg law. It follows, therefore, that if this is the only basis upon which the Noteholders can assert a claim, VDHI has (at least thus far) not done so. If correct, it would follow that VDHI's underlying ancillary claims, as pleaded in the ASAC, are not actionable by the Noteholders leading to the conclusion that VDHI ought not to have been appointed a representative claimant on behalf of the Noteholders to bring the said ancillary claim.

[65] In my considered view, it cannot be said conclusively that clause 7.2(d) of the T&Cs of the PPMs expressly excludes any right of action by the Noteholders or on their behalf by a representative claimant to set aside the Consent Order (Tomlin Order)

entered by the BVI court on 14th December 2020. This point is certainly arguable, but at this stage of the proceedings it cannot be said that the converse is unarguable and unsustainable as a matter of law or as a matter of contract. The learned judge was satisfied that the Ancillary Claim brought to set aside the Consent Order gave rise to common law claims under BVI law and under the court's inherent jurisdiction. At paragraph 34 of his written judgment, the judge refers to the submission by MBFX's lead counsel Mr. Malek KC at paragraphs 20 to 23 of his skeleton argument, that as the Noteholders had no claim in Luxembourg law to an *action oblique* against the Ancillary Defendants and Mr. Taher, there was no point in appointing a representative to represent them as no viable cause of action exists. At paragraph 35, the judge concludes (on this issue) in these terms: -

“[35] I do not need to consider this further. As Mr. Penny QC made clear neither the noteholders nor VDHI seek to bring an action oblique. Instead, they sue on ordinary BVI common law causes of action. This is sufficient in my judgment to dispose of this point.”

- [66] In my judgment, the learned judge cannot be faulted for the way in which he disposed of this point by MBFX. He was considering an application by MBFX to set aside the Representative Order. He need only satisfy himself, at this stage in the proceedings, that, as pleaded, VDHI had made out an actionable cause of action under BVI law. In this regard, the judge was clearly satisfied that VDHI had done so as it relates to the setting aside of the Consent Order on the basis, *inter alia*, of fraud as it relates to the Noteholders themselves which led, on the basis of the Consent Order, to the sum of 36.4 million euros being paid out of Mex Securities' account at MBFX to Mex Clearing. It was not for the learned judge at this stage to go further and to conclusively determine this issue in a summary way, particularly as he was not then considering an application to strike out the Ancillary Claim (as amended) or for summary judgment on the basis that the Ancillary Claim was unsustainable in law or VDHI and/or the Noteholders had no standing to bring such a claim, whether by virtue of clause 7.2(d) of the T&Cs or that they had not brought an *action oblique* or other form of derivative action.

[67] Accordingly, I conclude that ground 1 has not been made out and there is no basis upon which this Court can or ought to set aside the dismissal order on the footing of this first ground of appeal.

Ground 2 – Alleged failure to consider whether the Representative Order was justified or appropriate

MBFX's Submissions

[68] MBFX contends under this ground of appeal that the learned judge erred in three ways:

- (1) he wrongfully took into account the purported delay on the part of MBFX in bringing its application before the court to set aside the Representative Order;
- (2) he elevated the requirement to retain the (then) currently listed trial date of 11th July 2022 above the need to consider whether the Representative Order was justified; and
- (3) he failed to take into account the ability of VDHI, as class representative, to meet adverse costs orders and/or calls on the cross-undertaking in damages, and failed to address whether it would be more appropriate, in these respects, for the Noteholders to be joined as parties to the proceedings.

[69] MBFX also contends that, in doing so, the learned judge wrongly characterized the Representative Order and MBFX's application to set it aside as case management matters. Instead, he ought to have treated such matters as a substantive challenge to whether VDHI is a proper representative party pursuant to CPR Part 21, and whether it had obtained the Representative Order by the correct procedure. Therefore, the learned judge was wrong to find that case management considerations alone suffice to dismiss MBFX's set aside application, as it could

never be appropriate for a party which is not a fit and proper representative party to remain appointed as such merely on case management grounds.

[70] On the question of delay, the learned judge at paragraph 7 of the judgment, having observed that MBFX's set aside application had been issued over 9 months ago on 9th July 2021, concluded that 'it has not been pursued with vigour', which he attributed to the frequency with which MBFX's legal team has been changed, with each new team seemingly having a different litigation strategy. He then surmised: 'The reason, however, is irrelevant. A case management decision which might have been viable at an earlier stage of litigation might well become less viable the nearer the trial becomes.' MBFX takes issue with the judge's observations and apparent conclusion at paragraph 7 of his judgment, and his failure to weigh in the balance certain other prevailing factors or explanations as to why its set aside application having been filed shortly (15 days) after the Representative Order had been made *ex parte* on 21st June 2021, was not brought on for hearing earlier. They submit that the learned judge was incorrect to penalize or criticize MBFX because other applications had been pursued in parallel.

[71] In my opinion, the learned judge did not make a positive determination of delay or undue delay adverse to MBFX such as to disentitle it to an order setting aside the Representative Order. The learned judge was, at paragraph 7, observing that the set aside application, though filed in a timely way, may not have been pursued with the same vigour as other discharge applications brought subsequently by MBFX in the said proceedings, which applications have been listed and brought on for hearing prior to the application to set aside the Representative Order. What seemed to have been concerning to the judge, as can be gleaned from paragraph 7, is that a court may be less inclined to set aside a representative order the closer the hearing date is to an already fixed trial date, such as, in the instant matter, a trial date fixed on an expedited basis to commence on 11th July 2022, some 4 months later. This is, in my view, a fair observation and one which is appropriate for a judge to make ordinarily when dealing with an application to set aside a representative

order. That said, MBFX's point that where the representative order is patently bad or unsustainable or ought not properly to have been made, a delay in hearing a challenge to the appropriateness or correctness of such an order ought not to be determinative of the application to set aside or to discharge the representative order, because of an imminent or close trial date for the trial of the substantive claim.

[72] The gravamen of MBFX's complaint under ground 2, is that the learned judge approached the issue of the discharge or setting aside of the Representative Order on a wrong or incorrect basis. He approached the said application principally as a case management decision or determined it principally on case management grounds, and concluded, incorrectly: 'It suffices for me to conclude that changing the representative nature of the proceedings in these final stages of the action would be chaotic.'⁵² And at paragraph 9: 'In my judgment, case management considerations alone suffices to refuse MBFX's application of 6th July 2021.' Here MBFX points out that, in fact, at that stage, the pleadings were not yet closed, and directions had been given at the CMC for VDHI to file a statement of reply, to give disclosure, for the exchange of factual evidence, and for the filing of expert reports – none of which had yet taken place. Accordingly, it is submitted, that 'the CMC was the appropriate place to consider whether the claim should proceed by way of representative action rather than a standard claim in which the Noteholders are joined as claimants.'

[73] In relation to this aspect, it is noteworthy that MBFX's appeal against the judge's refusal to adjourn or to relist the trial dates, was upheld by this Court during the April 2022 Special Sitting, and the trial dates in July 2022 vacated.

[74] MBFX also challenges the appropriateness of the Representative Order. They criticize the learned judge for failing to take into his consideration the inability of VDHI, as a representative party, to meet adverse costs orders made in favour of the

⁵² Para 8 of the judgment in the court below.

Ancillary Defendants, and/or calls on its cross-undertaking in damages given in support of the WFO. Moreover, it is contended that in the representative action as presently constituted, the Noteholders are not parties to the Ancillary Claim and are thus not liable for any adverse costs orders, and orders made in the proceedings cannot be enforced against them without the court's permission given pursuant to CPR 21.3(1).

- [75] MBFX also raised issues concerning an admitted lack of communication between VDHI and the Noteholders, whether as to their (potential) liability for adverse costs orders or for payment of damages under the cross undertaking in damages given by VDHI. While it was disclosed to Noteholders in VDHI's 7th March 2022 update that the cost of pursuing the claim has to date been met by the Funds and KPMG as liquidators of the Funds supports the claim, it remains entirely unclear whether this commitment extends to funding the payment by VDHI of adverse cost orders. As mentioned above, more recently, MBFX has provided, and this Court has agreed to allow as evidence in the Representative Appeal, the Update Material evincing that VDHI's parent, VDH KG, has since February 2022, prior to the April 2022 Special Sitting, sold its interest in VDHI. Furthermore, in the Fortification Appeal it became clear that the commitment by KPMG as liquidators of the Funds to fund the Ancillary Claim, does not include a commitment or an obligation to fund the payment by VDHI of adverse costs orders. Moreover, as was also made clear during the hearing of the Fortification Appeal, VDHI did not have the resources necessary to pay, and was wholly unable to meet, the sum of US\$20 million ordered as fortification of its undertaking in damages given when obtaining the WFO.

VDHI's Submissions

- [76] It is VDHI's position that MBFX's ground 2 is a mischaracterization of the judge's reasoning, as the learned judge did not base his decision entirely on case management considerations, but went on to consider MBFX's detailed grounds of objection to the Representative Order from paragraph 10 to 44 of his judgment under the rubric '*detailed grounds of objection*'. This much is correct and beyond

question, in my view. What the learned judge did is to opine early in the judgment that case management considerations alone suffice to refuse MBFX's set-aside application. He did not confine his decision on the application to this basis, but went on to consider in detail MBFX's various and detailed grounds of objection and why it contended that the Representative Order ought to be set aside. These included MBFX's five issues or grounds: (i) an alleged conflict of interest, (ii) failure to keep Noteholders informed of material developments in the proceedings, (iii) the alleged irregularities in the holding of the EGMs, (iv) VDHI's alleged bad character having regard to certain regulatory failings, and (v) VDHI's recent application to substitute Messrs. Priess and Frevel as the Ancillary Claimants does not cure these defects. These are all matters which will be considered more fully later under ground 3 – errors in consideration of fit and proper representative.

[77] VDHI also submits that even if the learned judge had based his decision to maintain the Representative Order in place entirely on case management grounds, this would have been unimpeachable. It relies on the decision in **Lloyd v Google** which makes it clear that a judge's discretion to make a representative order, should be exercised taking into account the overriding objective of the CPR, and considerable deference will be given to the lower court's exercise of discretion in case management decisions. This Court ought only to interfere where the decision is perverse.⁵³

[78] I do not see the utility in recounting here VDHI's responses to each of the points sought to be made by MBFX in relation to the learned judge's consideration of delay by MBFX in getting its application to set aside the Representative Order heard, or the judge's considerations with regard to the approaching trial date. The simple position is that the learned judge, in any event, did not base his dismissal of MBFX's application solely on case management grounds.

⁵³ *Abdulle v Commissioner of Police of the Metropolis* [2016] 1 WLR 898 at [26]-[29].

[79] As to the three points relied on by MBFX to show that the judge failed to take into consideration the appropriateness of the representative action or order, VDHI's substantive responses are at paragraphs 24.1 to 24.3 of its skeleton argument. In relation to VDHI's failure to meet adverse costs orders, it submits that even if this point was raised by MBFX's counsel in oral arguments, it is not a reason to set aside the Representative Order. It was always open to MBFX to make an application, as it did, for security for costs and fortification of VDHI's cross-undertaking in damages. Furthermore, the court has the power to impose contribution to costs orders from those represented and to enforce such orders pursuant to CPR 21.3(1). As to the concerns that the Noteholders might not give disclosure, VDHI contends this is a new point never raised before the learned judge and ought therefore to be disregarded by this Court.

[80] VDHI submits that there is no utility or practical purpose in the court setting aside the Representative Order and having the claim proceed with the Noteholders being joined as claimants. This they argue, will serve no practical purpose and would only create chaos, as the learned judge concluded, and unnecessarily delay the trial. In this regard, I would observe that the new trial date or trial window is set for January 2024.

Analysis and Conclusion on ground 2

[81] In my considered opinion, there is little if any merit in ground 2. MBFX's criticisms of the learned judge's approach are without proper foundation and are not borne out by the judgement below. The learned judge did not base his decision purely or mainly on case management grounds, and to the extent that he took such considerations into account, he was correct as a matter of principle to do so. As the decision in **Lloyd v Google** clearly states, in deciding whether to appoint a representative, the judge is exercising a discretion which must be exercised taking into account the overriding objective to deal with cases justly, to ensure, so far as is practicable, that the parties are on an equal footing, that matters are dealt with expeditiously, and to save expense and costs.

[82] VDHI manages the three Funds, each of which have invested in the Notes which in turn are governed by the laws of Luxembourg. As Mr. Priess averred,⁵⁴ VDHI brought the claim as the management company of the three Funds, which he asserts they were entitled to do under the laws of Luxembourg. In addition, as matters turned out, at the EGM the Noteholders passed a resolution authorizing VDHI to represent them in the proceedings before the Commercial Court in BVI. This was prior to Jack J making the Representative Order on 21st June 2021.

[83] In my judgment, there was sufficient evidence before the learned judge to satisfy the threshold requirement under EC CPR 21.1(1) that the members of the class must have 'the same or a similar interest' in the proceedings, which expression is to be given a purposive interpretation. Clearly, the three Funds managed by VDHI, as investors in the Notes, have the same or similar interest in having the Consent Order (Tomlin Order) set aside and in the recovery of the funds transferred out of the accounts (FE2 and FE 3) in the name of Mex Securities at MBFX. Likewise, the other Noteholders have the same or a similar interest in the three Funds in doing so. I am also satisfied that VDHI had, at the time of making the Representative Order, a 'sufficient interest' in the extant proceedings before the court below to be appointed the representative claimant of the Funds and the other Noteholders constituting the class of Noteholders with the same or a similar interest in bringing the claims. Giving the expression '*sufficient interest*' a purposive interpretation, I hold that VDHI, both in its capacity as the manager of the three Funds which invested in the Notes, and as the entity authorized by the resolution passed at the EGM to represent the wider body of Noteholders in the said proceedings, also satisfies this basic requirement of rule 21.1(2)(a).

[84] The further question is whether, in considering the five detailed grounds of objection to the Representative Order, the learned judge erred or failed to take into account

⁵⁴ Consolidated appeal bundle, Vol. 6 p79, para 6 and 7.

matters that he ought properly to have taken into account, and whether, in the end, his decision was patently bad. This leads to a consideration of MBFX's ground 3.

Ground 3 – Consideration of fit and proper representative

[85] MBFX has identified in its notice of appeal and at paragraph 40 of its skeleton argument, seven matters in respect of which it contends the learned judge committed errors and failed to determine that VDHI was not a fit and proper person to be appointed a representative claimant in the proceedings below. These seven 'errors', which will be taken in turn, are as follows:

- (1) failing to take account or proper account of the conflict of interest between the Noteholders, VDHI and VDH AG – **"VDHI Conflict of Interest"**;
- (2) incorrectly taking into account the irrelevant consideration that VDHI had been successful in certain interlocutory matters as the representative of the Noteholders - **"VDHI's Success in Interlocutory Matters"**;
- (3) incorrectly taking into account the irrelevant and evidentially unsubstantiated preference of Noteholders – **"the Purported Noteholder Preference"**;
- (4) incorrectly dismissing or not taking into account VDHI's failure to update the Noteholders of relevant matters in breach of its duty as a representative – **"VDHI's Failure to Update Noteholders"**;
- (5) incorrectly dismissing as being "old" the involvement of the UBO of VDHI, Mr. Boettcher, in proceedings in the United States in which he was alleged to have participated in a fraud, and which proceedings were compromised by payment of a very substantial settlement sum. By contrast, taking into account equally 'old' matters as bases for finding that MBFX was at risk that MBFX would dissipate. The judge's basis for ignoring the allegations against the UBO of VDHI – that it is a regulated entity- is equally applicable to MBFX – **"Alleged involvement of VDHI's UBO in Fraud"**;
- (6) incorrectly dismissing the resignation of KPMG as auditor of the Funds managed by VDHI on the basis of lack of evidence, in circumstances where that evidence would solely be in the hands of VDHI, and taking into account

irrelevant matters, namely, that KPMG had agreed to fund the proceedings in the absence of any evidence of such agreement – **“Resignation of KPMG and its agreement to fund the proceedings”**; and

(7) incorrectly dismissing the irregularities in purported EGMs held by the ‘Noteholders’ when in fact only VDHI and VDH AG actually voted – **“Irregularities in the EGMs”**.

(1) VDHI’s Conflict of Interest

[86] MBFX relied on two potential conflicts of interest as a consequence of which they contend that VDHI cannot fairly or adequately act in the interest of the Noteholders. These conflicts were correctly summarized by the learned judge at paragraph 12 of his judgment. They are also particularized at paragraph 41 of MBFX’s skeleton argument. Borrowing heavily from these summaries, they are as follows:

- (1) The Noteholders are likely to have substantial claims against VDHI arising out of VDHI’s management of the Notes. VDHI is not a Noteholder, but rather, the fund manager of a number of funds in which Noteholders invested (and through which Noteholders invested in the Notes). The Notes were badly mismanaged, suffering huge trading losses (through VDH AG’s strategy as investment manager) and through investments in gold and precious metals derivatives in which UCITS Funds such as those managed by VDHI were prohibited from investing. It is VDHI’s case that the request, prematurely, to withdraw funds from the Notes which brought the Multibank Group’s joint venture with VDH AG to an end, gives rise to claims by the Multibank Group against Mex Securities and VDH AG. The argument is that given VDHI’s involvement in these events in (i) procuring the UCITS Funds unlawfully to acquire the Notes, and (ii) requiring VDH AG to withdraw funds from the Notes prematurely, it is reasonable to suppose that the Noteholders may have claims against VDHI in respect of losses suffered on their investments in the Notes;

- (2) The Noteholders are likely to have substantial claims against VDH AG. As the argument goes, given VDH AG's role in (i) committing Mex Securities to such undertakings, and then (ii) contravening those undertakings, it is reasonable to suppose that the Noteholders may have claims against VDH AG in respect of losses suffered on their investments in the Notes. Further, the Noteholders may have claims as a result of VDH AG's earlier management of the Notes, for example, in connection with the 11.95 million euros of losses suffered as a result of the initial trading strategy used by Mr. Moser, the premature closing of positions and as a result of VDH AG's dispute with the original issuers of the Notes ("the Oaklet dispute").

[87] At paragraph 41(4) of its skeleton argument, MBFX stresses that "one consequence of this mismanagement of the Notes is that Noteholders may well have claims, including for precisely the 'losses' which these proceedings purportedly seek to recover, against VDHI and VDH AG." To underscore this point, they refer to the acknowledgement by the learned judge at paragraph 22 that one investor in VDHI funds has already stated that he is considering claims against VDHI and VDH AG. Also, at paragraph 42 of its skeleton, MBFX particularizes the 'anticipated' conflicts of interest scenarios applicable to VDHI and VDH AG, which it contends makes VDHI an inappropriate representative party in the proceedings below. These are as follows:-

- (1) VDHI may be put in a position where it ought to commence a claim against VDH AG, a company in the same group and with which it shares a degree of common ownership. I would merely comment here, that given the New Material admitted in this appeal concerning the sale in February 2022 by VDH KG of its interest in VDHI it is now MBFX's contention that VDHI is no longer part of the VDH KG group.
- (2) A time may come when VDHI ought to be advising the Noteholders that it should be claiming against VDH AG (or even against VDHI itself) rather

than any Multibank Group entity. But it is vanishingly unlikely that VDHI would ever take such a course.

[88] It is MBFX's submission, that these potential conflicts of interests were ignored by the learned judge "who simply found that because, within the narrow context of this litigation, the Noteholders, VDHI and VDH AG all have an interest in maximizing recovery, there is no conflict of interest.' MBFX argues that in coming to this conclusion, the learned judge 'simply misunderstood (in paragraphs 14 – 15) the nature of the conflict of interest and appears to have misunderstood the authority of **Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd**⁵⁵ as standing for the proposition that as long as the representative party has some interest in the proceedings being successfully pursued, that is sufficient.'

[89] VDHI, in its submissions, argues that MBFX has not made out a 'compelling case' that VDHI faces imminent prospective claims against it by the Noteholders, and the 'short point' is that even if there were any such threatened claims, they are entirely irrelevant to the appropriateness of VDHI as a representative party in these proceedings. The reason why that is irrelevant, VDHI contends, is because in these proceedings the interests of VDHI and the Noteholders 'are entirely aligned – they want to get the misappropriated monies back from the Multibank parties.'⁵⁶ Accordingly, they submit that any perceived conflict 'has no bearing on the common goal of recovering the stolen funds.' On this point regarding a 'common goal', VDHI cites the decision in **Pan Atlantic** as making clear that 'the question is whether the parties have the same interest as against the defendants; not whether they have the same interest as between themselves.' VDHI also contends that the continuation of this claim by VDHI as a representative party of the Noteholders, does not preclude it from taking action against VDH AG nor of the Noteholders taking parallel action against either VDHI or VDH AG. This does not give rise to a 'binary' choice.⁵⁷

⁵⁵ [1989] 1 Lloyd's Rep 568.

⁵⁶ Para 27 of VDHI's Skeleton Argument.

⁵⁷ Para 28 of VDHI's Skeleton Argument.

Analysis and Conclusion

[90] In my judgment, the learned judge adopted the correct approach, applied the correct principles of law as set out in the decision in the **Pan Atlantic** case, and came to the correct conclusion as a matter of fact and law on this first issue or alleged 'error' of conflicts of interest potential or perceived. At paragraph 13, the learned judge identified what he saw as a 'simple answer' to the two types of potential conflict of interests relied on by MBFX in its application to set aside the Representative Order. This he concluded was sufficient to dispose of the conflict point. He put it this way:-

“There may, as between themselves, be a conflict of interest between (a) VDHI, (b) VDH AG and (c) the noteholders. However, there is no conflict between VDHI, VDH AG and the noteholders on the one hand and the MGW entities and Mr. Taher on the other. On the contrary, all of VDHI, VDH AG and the noteholders have the same interest in recovering as much as possible against MBFX and the other ancillary defendants. There is a complete community of interest in *this* aspect of the case.”

[91] The learned judge set out *in extensio* the relevant passages and principles enunciated in the judgment of Walker LJ in the English Court of Appeal decision in **Pam Atlantic**, dealing with the requirements of a representative action. It is therefore unnecessary for me to do so in full here. Suffice it to be said, as was expounded by Lord MacNaghten in the House of Lords in **Bedford (Duke) v Ellis**,⁵⁸ three conditions must be fulfilled for the appointment of a representative party. These are: (i) the parties or the class of persons must have the same interest in the proceedings; (ii) they must have a common grievance; and (iii) the relief sought must be beneficial to all members of the class.

[92] In the instant matter, it cannot be gainsaid that VDHI and the Noteholders have the same interest in the Ancillary Claim in No. 73 of 2021. That claim seeks to set aside the Consent Order on various grounds, including alleged fraud by Mex Securities and MBFX. Likewise, it cannot be gainsaid that in those proceedings VDHI and the Noteholders have a common grievance, which is that the Consent Order was

⁵⁸ [1901] AC 1.

entered as part of an alleged scheme, said to involve Mex Securities and MBFX, to defraud the Noteholders of the sum of 36.4 million euros. Also, that in bringing the Ancillary Claim (as amended) the reliefs being sought are beneficial to all the Noteholders being represented in the said action by VDHI.

- [93] It follows that the learned judge was correct when he concluded at paragraph 16 that there is no relevant conflict of interest between VDHI and the Noteholders in these proceedings, as they have the same interest in the claim against the Ancillary Defendants (Mex Securities and MBFX). The concern that Noteholders may also have claims or potential claims against VDHI and/or VDH AG, which claims are not part of the proceedings in Claim No. 73 of 2021, is, in my view, irrelevant to the question of whether VDHI is an appropriate representative party in the said proceedings to represent, as Ancillary Claimant, the interest of the Noteholders, which said interest are the same or, as the judge put it, 'a complete community of interest', in setting aside the Consent Order and recovering the sum of 36.4 million euros paid out or transferred from the accounts of Mex Securities at MBFX to Mex Clearing. For these reasons, this first limb of ground 3 of MBFX's appeal is without merit and fails.

(2) VDHI's success in interlocutory matters

- [94] In my view, this is a non-point. It is without merit. It is certainly not a sound criticism of the learned judge's reasons for dismissing MBFX's set aside application. At paragraph 4 of the judgment, the learned judge, having stated that he will consider shortly the detailed matters or criticisms being made by MBFX of VDHI's appropriateness to be a representative party of the Noteholders, observed that, on the whole, VDHI had been doing a good job on behalf of the Noteholders, in that they have been successful in most of the 'extensive interlocutory skirmishing' which has occurred thus far in the proceedings. In no way did the learned judge use this observation in reasoning his dismissal of MBFX's application. Accordingly, this second alleged 'error' fails.

[95] The matters listed by MBFX at paragraph 47 of its skeleton argument under this second category of alleged 'errors', all concern matters of alleged failure by VDHI to update and to communicate with the Noteholders, as a criticism of its conduct as the representative claimant. These points are more appropriately dealt with under the fourth of the 'errors' alleged, that is 'Failure to Update the Noteholders'.

(3) Purported Noteholder Preference

[96] This alleged 'error' concerns the learned judge's statement at paragraph 6 that 'there is no evidence that the noteholders would prefer either that the representative order be discharged in toto with them becoming individual ancillary claimants or that a committee of a small number of noteholders be appointed. At most there is a blank in the evidence.' The context in which these statements were made is that the learned judge referred to a general meeting of noteholders held on 27th July 2021 to consider a resolution to appoint Mr. Priess and Mr. Frevel, both of whom are directors of VDHI but not Noteholders themselves, as representative parties in place of VDHI; and the result of the voting on the said resolution whereby the majority of both the Multibank Noteholders and the Alpha Noteholders voted in favour. The judge noted that the substitution of these two directors for VDHI as representative parties did not take place. He also noted that the Noteholders had approved having VDHI through its officers running the litigation on their behalf. It was in response to a submission by Mr. Malek KC, learned counsel for MBFX, pointing to there being various imperfections in the way that meeting was held, that the learned judge made the observation quoted above.

[97] It is MBFX's case that this was an error on the part of the judge, as there was no evidence or no proper evidence as to what the Noteholders' wishes are since, at that EGM relied on by the judge, essentially, VDHI and VDH AG alone voted, and the said resolution was never in fact acted upon. Moreover, the only person who could plausibly obtain any evidence of Noteholder preference was VDHI, there is/was no such evidence before the court, and this ought to have been taken into account by the judge against VDHI.

[98] In response to these submissions, VDHI submits that the learned judge was entitled to rely on the evidence of what had occurred at the EGMs, and that the Noteholders had approved VDHI, through its officers, as the representative party to run the litigation. This was evidence of the Noteholders' wishes upon which the learned judge was entitled to rely.

Analysis and conclusion

[99] In my considered view, this is also a non-point. The simple fact is there was no evidence whatsoever before the court that the Noteholders had (by a simple majority or greater), at any time, decided or agreed among themselves, that the Representative Order appointing VDHI was not in their interest and/or ought to be discharged, or that they should individually become claimants in the said claim, or that some other representative or representatives, whether a small group of the Noteholders or some other person or entity, be appointed to represent them and to conduct the litigation in BVI on their behalf and in their interest. Accordingly, the judge's observations at paragraph 6 were correct and cannot be successfully challenged. This third alleged 'error' therefore fails.

(4) VDHI's Failure to Update Noteholders

[100] In the judgment below, the learned judge dealt with three areas of complaint which it contended were illustrative of VDHI's failure to update Noteholders. These are set out in full at paragraph 17 of the judgment, and need not, for present purposes be repeated in full here. Suffice it to be said that the learned judge, correctly in my view, found the first alleged area of complaint – VDHI belatedly disclosing the circulars which had been sent to the Noteholders in July 2021 in respect of the EGMs – to have 'very little weight as a relevant consideration', for the cogent reasons given at paragraph 18.

[101] The second alleged failure to update relates to a letter dated 11th February 2022 from Mr. Taher, a substantial Noteholder, written before VDHI sought to add him as

an Ancillary Defendant, to Mr. Priess inquiring as to whether VDHI had informed the Noteholders of various matters (including those set out at paragraphs 51.1 to 51.3 and 52 of MBFX's skeleton argument in the court below), and the unsatisfactory and wholly lacking response received from VDHI. The learned judge dealt with these matters at paragraph 19. In doing so, he considered this as an example of 'VDHI failing to engage as they should have done with MBFX and Mr. Taher.' He also commented that cooperation requires two sides to work together. His focus was on MGW's written offer to settle to Noteholders. In his view, VDHI should have passed it to the Noteholders for them to consider. However, MGW had included with their offer a statement outlining their defence, which statement contained 'inappropriate language and VDHI, not in my judgment unreasonably, refused to send it unaltered.'⁵⁹ The learned judge then assessed that 'happily some sign that greater cooperation is occurring.' He referenced and set out at paragraph 20 extracts from an email sent on 16th March 2022 by him, presumably to counsel for the parties in which, inter alia, he stated that he considered it right to '*give directions that the Noteholders be given up-to-date information, including information as to the offer made by MGW.*' This the judge saw as 'a pragmatic way forward.'⁶⁰

- [102] Interestingly, none of what the learned judge put in his email sent 16th March 2022 as directions which he intended to give, has been made the subject of an order or direction of the court. Moreover, no such order or direction was requested by any party. Accordingly, VDHI providing regular updates to Noteholders regarding the progress of the litigation, was never elevated to a directive of the court or a condition of its continued appointment as the representative claimant in No. 73 of 2021. This avenue was clearly open to the court and is one which it seems from his email, the learned judge had contemplated availing himself of.

⁵⁹ Para 19 of the judgment in the court below.

⁶⁰ Para 21 of the judgment in the court below.

- [103] The learned judge concluded at paragraph 21, that whilst this issue raised by Mr. Malek KC is regrettable, in his judgment it is not sufficient to justify terminating VDHI's representative function. With this conclusion I am entirely in agreement.
- [104] The third point of complaint relied on by MBFX, is that it is not only Mr. Taher but other Noteholders who are being kept in the dark by VDHI concerning the litigation. In this regard, reference was made to a letter dated 15th February 2022 written by the German law firm of Seith Miller Steinlein ("SMS") on behalf of their client Mr. Aufrecht – a Noteholder, to the Multibank Group complaining that VDHI and VDH AG had only returned 50% of the monies invested by their client. Reference was also made to evidence that SMS subsequently confirmed that the Multibank Group had not informed their client (i) of the fact that the UCITS Funds were – via the Notes- unlawfully invested in precious metals, or (ii) of the regulatory investigation to which VDHI is (or was) subject; nor was SMS's client invited to any meeting of Noteholders to discuss the conduct of the litigation.⁶¹ The learned judge having assessed that Mr. Aufrecht, who had invested in one of the funds, 'was not a direct noteholder and thus not entitled to attend the EGMs and that KPMG, who were winding up the Funds, 'had returned an initial 50 per cent of [his] investment to him', whilst 20% was being retained by KPMG 'to cover the cost of litigation', with the balance, if any, to be paid over to Mr. Aufrecht in due course, concluded that there was in his judgment 'nothing to this third point'.
- [105] VDHI submits that there is nothing in these three points or complaints relied on by MBFX. They do not warrant discharging or setting aside the Representative Order. They do not make it inappropriate for VDHI to continue as the representative claimant in these proceedings before the Commercial Court.

⁶¹ Paragraph 17 of the judgment, quoting MBFX's skeleton argument in the court below.

Analysis and conclusion

[106] I agree with the conclusions reached by the learned judge on all three of these points of complaint about VDHI's alleged failure to update the Noteholders. None of these complaints, without more, warrant a court discharging a representative order. In this vein, it is important to bear in mind the principles in relation to making a representative order as formulated in **Lloyd v Google** where, Lord Leggatt observed: 'there is ordinarily no need for a member of the represented class to take any positive step, or even to be aware of the existence of the action, in order to be bound by the result.' Further: 'It is, however, always open to the judge managing the case to impose a requirement to notify members of the class of the proceedings, and establish a simple procedure for opting out of representation, if this is considered desirable.' In my opinion, it was open to the learned judge, if he considered it necessary or desirable, to give a direction requiring VDHI as the representative claimant to communicate at suitable intervals, and as may be necessary and prudent, with the Noteholders, to update them with regard to important steps taken or to be taken during the progress of the litigation. This avenue was not directly undertaken by the learned judge nor was such an order or directive sought by MBFX, perhaps understandably because its position has been that the Representative Order ought not to have been made at all for the various reasons which it advanced both in the court below and before this Court. It may be that the learned judge, having opined as to the 'pragmatic way forward' (as set out in his email – at para. 21), would expect VDHI to act accordingly going forward, and he observed that there was 'happily some sign that greater cooperation is occurring.' For these reasons, this alleged error by or complaint of the learned judge's approach to and treatment of the allegations of failure to update Noteholders also does not succeed.

(5) Involvement by VDHI's UBO's in Fraud

[107] Before the learned judge below, MBFX mounted four bases of objection which they argued pointed to VDHI's bad character rendering it not a fit and proper person to be the representative claimant in these proceedings. These four bases were

summarized by the learned judge at paragraph 25 of the judgment below. However, before this Court, MBFX relied on only the second of these bases, namely, that the UBO (Mr. von Boetticher) of VDHI had faced civil fraud proceedings in the United States.

[108] In his consideration of this second basis, the judge observed at paragraph 27 that the allegations of involvement by Mr. von Boetticher in a civil fraud, related to a period in the 1990's when he was involved in an American company called Mills Corp, which operated a real estate investment trust (or REIT). Apparently, he was one of a number of defendants to a class action brought in respect of an alleged fraud committed 'by distributing more by way of income than the company in fact earned.' This was described by the plaintiffs as a Ponzi Scheme. However, the matter never came to trial and the alleged fraud was not proved in a court of law. There is evidence of a 'settlement' of the claim reached on 12th November 2008 in that suit on the basis of the payment of the very substantial sum of US\$165 million with Mills Corp, related entities and individuals. This much is to be found at paragraph 2.15 of a K2's report (obtained by MGW). The learned judge also recorded at paragraph 28, that Mr. von Boetticher's involvement 'was to sign the allegedly misleading financial statements of Mills Corp between 2000 and 2004, whilst at the same time selling US\$65 million of shares owned by him in the company, at a price which reflected, what is said to have been, the false market in the company'; and that he also controlled the KanAm defendants.

[109] MBFX premised its submissions on this issue (para. 53) with the observations that the learned judge below accepted that it was a matter of concern that the UBO (Mr. von Boetticher) of VDHI was involved in this class action suit in the United States in which he was accused of fraud, and which was settled by payment of a very substantial sum. To be more specific, the learned judge considered that the size of the settlement 'is a concern'. He also observed that –

“[29] In considering this allegation of unsuitability, it [is] important to note that these allegations against Mr. von Boetticher are quite old. The matter settled over 13 years ago with, so far as appears, no admission of liability.

The issues were never tried. Mr. von Boetticher, so far as appears, has no day-to-day involvement in the management of VDHI or the current litigation. Very importantly in my judgment, VDHI is a regulated entity. Its Luxembourg regulator, the CSSF, has, so far as appears, raised no concerns about Mr. von Boetticher.”

[110] On this issue, the learned judge concluded that while the amount of the settlement is a concern, ‘these other considerations lead to a conclusion that Mr. von Boetticher’s ultimate beneficial ownership of VDHI does not render VDHI an unsuitable entity to act as representative for the noteholders.’⁶²

[111] MBFX submits that the grounds on which the learned judge dismissed this contention of unsuitability of VDHI to be a representative party, do not stand up to scrutiny. At paragraph 53 of its skeleton argument, MBFX analyses the three bases relied on by the judge. They contend (i) the fact that the allegations of fraud against Mr. von Boetticher were ‘old’, do not obviate the necessity to disclose them; (ii) there was no evidence before the judge to support his observation that Mr. von Boetticher appears not to have any day-to-day involvement in the management of VDHI or the current litigation; and (iii) the implication drawn from the fact that VDHI is a regulated entity automatically makes it an appropriate representative party, is plainly wrong, and this is quite apart from the fact that VDHI has been cited for serious regulatory failures. MBFX also takes issue with the learned judge’s further statement at paragraph 32, having noted that VDHI’s regulator CSSF did fine it for regulatory breaches, but the fines were so low as not to have to be publicly disclosed by VDHI, that –

“If the regulator is content for VDHI to continue to carry out regulated duties, it is not for this court to go behind that authoritative view of VDHI’s suitability to be a regulated entity.”

[112] For these reasons, MBFX argues, the learned judge was wrong to dismiss Mr. von Boetticher’s involvement in the fraud proceedings and, accordingly, failed to take account of a relevant matter. In addition, MBFX argued that VDHI’s failure to draw

⁶² Paragraph 30 of the judgment in the court below.

Mr. Boetticher's involvement in the fraud proceedings to the attention of the court below, was a breach of its duty of full and frank disclosure upon the *ex parte* application to be appointed a representative claimant in the proceedings.

- [113] In response, VDHI submits that the learned judge undertook a careful evaluation of these allegations, and he came to the correct conclusion that none of them were such as to justify him setting aside the Representative Order. In doing so, the various observations and conclusions reached by the judge were correct, and he did not abrogate his duty to assess the suitability of VDHI as a representative party. Moreover, no evidence has been led or identified which demonstrates that Mr. von Boetticher's alleged historical involvement in a civil fraud (which has not been established) may have a negative impact on VDHI's ability to be appointed a suitable representative party and to prosecute these proceedings.

Analysis and conclusion

- [114] In my considered judgment, on this issue, there is no proper basis on which to conclude that the learned judge 'dismissed' Mr. von Boetticher's alleged involvement in civil fraud suit in the USA against Mill Corp by himself among other defendants, or the fact that the said action was reported to have been settled (without going to trial) for a very substantial sum of money. In fact, the learned judge recounted all of this at paragraphs 27 to 30 of his judgment. The matters which the learned judge observed at paragraph 29 were all matters which were properly open to any judge dealing with such an allegation. It is a fact that the said action in the USA in which Mr. von Boetticher was a named defendant, is quite old, going back over 13 years, and the allegations of fraud (in so far as they concern Mr. von Boetticher's involvement) are of much greater vintage. There was no evidence before the judge that liability in the said suit had been admitted by any defendant, including Mr. von Boetticher. This means that the allegations of fraud were never proven against him. As regards the judge's observation that Mr. von Boetticher appears to have no involvement in the day-to-day activities of VDHI, the learned

judge prefaced this with the expression 'so far as appears'. He made no conclusive finding as such in my view, nor could he.

[115] As to VDHI being a regulated entity, this is a material consideration. While it does not lead inextricably to a conclusion that a regulated entity is a suitable entity to be appointed a representative party by the court, it is certainly a factor on the positive side of the equation. The fact that VDHI has been fined by its regulator, was dealt with appropriately by the learned judge at paragraph 32. It is not unusual for regulated entities with a stellar reputation and standing to be fined at times by its regulator. This does not make them unsuitable to be appointed a representative party. The seriousness of the breaches and the severity or size of the fines or other penalties imposed by the regulator, are material considerations in determining suitability or whether that entity is a fit and proper person to be appointed a representative party in legal proceedings. All these factors were considered and weighed by the learned judge in deciding whether VDHI was a suitable representative party and whether he ought, properly, to set aside the Representative Order in these proceedings.

[116] Finally, the criticism of the last sentence of paragraph 32 set out above, is misplaced in my considered view. The learned judge was simply saying that since VDHI continues (even after its UBO's involvement in the fraud proceedings in the USA over 13 years ago), to be a licensed regulated entity in Luxembourg, and there is no evidence of the regulator suspending or cancelling their license, it is not for the court to question VDHI's suitability to be a "regulated entity" – not a suitable representative party – because of this fact. For these reasons, this fifth 'error' also fails.

(6) Resignation of KPMG

[117] This issue is a criticism of the judge's treatment of the resignation by KPMG as the auditors of the Funds which VDHI administered, and the failure by VDHI to disclose this fact early in the proceedings and the reasons for KPMG's resignation. The gist

of MBFX's criticism is that the learned judge incorrectly took the absence of evidence as to the reasons for KPMG's resignation as a point in VDHI's favour; and VDHI has breached its duty of full and frank disclosure on the *ex parte* application for a representative order. As VDHI points out, KPMG while the auditors of the Funds, they were not the auditors of VDHI. VDHI also pointed to the evidence of Mr. Preiss at paragraph 55 of Preiss 3, that KPMG's resignation as auditor of the Funds, was not related to the letter from its regulator CSSF.

Analysis and conclusion

- [118] In my considered view this complaint, even if it has some merit, does not lead to a conclusion that VDHI is unsuitable to be appointed a representative party. It is to a large extent irrelevant and immaterial to such considerations. It accordingly fails.

(7) Irregularities in the EGMs

- [119] I have to some extent already dealt with this issue, and the extent to which the learned judge relied on what transpired at the EGMs as not evidencing a decision by the Noteholders to have the Representative Order discharged or to themselves be named as claimants or to have a small group of Noteholder represent the entire class. The EGMs were considered by the judge at paragraph 23 where he concluded that the detailed submissions of Mr. Penny KC, learned counsel for VDHI at the time, 'is borne out by the evidence'. MBFX's criticism is that the judge did not refer to any evidence from which he concluded that Mr. Penny's submission were borne out. Having so found, the learned judge then rejected the allegation that the EGMs were not validly held, and commented: 'VDHI seem (sic) to have done well under difficult circumstances with Mex Securities effectively having abandoned its duties to the noteholders.'⁶³ On the other hand, VDHI submits that these resolutions are now binding as a matter of Luxembourg law, and none of MBFX's points, even if there was anything in them, 'are such as to make VDHI fundamentally unsuitable to act as a representative claimant.'

⁶³ Para 24 of the judgment in the court below.

Analysis and conclusion

- [120] With this last submission by VDHI I am entirely in agreement. I do not see how alleged irregularities in the EGMs can disentitle VDHI from being suitable to be appointed as a representative claimant in the proceedings below. This issue therefore is not made out and fails.

Conclusion on ground 3

- [121] For the reasons given above under this section, MBFX's ground 3 relating to alleged errors by the judge in his consideration of fit and proper representative having all failed, ground 3 therefore fails.

Ground 4 - Ex Parte Application

- [122] MBFX submits that VDHI's application to have itself appointed as a representative claimant in the proceedings below, should not have been made *ex parte*, and having been made and proceeded with by the judge on an *ex parte* basis, VDHI failed in its duty of full and frank disclosure. Accordingly, MBFX argues that the Representative Order ought to be discharged and not re-granted. MBFX relies on four points. MBFX's points and VDHI's response to each of them are as follows:

(1) The judge failed to address the test for whether a party may pursue an application *ex parte* and, specifically, he did not consider whether the two cumulative conditions in **Re First Express Ltd** [1991] BCC 782 were met.

MBFX submits they plainly were not as there was no real urgency and to the extent there was some urgency, it was entirely self-driven by VDHI. This basis is sufficient to dispose of the appeal.

VDHI argues that the judge was clearly satisfied that the requirements for an *ex parte* hearing were met in the circumstances, which he summarised at paragraphs 37-40 of the judgment. (para. 36)

(2) The judge took into account an irrelevant matter, namely, that MBFX's then lead counsel, Mr. Gee KC, 'elected ' to allow VDHI to make the application *ex parte* on that day 21st June 2021.

MBFX argues that it was plainly wrong to suggest that MBFX had the 'option' to have the said application heard *inter partes* but declined the judge's invitation to so elect. In any event, the so-called 'election' could not justify the application being made *ex parte* when, in fact, there was otherwise no justification for doing so.⁶⁴ 'The true position was that MBFX's counsel was offered an *inter partes* hearing of an application which he still had not even seem, for hearing just three days later, at a time when there were numerous other applications (such as fortification and security for costs, as well as the discharge of the WFO) being pursued by MBFX'.⁶⁵

VDHI argues that the judge was correct to point out that MBFX's counsel was given the option of having the application heard *inter partes* but did not take it. The contends that this was a tactical decision by MBFX.⁶⁶

(3) The judge erred in law in opining that it is 'always a matter for the judge as to whether a matter should be heard ex parte or not' (para.40), without considering the criteria for making an ex parte application.

MBFX submits that this approach was extraordinary, as it fundamentally undermines the most fundamental principles of civilized systems of justice.

VDHI responds that the judge did point out that the decision whether to hear the matter *ex parte* is an aspect of the court's case management powers, and there was no suggestion that such a decision could be made in an unprincipled way.⁶⁷

(4) The judge erred when he appeared to suggest or to hold (at para.43), without citing any authority and contrary to the authority cited by MBFX, that there was some lesser burden of full and frank disclosure because the application was 'in the nature of an administrative exercise'.

⁶⁴ Para 61 of MBFX's Skeleton Argument.

⁶⁵ Ibid, Para 62.

⁶⁶ Para 37 of VDHI's Skeleton Argument.

⁶⁷ Ibid, Para 38.

MBFX argues that this characterization was wrong, as the appointment of a representative party in contested litigation, which includes allegations of fraud, 'is not a mere box-ticking exercise. It requires careful consideration by the court to ensure that it is satisfied, among other things, that the proposed representative is fit and proper to act.'⁶⁸ In any event, the idea that there was some reduced full and frank burden is wrong as a matter of principle - see, for example, **Price v Registrar of Companies**⁶⁹ where the application was to restore a company to the register.

In response, VDHI stressed that the judge did not make any finding that there was a 'reduced burden' or that the application was a 'mere box ticking exercise'. Instead, what the judge did at paragraph 43, was to indicate his agreement with VDHI's submission that the content of what had to be disclosed as part of that duty of full and frank disclosure differed depending on the nature of the application. This was correct as a matter of principle. He also accepted that the application to appoint a representative party was more in the nature of an administrative exercise to be decided in accordance with the overriding objective. Further, paragraph 91 of the decision in **Price v Registrar of Companies** 'emphasizes the (undoubted) importance of the duty of full and frank disclosure, it does not state that the 'content' of what must be disclosed to discharge that duty is identical in every application. It is not.'⁷⁰

Analysis and Conclusion on ground 4

- [123] As stated above in the section dealing with Part 21 applications, CPR 21.2(5) permits applications for appointment of a representative claimant to be made without notice. The position is different where the application is to appoint a

⁶⁸ Para 65 of MBFX's Skeleton Argument.

⁶⁹ [2018] 1 WLR 738.

⁷⁰ Para 39 of VDHI's Skeleton Argument.

representative defendant which, by virtue of CPR 21.2(4) must be on notice to the claimant. Thus, the starting point in the instant matter is that VDHI's application to be appointed a representative claimant 'may' be made without notice to the Ancillary Defendants. In this vein, CPR 11.8 provides that an applicant may make an application without giving notice if this is permitted by (a) a practice direction, or (b) rule.

[124] By contrast, CPR Part 17, which deals with applications for interim remedies such as a freezing injunction, provides (rule 17.3(2)) that the court may grant an interim remedy on an application made without notice 'if it appears to the court that there are good reasons for not giving notice'; and the reasons for not giving notice must be stated in the evidence in support of the application. CPR 17.4(4) stipulates that the court may grant an interim remedy on an application made without notice for a period of not more than 28 days, if it is satisfied that (a) in a case of urgency no notice is possible; or (b) that to give notice would defeat the purpose of the application. These provisions are specific to applications under Part 17 for interim remedies. No such stipulations, such as urgency, have been incorporated into the Part 21 procedure. To the contrary, rule 21.2(5) expressly permits an application to appoint a representative claimant to be made without notice. However, also as noted above, this is not determinative of the application being proceeded with without notice, as the judge, in the exercise of his discretion, has the power and option of directing that notice of such application be given to any person. This would, in the instant matter, include the Ancillary Defendants, pursuant to CPR 21.2(6). This also accords with the judge's case management powers under CPR 26.1(g), and the overriding objective of the CPR to deal with cases justly.

[125] MBFX has cited the dicta of Hoffmann J (as he then was) in **Re First Express Ltd.** In that case, joint administrative receivers (appointed under a fixed charge over the books debts of the First Express Ltd and a floating charge over the assets of the company), applied ex parte to the registrar and obtained an order under section 234 of the Insolvency Act 1986 [UK] requiring the first appointed voluntary liquidator of

the company, to transfer books and records of the company, and all money held by him on behalf of the company. The liquidator failed to comply with the registrar's order and the receivers applied for the discharge of the order. Hoffmann J discharged the order on the basis that the application to the registrar should not have been made *ex parte* and the receivers had, in making the application, failed to comply with their duty of full and frank disclosure of relevant facts. In **Re First Express**, unlike CPR 21.2(5), there was no express provision permitting an application under s. 234 to be made without notice.

- [126] As regards the circumstances under which a court ought to proceed to hear an application without giving the other side an opportunity to be heard and the concomitant duty of full and frank disclosure, Hoffmann J opined (at p.828 d-g) –

“I am firmly of the view that **it was wrong for the application to be made *ex parte***. It is a basic principle of justice that an order **should not be made against a party** without giving him an opportunity to be heard. The only exception is when two conditions are satisfied. First, that giving him such an opportunity appears likely to cause injustice to the applicant, by reason either of delay involved or the action **which it appears likely that the respondent or others would take before the order can be made**. Secondly, when the court is satisfied that **any damage which the respondent may suffer** through having to comply with the order is compensatable under the **cross-undertaking** or that **the risk of uncompensatable loss** is clearly outweighed by the risk of injustice to the applicant if the order is not made.” (my emphasis)

“There is, I think, a tendency among applicants to think that a calculation of the balance of **advantage and disadvantage** in accordance with the second condition is sufficient to justify an *ex parte* order. In my view, this attitude should be discouraged. One does not reach **any balancing of advantage and disadvantage** unless the first condition has been satisfied. The principle *audi alterem partem* does not yield to a mere utilitarian calculation. It can be displaced only by invoking the overriding principle of justice which enables the court to act at once when it appears likely that otherwise injustice will be caused.” (my emphasis)

- [127] In **National Bank of Jamaica Ltd v Olint Corp Ltd (Practice Note)**,⁷¹ Lord Hoffmann, sitting in the Privy Council, held (at para.[13]):-

⁷¹ [2009] 1 WLR 1405.

“Although the matter is in the end one for the discretion of the judge, *audi alterem partem* is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the **injunction (as in the case of a Mareva or Anton Pillar order)** or there has been literally no time to give notice before the **injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4 of the Civil Procedure Rules 2002.** Their Lordships would expect cases in the latter category to be rare, because even in cases which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. **Any notice is better than none.**” (my emphasis)

- [128] It is my opinion, that the principles and condition applicable to a court or judge deciding, in the exercise of discretion, whether to hear an application without notice, as authoritatively stated By Lord Hoffmann in both **Re First Express Ltd** and **National Bank of Jamaica Ltd** are clearly applicable with their full force and import to applications for interim remedies, such as Mareva injunctions and Anton Pillar orders, under Part 17 of CPR. These principles serve to uphold the fundamental principle of open justice enshrined in the *audi alterem partem principle*. This much is clear from the said passages and statements of principles and applicable conditions. These categories of applications must be contrasted with applications which the CPR expressly permits a party to existing proceedings to make without notice to the opposite party thereto, such as applications for the appointment of representative claimants pursuant to CPR 21.2(5). Moreover, an application to appoint a representative claimant is not of the genesis of ‘*an order to be made against*’ a defendant (such as injunctions) addressed by Lord Hoffman in the said two cases. An order appointing a representative claimant (or indeed a representative defendant) is, as the learned judge correctly accepted, more in the nature of ‘an administrative exercise’ to enable proceedings to be brought or proceeded with by a representative in circumstances where there is a class of claimants or defendants who have a common interest or common claim.

[129] That said, applications pursuant to Part 21 for the appointment of a representative party are certainly not a 'box ticking' or routine exercise, as the court must be satisfied that the representative party had a sufficient interest or the same or substantially similar interest to those members of the class which he or she seeks to represent in the proceedings. In short, the judge was required to consider whether, in the interest of justice, the representative application ought to be allowed, in all the circumstances, to proceed *ex parte*, or whether the justice of the matter warranted him directing service on the Ancillary Defendants, and proceeding to an *inter parte* hearing.

[130] From the record of the proceedings on 21st June 2021, the learned judge appreciated that notwithstanding CPR 21.2(5), it is not obligatory to proceed *ex parte*. He concluded that VDHI was 'simply being unhelpful to MBFX in not serving the documents.'⁷² He remarked that it was not unsurprising that lead counsel for MBFX 'complained that he was being ambushed by VHDI.' He then went on to give counsel for MBFX the option of either 'hearing VDHI's *ex parte* on Monday with a return date of the case management conference, or I will extend the time for service of VDHI's pleading to Thursday 24th June 2021, so the application could be heard *inter partes*.'⁷³ The judge records that MBFX's counsel did not elect for either of these options and so he, eventually, decided to deal with the matter *ex parte*.'

[131] In my judgment, the learned judge in deciding ultimately to proceed with the application *ex parte* did not commit any error of procedure or principle. More importantly, there was nothing compelling him to only hear the application on an *inter partes* basis. Effectively, the application was heard 'ex parte on notice' to MBFX (as the judge observed, effectively, at paragraph 37), and no injustice was caused to MBFX. The judge also considered that it was necessary to proceed with the application as 21st June 2021 was the date on which VDHI had to serve its pleadings

⁷² Para 38 of the judgment in the court below.

⁷³ Para 39 of the judgment in the court below.

and, in order to do so, it needed to be appointed a representative party in the proceedings. There is no basis for setting aside the Representative Order on the ground that it should never have been pursued on an *ex parte* basis on any of the reasons or points contended for by MBFX at paragraph 58 of its skeleton argument, and I decline to do so.

- [132] MBFX also complains that VDHI breached its duty of full and frank disclosure. In **Price v Registrar of Companies**, Etherton MR stated:

“[91] Finally, I would emphasise that nothing in this judgment should detract from the importance of full and frank disclosure to the court of all material facts on applications for restoration of a company to the register and any subsequent variations to the restoration order where, as here, they are effectively *ex parte* applications in view of the limited involvement of the Registrar of Companies.”

- [133] While I accept that VDHI certainly had a duty of full and frank disclosure in pursuing the representation application *ex parte*, I agree with learned counsel for VDHI, Mr. Penny KC, that the above passage in **Price** merely reiterates the duty itself. That duty is to disclose to the court ‘material facts’. It is well settled that the extent of the duty depends upon the circumstances of each case and nature of the remedy which is being sought on an *ex parte* basis. As stated by Carrington JA at paragraph 31 of this Court’s decision in **Paraskevaides v Citco Trust Corp.**⁷⁴

“The key elements are that the duty is not only to disclose what the applicant or their legal advisers considers to be material but what one reasonably should expect a court to consider to be material in the exercise of its discretion whether to grant the order being sought. This requires not only objective consideration of matters that the party puts before the court, but also an active duty to make proper inquiries so as to determine whether there is other material that may be available for him to place before the court on the application. This is because even an innocent non-disclosure on account of a party not being aware of the fact or not realizing its materiality may be a factor against him whereas a deliberate non-disclosure will always be a factor against him.”

⁷⁴ BVIHCMAP2018/0046 (delivered 30th March 2020, unreported).

New Material - Sale of VDHL by VDH AG in February 2022

- [134] I agree with the learned judge's conclusion at paragraph 43 that there was no material non-disclosure, in terms of the various matters relied on by MBFX before him to establish a breach by VDHI of its duty. However, the matter does not end there. This Court, in an order dated 24th January 2023, allowed in as evidence in this appeal and agreed to consider the New Material that VDHI's parent VDH KG sold its interest in VDHI to an entity beneficially owned by Mr. von Boetticher in February 2022.
- [135] We are satisfied that the material or information as to the sale of VDHI by its parent to an entity beneficially owned by Mr. von Boetticher in February 2022, was material to the lower court's hearing and determination of MBFX's application to discharge the Representative Order obtained ex parte on 21st June 2021, approximately 4 months later. Therefore, this fact ought to have been disclosed by VDHI to the judge below as part of the said application and hearing. This VDHI failed to do. Accordingly, in this respect and to this extent VDHI breached its continuing duty of full and frank disclosure. It is difficult to understand or to conclude that VDHI was not aware of the sale by its parent of its interest in VDHI. In any event, this information was available to VDHI and its directors upon the most perfunctory of inquiries. This they either failed to do or failed to disclose.
- [136] The question is whether this was a deliberate non-disclosure or an innocent non-disclosure, and what ought to be the effect or consequences in relation to the continuation of the Representative Order made prior to the said sale. Does this change in the ownership of VDHI from an international bank, VDH KG, to an entity owned ultimately by Mr. von Boetticher render VDHI not suitable to be appointed or to continue to be appointed a representative claimant in the proceedings below? In my judgment, this information was on any commonsense view material to the question of the suitability of VDHI to be the representative claimant in the proceedings below. It is material to the court's consideration of such an order which entity owns VDHI. However, in my considered judgment, the sale by VDH KG of its

interest in VDHI in February 2022 to an entity ultimately controlled by Mr. von Boetticher, whilst material and whilst not disclosed at the discharge stage of the proceedings in the court below or during the April 2022 Special Sitting, does not render VDHI unsuitable to be appointed or to continue as the representative claimant in the proceedings below. This change in its ownership does not go to the threshold requirement that VDHI must have a sufficient interest in the proceedings below in order to be appointed as the representative claimant of the class of Noteholder seeking the setting aside of the Consent Order (Tomlin Order) and recovery of the monies transferred or withdrawn from the accounts of Mex Securities with MBFX following such order being made.

- [137] Having so concluded, the question of re-grant does not arise for consideration. However, if it did, I would have ordered a regrant of the representative order appointing VDHI as the representative claimant in No. 73 of 2021. I say this for the reasons set out at paragraphs 82 and 83 above. The effect of the transfer is that VDHI is no longer owned by the bank VDH KG. However, VDH KG was under no legal obligation to either finance the litigation or to meet adverse costs orders against VDHI. This position has not changed, by virtue of the said sale, to the detriment or potential detriment of MBFX. The evidence before the court is that VDHI cannot meet any adverse costs orders in the proceedings from its own resources. Indeed, the evidence thus far in these proceedings has shown its stated inability to meet the sum of US\$20 million ordered as fortification of its cross-undertaking in damages given in support of the WFO, which order for fortification will be discharged by the decision in the Fortification Appeal to be delivered contemporaneously with this decision. While there may be a fund available to fund VDHI in the litigation, this Court was told that it does not extend to providing fortification, and it remains unclear whether it will extend to cover any adverse costs orders against VDHI. Accordingly, nothing of any substance has effectively changed by the sale by VDH KG of its interest in VDHI. For these reasons, and in the absence of any suitable alternative representative proposal having been approved and implemented by the court, I

would have to reimpose the Representative Order by which VDHI was appointed as the representative claimant in the proceedings below.

Disposition

[138] For the reason given above, MBFX fails in its appeal. I consider that the appropriate order on costs is that MBFX shall pay VDHI's costs in the appeal.

Order

[139] In the premises, I would make the following orders:

- (1) the appeal is dismissed;
- (2) MBFX shall pay VDHI's costs in the appeal, to be assessed by a judge of the Commercial Division of the High Court, if not agreed within 21 days.

Postscript

[140] Whether it is time for some of the Noteholders to become claimants in the proceedings below and to take on directly the prosecution of the Ancillary Claim, or whether some other person or entity with standing and a sufficient interest can step forward and be appointed as a representative party on behalf of the Noteholders, is uncertain. These are all options which have been 'floated' in these proceedings and they may not necessarily be exhaustive. These are issues and matters to be dealt with by the court below, if and when an appropriate application is made to it. Accordingly, I will say no more about it.

[141] I express our collective appreciation to counsel and their respective teams for their industry and helpful submissions.

I concur.
Mario Michel
Justice of Appeal

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

By the Court

Chief Registrar