

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0008

BETWEEN:

VON DER HEYDT INVEST S.A.

Appellant

and

MULTIBANK FX INTERNATIONAL CORPORATION

Respondent

Before:

The Hon. Mario Michel

Justice of Appeal

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

The Hon. Mr. Gerard St. C Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Alex Hall Taylor KC with him Mr. Alexander Cook, Mr. Simon Hall and Mr. Guy Olliff-Cooper for the Appellant

Mr. Hodge Malek, KC with him Mr. Caley Wright, Mr. Oliver Clifton Mr. Luke Petith and Mr. Sam Hollingworth for the Respondent

2022: November 11;
2023: February 21.

Interlocutory appeal – Worldwide freezing order – Fortification – The criteria to order fortification set out in Energy Venture Partners Ltd v Malabu Oil and Gas Ltd and PJSC National Bank Trust and another v Boris Mints and others (“the Malabu/Mints test”) – Whether the learned judge erred in his treatment of the three elements of the Malabu/Mints test that must be satisfied in an application for fortification of a cross undertaking in damages – Whether the appellant, a representative party, should be ordered to fortify the undertaking in damages, and if so, whether an order to put up US\$20 million or any other substantial amount would have the effect of stifling the appeal – Whether fortification should cater for losses suffered by third parties, the time taken for the fortification application to be heard, and the respondent’s failure to provide security for the appellant’s claim by paying the amount of the claim into court

On 10th December 2020 Mex Clearing Limited (“Mex Clearing”) issued a claim in BVIH(COM) 2020/0215 against Mex Securities S.A.R.L (“Mex Securities”) and Multibank FX International Corporation (“Multibank”) for €36,385,509.52. Four days later the parties to the claim entered into a consent order giving judgment for Mex Clearing on the claim and ordering that €36,385,509.52 out of funds that were then in accounts of Mex Securities at Multibank, be transferred to Mex Clearing. The money was transferred on 18th December 2020. On becoming aware on 21st April 2021 that the €36,385,509.52 had been removed from the accounts at Multibank, Von der Heydt Invest S.A. (“VDHI”) applied ex parte on 23rd April 2021 in the proceedings in the court below (BVIH(COM) 2021/0073) for a worldwide freezing order (“the WFO”) and other interim relief against Mex Clearing, Mex Securities and Multibank (collectively “the Defendants”). Jack J granted the WFO on 26th of April 2021. The WFO contained the usual cross-undertaking in damages by which VDHI undertook that if the court later finds that the WFO has caused loss to the Defendants (or any of them), and that the Defendants should be compensated for that loss, VDHI will comply with any order that the court may make. The cross-undertaking in damages was not fortified for the reasons set out in the evidence of Mr. Olaf Priess, the managing director of VDHI.

VDHI applied to continue the WFO and Multibank and Mex Clearing cross-applied to discharge the WFO. Jack J dismissed Multibank’s discharge application and continued the WFO until trial or further order. He found, among other things, that ‘VDHI have shown a good arguable case of fraud’. Multibank appealed] against Jack J’s order in the Discharge Appeal. The finding of a good arguable case of fraud was affirmed by this Court in the Discharge Judgment.

On 24th June 2021, Multibank applied for fortification of VDHI’s cross undertaking in damages and for security for costs. The application for fortification was adjourned on different occasions and was finally heard by the learned judge (“the Judge”) on 15th July 2022. The Judge delivered an *ex tempore* judgment by which he granted Multibank’s application and ordered VDHI to pay US\$20 million into court within 14 days to provide fortification for the WFO, failing which the WFO be lifted (“the Fortification Order”). The Judge granted leave to VDHI to appeal against the Fortification Order but refused VDHI’s application for a stay of the Order. VDHI appealed against the Fortification Order and applied to this Court for a stay of the Fortification Order. On 14th October 2022, this Court granted a stay of the Fortification Order pending the determination of the appeal.

On 27th January 2023, VDHI applied for permission to adduce fresh evidence to be considered before the delivery of judgment in this appeal and the Discharge Appeal (BVIHCVAP2021/009).

VDHI’s grounds of appeal and the issues for determination by this Court can be summarised as follows: (i) whether the Judge erred in his treatment of the three

elements of the Malabu/Mints test that must be satisfied on an application for fortification of a cross undertaking in damages; (ii) whether VDHI, a representative party, should be ordered to fortify the undertaking in damages, and if so, whether an order to put up US\$20 million or any other substantial amount would have the effect of stifling the appeal; (iii) miscellaneous issues such as whether fortification should cater for losses suffered by third parties, the time taken for the fortification application to be heard, Multibank's failure to provide security for VDHI's claim by paying the amount of the claim into court, and the fresh evidence application.

Held: allowing the appeal, setting aside the Judge's order and awarding VDHI its costs of the proceedings in the court below and of the appeal, such costs to be assessed by a judge of the Commercial Court if not agreed within 21 days, and dismissing VDHI's application for permission to adduce fresh evidence on appeal, that:

1. The three criteria that should be met before the court will order fortification are set out in **Energy Venture Partners Ltd v Malabu Oil and Gas Ltd** and **PJSC National Bank trust and another v Boris Mints and others** as: (i) whether the applicant can show a sufficient level of risk of loss to require fortification, which involves showing a good arguable case to that effect; (ii) whether the applicant can show, to the standard of a good arguable case, that the loss has been or is likely to be caused by the granting of the injunction; and (iii) whether there is sufficient evidence to allow the court to make an intelligent estimate of the quantum of the losses. The criteria are cumulative and the applicant must satisfy all three. Only then will the court be required to consider the discretionary factors and decide whether fortification should be ordered.

Energy Venture Partners Ltd v Malabu Oil and Gas Ltd [2014] EWCA Civ 1295 followed; **PJSC National Bank Trust and another v Boris Mints and others** [2021] EWHC 1089 (Comm) considered.

2. The Judge found that there was sufficient evidence of a risk that Multibank could suffer and did suffer loss because of the WFO. He took into consideration that Multibank is a financial services company trading on trust; the evidence from Multibank that it had suffered actual loss from the fact that Standard & Poors ("S&P") had declined to rate the Multibank Group in connection with the steps it was taking to secure a loan in the form of a bond for €500 million; and the fact that two institutional investors had withdrawn their offers to make substantial investments with Multibank and the Multibank Group. The finding by the Judge that there was sufficient evidence of a real risk of loss to Multibank was based on the evidence that was before him and there is no basis to interfere with that finding.
3. The test for whether the WFO is the cause of the losses suffered by Multibank is whether the losses would not have been suffered but for the

WFO. The applicant can establish this by showing that the WFO was the effective cause of the loss, or the cause without which the loss would not have been suffered.

Energy Venture Partners Ltd v Malabu Oil and Gas Ltd [2014] EWCA Civ 1295 followed; **PJSC National Bank Trust and another v Boris Mints and others** [2021] EWHC 1089 (Comm) considered; **SCF Tankers Ltd (Formerly known as Fiona Trust & Holding Corporation) and others v Privalov and others** [2018] 1 WLR 5623 considered.

4. The Judge may not have used the language in the decided cases like 'effective' or 'without which', but it is clear from a reading of the judgment that he was aware that he was required to identify the WFO as the cause of the loss (even if there was an additional cause). Moreover, the Judge should not be faulted for finding that the WFO was a likely cause of the losses suffered by Multibank - this is what is recorded in the minutes dated 20th June 2021 of a meeting held on 17th June 2021 between representatives of S&P and representatives of Multibank Group. The WFO is also the cause that has been asserted by Multibank in its evidence. Applying the well-known principles relating to appellate reluctance to interfere with findings of fact by the judge of the lower court, this Court will not interfere with his finding that the WFO was a likely cause of Multibank's loss. However, the allegations in the underlying proceedings were an additional or concurrent cause of the loss. A finding of concurrent causes does not mean, as the Judge found, that the WFO had to be discarded as a cause of the loss. The presence of two or more competing causes for the loss is not fatal to an application for fortification. In this case, the competing causes are the WFO and the allegations of fraud in the underlying proceedings against Multibank and Mr. Taher. The applicant must show that despite competing causes the WFO was the effective cause of the losses or the cause without which the losses would not have been suffered.

Alta Trading UK Ltd v Bosworth and others [2021] EWHC 1126 (Comm) considered.

5. An applicant for fortification must show that it is the coercive or preventive effect of the freezing injunction that caused the loss. The mere presence of a freezing injunction is not enough. It must have prevented the applicant or persons dealing with the applicant from doing something that resulted in the loss to the applicant.

Alta Trading UK Ltd v Bosworth and others [2021] EWHC 1126 (Comm) considered; **Harley Street Capital Limited v Tchigirinsky & others** [2005] EWHC 2471 (Ch) considered.

6. The Judge erred as a matter of principle in not considering the underlying allegations of fraud as an effective cause of the loss suffered by Multibank, and that the loss suffered from the WFO included reputational loss from the effect of the WFO. There is no satisfactory proof that the loss from the WFO, if any, was caused by the coercive or preventive effect of the WFO. These are matters that should have factored into the causes of the loss suffered by Multibank, and the assessment of that loss in fixing the level of the fortification.
7. The burden of disentangling the loss and showing what portion of it was caused by the freezing injunction rests squarely on the applicant for fortification (Multibank). In this case, the evidence of loss consists of assertions without supporting documents or other independent support. It was not updated to reflect the loss actually suffered by Multibank during the year since the evidence was filed. Additionally, there was no attempt by Multibank to disentangle (a) the loss caused by the allegations of fraud (which they deny) from the loss caused by the WFO; and (b) the loss caused by the coercive or preventive effect of the WFO from the loss caused by the reputational effect of the WFO. The estimate by Multibank of a loss of US\$20 million does not have an evidential basis. It is simply an estimate of a minimum loss. The Judge erred in accepting this figure without conducting his own estimate of the loss. In the circumstances, Multibank has failed to discharge the burden of showing an intelligent estimate of the loss from the WFO and the Fortification Order of US\$20 million by the Judge should be set aside.

Alta Trading UK Ltd v Bosworth and others [2021] EWHC 1126 (Comm) considered.

8. This Court is not in a position on the state of the evidence to disentangle the losses, even applying a liberal approach, and come to an intelligent estimate of the loss caused by the WFO that should be covered by fortification. Remitting the matter to the Judge is even less attractive for any number of reasons including that he would have to work with the same evidence.
9. VDHI's application for permission to adduce fresh evidence in the appeal is dismissed:

JUDGMENT

(The Fortification Appeal)

[1] **WEBSTER JA [AG]:** This is an appeal by Von der Heydt Invest S.A. ("VDHI") against the interlocutory judgment and order of the learned judge ("the Judge"),

delivered on 15th July 2022 by which the Judge ordered VDHI to provide fortification for the cross undertaking in damages contained in a worldwide freezing order dated 26th April 2021 (“the WFO”) by paying into court US\$20 million by 4 P.M on Friday, 12th August 2022. The WFO restrained Multibank FX International Corporation and Mex Securities S.A.R.L from dealing with their assets whether within or outside the Virgin Islands up to a value of €43,378,533.38 and similarly restrained Mex Clearing Limited up to a value of €36,385,509.52. For convenience I shall refer to Multibank FX International Corporation, Mex Securities S.A.R.L and Mex Clearing Limited collectively as “the Defendants”.

- [2] The background to the disputes between the parties is set out in detail in a judgment delivered contemporaneously with this judgment in Commercial Appeal No. 9 of 2021 in what has become known as the Discharge Appeal “(the Discharge Judgment)”. The background will be repeated in this judgment only to the extent that it is necessary to understand this appeal.

Parties

- [3] Mex Group Worldwide Limited (“MGW”) is the top holding company in the group of companies known as the Multibank Group. The Multibank Group is one of the leading Forex and CFD financial institutions in the world. The ultimate beneficial owner of the Multibank Group is Naser Taher (“Mr. Taher”). In 2017 MGW established an index fund that issued notes (“the Notes”). The Notes were issued by Mex Securities and managed by Von der Heydt & Co AG (“VDH AG”), an investment management company registered and regulated in Germany.
- [4] The respondent, Multibank FX International Corporation (“Multibank”), is a Virgin Islands company. It runs a foreign exchange trading platform and is regulated by the Financial Services Commission of the Virgin Islands.

- [5] The first defendant in the court below, Mex Clearing Ltd., is a regulated broker company in the United Arab Emirates (“Mex Clearing”). Both Multibank and Mex Clearing are subsidiaries of MGW and parts of the Multibank Group.
- [6] The second defendant in the court below, Mex Securities S.A.R.L (“Mex Securities”), is a Luxembourg securitisation company. Although carrying the word “Mex” as a part of its name, it is not a part of the Multibank Group.
- [7] VDHI is a Luxembourg investment management company. VDHI managed three funds that invested in the Notes.
- [8] Bankhaus von der Heydt GmbH & Co KG (“VDH KG”), is a long-established and reputable German bank. The ultimate beneficial owner of VDH KG is Mr. Dietrich von Boetticher. VDH KG was until February 2022 the parent company of VDHI.

The procedural history

- [9] On 10th December 2020, Mex Clearing issued a claim in BVIH(COM) 2020/0215 against Mex Securities and Multibank for €36,385,509.52. The following day the parties to the claim entered into a consent order giving judgment for Mex Clearing on the claim and ordering that the €36,385,509.52, which was then in accounts of Mex Securities at Multibank, be transferred to Mex Clearing. The money was transferred on 18th December 2020.
- [10] On becoming aware on 21st April 2021 that the €36,385,509.52 had been removed from the accounts at Multibank, VDHI applied ex parte on 23rd April 2021 in the proceedings in the court below (BVIH(COM) 2021/0073) for the WFO and other interim relief against the Defendants. Jack J granted the WFO. The WFO contained the usual cross-undertaking in damages by which VDHI undertook that if the court later finds that the WFO has caused loss to the Defendants (or any of them), and that the Defendants should be compensated for that loss, VDHI will comply with any order that the court may make. The cross-undertaking in damages was not fortified

for the reasons set out in the evidence of Mr. Olaf Priess, the managing director of VDHI.

- [11] In a separate but related application, Jack J granted an *ex parte* order appointing VDHI as the representative of all the holders of index notes issued by MGW. Multibank applied to set aside the order. On 28th March 2022, following a contested hearing, Jack J refused Multibank's set aside application and continued the representation order on terms that VDHI represent all the noteholders except Mr. Taher. Multibank appealed against the representation order ("the Representation Appeal").
- [12] In the meantime, VDHI applied to continue the WFO and Multibank and Mex Clearing cross-applied to discharge the WFO. Jack J dismissed Multibank's discharge application and continued the WFO until trial or further order. He found, among other things, that 'VDHI have shown a good arguable case of fraud'.¹ Multibank appealed against Jack J's order in the Discharge Appeal. The finding of a good arguable case of fraud was affirmed by this Court in the Discharge Judgment.
- [13] At a special sitting of the Court of Appeal on 25th to 29th April 2022, the Court heard eight applications for permission to appeal and substantive interlocutory appeals between the parties. At the conclusion of the special sitting the Court handed down its decision on two of the appeals with written reasons to follow and reserved judgment on the other six appeals including the Representation Appeal and the Discharge Appeal ("the Reserved Judgments").
- [14] On 24th June 2021 Multibank applied for fortification of VDHI's cross undertaking in damages and for security for costs. The application for fortification was adjourned on different occasions and was finally heard by the Judge on 15th July 2022. The Judge delivered an *ex tempore* judgment by which he granted Multibank's

¹ Paragraph 80 of the judgment of Jack J dated 4th October 2021 , corrected 19th October 2021.

application and ordered VDHI to pay US\$20 million into court within 14 days to provide fortification for the WFO. Costs of the application were awarded to Multibank. The order also provided that if the US\$20 million was not paid within the 14 days the WFO be lifted (“the Fortification Order”). The security for costs application has not yet been heard.

- [15] The Judge granted leave to VDHI to appeal against his order but refused VDHI’s application for a stay of the Fortification Order. VDHI appealed against the Fortification Order and applied to this Court for a stay of the Fortification Order. On 14th October 2022 this Court granted a stay of the Fortification Order pending the determination of the appeal.

General principles about undertakings and fortification

- [16] The basic rules relating to interim injunctions and cross undertakings in damages are well known but I will refer to them briefly. The applicant for an interim injunction such as a worldwide freezing order is usually required to give the court an undertaking to compensate persons suffering losses as a result of the injunction if the court later finds that the injunction should not have been granted. The undertaking is the price that the applicant pays for being granted interim injunctive relief. The undertaking provides the defendant with a procedure to recover losses suffered as a result of an interim injunction that should not have been granted. The principle has statutory force in the Eastern Caribbean in rule 17.4(2) of the **Civil Procedure Rules 2000** (the “CPR”) which provides that ‘[u]nless the court otherwise directs, a party applying for an interim order under this rule must undertake to abide by any order as to damages caused by the granting or extension of the order’.
- [17] Fortification is not automatic. Freezing injunctions are usually granted without fortification if the court accepts a cross undertaking in damages offered by the claimant. But if the claimant does not have sufficient assets within the jurisdiction, and/or for any other sufficient reason, the court may order the claimant to fortify the

undertaking by paying into court a sum of money estimated by reference to the likely amount of loss that the applicant will suffer as a result of the injunction, or by providing some other form of security such as a bank guarantee. Conversely, if the claimant has sufficient assets in the jurisdiction the court is not likely to order fortification.

- [18] The cases establish that there are three criteria that should be met before the court will order fortification. The criteria are cumulative and the applicant must satisfy all three. Only then will the court be required to consider the discretionary factors and decide whether fortification should be ordered. The three criteria are set out in **Energy Venture Partners Ltd v Malabu Oil and Gas Ltd**² (“Malabu Gas”) and repeated by Calver J in **PJSC National Bank Trust and another v Boris Mints and others**³ (“Mints”). I will refer in this judgment to the three criteria as “the Malabu/Mints test”. Calver J set out the criteria as follows-

“In considering whether to exercise its discretion to order fortification, the Court will take the three criteria – which are inextricably linked factors – into account...

- (a) Can the applicant show a sufficient level of risk of loss to require (further) fortification, which involves showing a good arguable case to that effect?
- (b) Can the applicant show, to the standard of a good arguable case, that the loss has been or is likely to be caused by the granting of the injunction?
- (c) Is there sufficient evidence to allow an intelligent estimate of the quantum of the losses to be made?”⁴

- [19] The criteria were repeated in substance by the Judge at internal page 172 of the transcript of his judgment. He continued on page 173 that the standard that the applicant has to meet is a good arguable case and that that is a relatively low standard, lower than on a balance of probabilities. He found that Multibank had shown a good arguable case on the three criteria of the test and made the Fortification Order.

² [2014] EWCA Civ 1295.

³ [2021] EWHC 1089 (Comm).

⁴ Ibid paragraph 26.

The Appeal

[20] The grounds of appeal occupy nine pages of the notice of appeal. They are divided into two main grounds: 6.1 dealing with errors of law made by the trial judge and 6.2 challenging the judge's findings and conclusions. Ground 6.2 is subdivided into sub-grounds (a) to (h) of which grounds (a) to (e) are further subdivided into numerous sub-sub-grounds using Roman numerals. Issues in the sub-grounds and the sub-sub-grounds overlap and the same issues are sometimes dealt with in more than one sub-ground or sub-sub-ground. The grounds of appeal do not comply with CPR 62.4(5) which states that they must be concise, set out in consecutively numbered paragraphs under distinct headings, and be without argument or narrative. These rules are there to assist the court in understanding the grounds of appeal.

[21] I distil from the grounds of appeal and the submissions of the parties the following issues for determination by this Court:

- (a) the Judge's treatment of the three elements of the Malabu/Mints test that must be satisfied on an application for fortification of a cross undertaking in damages: (risk of or actual losses, causation and estimating losses);
- (b) whether VDHI, a representative party, should be ordered to fortify the undertaking in damages, and if so, whether an order to put up US\$20 million or any other substantial amount would have the effect of stifling the appeal;
- (c) miscellaneous issues such as whether fortification should cater for losses suffered by third parties, the time taken for the fortification application to be heard, and Multibank's failure to provide security for VDHI's claim by paying the amount of the claim into court.

I will deal with these issues but before doing so I will outline the approach to challenges to findings of fact by an appellate court.

Appellate approach to findings of fact

[22] Some of the issues raised by the grounds of appeal involve challenges to findings of fact made by the Judge. The approach to findings of fact is well known and has been documented in several cases by this Court. In **Ikana Holdings, S. DE R.L et**

al v Putney Capital Management Ltd et al⁵ the Court said in relation to findings of primary fact –

“In summary, an appellate court is generally reluctant to interfere with the findings of fact by a lower court since that court had the opportunity of seeing and hearing the witness give their evidence and to assess their demeanour and credibility. The appellate court will interfere only if the judge erred in principle in his findings or if his decision was clearly or blatantly wrong.”

[23] However, the reluctance to interfere is less when the evidence was given by affidavits and there was no cross examination of the witnesses. In this type of case, the judge’s findings of fact are usually based on his evaluation of the printed evidence and the inferences drawn from the evidence. The Court of Appeal is in as good a position as the judge to assess the printed evidence and make its own findings. But even in this situation, the appellate court is still reluctant to interfere because of the deference it pays to the judge who often has a better understanding of the case by being immersed in the details of the proceedings in the lower court.

In **Assicurazioni Generali SpA v Arab Insurance Group**⁶ Clark LJ said –

“Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way.”⁷

[24] Similar guidance was given by Lewison J in **FAGE UK Limited and another v Chobani UK Limited and another** –⁸

“Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to the inferences to be drawn from them.”⁹

⁵ BVIHCP2021/0027 (delivered 24th January 2022, unreported).

⁶ [2003] 1 WLR 577.

⁷ Ibid at paragraph 16.

⁸ [2014] EWCA 630 Civ 5.

⁹ Ibid at paragraph 114.

[25] Guided by these general principles I will interfere with the Judge's findings of fact only if I am satisfied that he erred in principle or was blatantly wrong, bearing in mind constantly that the Judge's findings based on his evaluation of the evidence should be respected and not departed from simply because this Court does not agree with him.

THE MALABU/MINTS TEST

Risk of losses to Multibank.

[26] The starting point in considering the Malabu/Mints test is that the applicant must prove that there is a good arguable case that there is a real risk that it will suffer losses as a result of the freezing order. This must be established by 'a solid, credible evidential foundation that the claimed loss has been or will be suffered'.¹⁰

[27] The Judge found that there was sufficient evidence of a risk that Multibank could suffer and did suffer loss as a result of the WFO. He took into consideration that Multibank is a 'financial services company trading on trust'¹¹ and the following statements from the cases:

- (i) McCombe LJ in **Hone and Abbey Forwarding Ltd (in liquidation)**¹² 'if [freezing orders] are wrongly deployed, just as with a nuclear weapon, damages are inevitable'.¹³
- (ii) Mann J in **Sinclair Investment Holdings SA v Cushnie and others**¹⁴ 'in many cases the fact that there is a risk of loss will be obvious merely from the general situation'.

[28] The Judge also relied on the evidence from Multibank that it had suffered actual loss from the fact that Standard & Poors ("S&P") had declined to rate the Multibank

¹⁰ PJSC National Bank trust and another v Boris Mints and others [2021] EWHC 1089 (Comm) at paragraph 27](i).

¹¹ Internal page 177 of the transcript of the judgment lines 10-12.

¹² [2014] 3 WLR 1676.

¹³ Ibid, paragraph 110.

¹⁴ [2004] EWHC 218 Ch.

Group in connection with the steps it was taking to secure a loan in the form of a bond for €500 million. Without the rating from S&P, the Multibank Group had to withdraw its efforts to secure the bond resulting in the loss of income and profits that would otherwise have been made by Multibank. The Judge also relied on the fact that two institutional investors had withdrawn their offers to make substantial investments with Multibank and the Multibank Group.

[29] Learned counsel for VDHI, Mr. Alexander Cook, submitted that the Judge erred in finding that damage from a WFO was inevitable. This appears to be an unjustified criticism of the Judge's reasoning. The transcript shows that the Judge referred to the cases cited above that suggest that damage from a freezing injunction is inevitable, but he did not conclude that damage from a freezing injunction is inevitable, certainly not in all cases. My reading of his decision is that he referred to the cases to show that an interim freezing injunction is likely to cause damage, especially in the case of a company like Multibank that trades on trust, and that the evidence shows a good arguable case that Multibank did suffer loss as a result of the WFO. He expressly left open the actual proof of the losses which he said was 'a battle for another day', meaning they are issues to be resolved if the matter goes to an enquiry of the losses suffered because of the WFO.

[30] Learned counsel for Multibank, Mr. Hodge Malek KC, submitted in his written and oral submissions that –

“There is a wealth of authority to support the contention that, in many circumstances, the Court will readily accept a risk of loss being caused by a WFO from the surrounding circumstances and inherent probabilities.”¹⁵

Mr. Malek KC supported his position by reference to **Sinclair Investment Holdings SA v Cushnie**¹⁶ where Mann J said:

“In many cases the fact that there is a risk of loss will be obvious merely from the general situation, and while it may not be possible to put anything like a precise figure on the loss, the court, will if necessary, do what it can on the evidence before it to reach an appropriate figure... The mere

¹⁵ Paragraph of Multibank's written submissions filed 21st October 2022.

¹⁶ [2004] EWHC 218 (Ch) at paragraph [24].

absence of particularised evidence does not mean that there is no evidence of a risk of loss. Mr Briggs submitted that what he had to show was a risk of loss; any more refined questions of causation and likelihood would be appropriate for the enquiry (if any) should the cross-undertaking be called upon. I agree with that as a general approach. By and large it would be unnecessary and inappropriate for a court to go into a detailed and prolonged assessment of difficult questions on causation on applications for interim relief, not least because it might become entirely academic.”

- [31] I prefer Mr. Malek’s submission that there was a risk of loss to Multibank, subject to the qualification that with the passage of time since Multibank applied for fortification in June 2021, there is no evidence of further losses above the amounts alleged in the application, suggesting that the risk has diminished. The finding by the Judge that there was sufficient evidence of a real risk of loss to Multibank was based on the evidence that was before him and there is no basis to interfere with that finding. This satisfies the first limb of the *Malabu/Mints* test.

Causation

- [32] The second criterion of the test for fortification is the “but for” test. The applicant (Multibank) must show a good arguable case that but for the WFO, the loss would not have been suffered. This is the causation criterion of the test for fortification. The causation test was set out by Calver J in **Mints** –

“ii. In relation to the causation element:

(a) It is for the party seeking to enforce the undertaking to show that the damage he has sustained would not have been sustained but for the order/injunction...

(b) In order to show that the loss would not have been suffered ‘*but for*’ the injunction, the applicant must show that the freezing order and the undertakings were an effective cause of the third party’s loss. As Tomlinson LJ stated in *Malabu Oil* at [54]:

‘[as] to causation, it is sufficient for the court to be satisfied that the making of the order is or was a cause without which the relevant loss would not be or would not have been suffered. That is the hurdle which the applicant must surmount’.¹⁷

¹⁷ PJSC National Bank trust and another v Boris Mints and others [2021] EWHC 1089 (Comm) at paragraph 27.

- [33] Calver J's outline of the test is stated in three different but related ways. The applicant (Multibank) must show that it would not have suffered loss but for the WFO. To do this the applicant must show that the WFO was the effective cause of the loss or that the injunction was the cause without which the losses would not have been suffered.
- [34] In **Malabu** Tomlinson J, used the expression 'without which' to describe the cause of the loss suffered by the applicant¹⁸. In **Mints**, Calver J, having referred to the three criteria in the Malabu/Mints test, went on to use the phrase 'without which' four times when describing the cause of the individual losses allegedly suffered by the defendant. In **SCF Tankers Ltd (Formerly known as Fiona Trust & Holding Corporation) and others v Privalov and others**¹⁹ the Court of Appeal referred to the 'but for' test and said that the freezing injunction, if not the sole or exclusive cause, must be an effective cause of the losses.²⁰
- [35] In short, the test for whether the WFO is the cause of the losses suffered by Multibank is whether the losses would not have been suffered but for the WFO. To show this, the applicant must show that the WFO was the effective cause of the loss or the cause without which the loss would not have been suffered. These two phrases do not in my opinion create a separate test for causation or raise the level of proof required to show that the loss would not have been suffered but for the freezing injunction. In the final analysis, an applicant for a fortification of a freezing injunction must present a good arguable case that the loss would not have been suffered but for the freezing injunction. How this is done will vary from case to case.
- [36] There are two other principles relating to causation that are relevant to this case. Firstly, the presence of two or more competing causes for the loss is not fatal to an application for fortification. In this case the competing causes are the WFO and the allegations of fraud against Multibank and Mr. Taher in the underlying proceedings.

¹⁸ See paragraph 32 above.

¹⁹ [2018] 1 WLR 5623.

²⁰ Ibid at paragraph 48.

In this situation the applicant must show that despite competing causes the WFO was the effective cause of the losses or the cause without which the losses would not have been suffered.²¹ I will say more about this principle when I deal with the facts.

[37] The second additional principle is that the applicant must show that it is the coercive or preventive effect of the freezing injunction that caused the loss. The mere presence of a freezing injunction is not enough. It must have prevented the applicant or persons dealing with the applicant from doing something that resulted in the loss to the applicant.²² In **Mints** Calver J said in relation to causation at paragraph 27(ii)(c) that -

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

Later at paragraph 47 -

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

Calver J’s references to **Harley Street** are to paragraph 22 of the judgment of Briggs KC sitting as a deputy judge -

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

²¹ *Alta Trading UK Ltd v Bosworth and others* [2021] EWHC 1126 (Comm).

²² *Harley Street Capital Limited v Tchigirinsky & others* [2005] EWHC 2471 (Ch) at paragraph 22.

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

[39] The Judge treated with these principles in his judgment. At internal pages 181-182 of the transcript of the judgment he said -

“Now, the second principle is that the Applicant must show a good arguable case that the loss has been or is likely to be caused by the grant of the injunction. The authority I've read out makes it clear that it's good enough to get home if you're a fortification applicant, to show that the WFO in this case, is 'a cause' or is likely to be 'a cause' without which the relevant loss would not have been suffered.

Mr. Valentine ambitiously, correctly snatched at the 'but for' test and there is evidence, there is some authority for the 'but for' proposition, of course, but the point is the injunction does not have to be a predominant cause, it has to be 'a cause'. And if there are possibly a variety of causes all at the same time, then that is not, I have been taken to authority to say that it is a variety of causes out there or possible causes out there, then you have to discard the WFO as a potential cause? No. That is not what the authorities say. They just talk about 'a cause'. It's very clear that the evidence I've been shown is that certainly with bond loss and with those two brokers a cause is or is likely to be the WFO.

Mr. Valentine said, well, it's Mr. Taher, and his fraudulent propensities which have been averted to in a judgment. It may possibly be 'a cause' but again, I come back to the point that Mr. Valentine could not take issue with a single proposition which was contained in those two e-mails. Those e-mails could have been written by anybody, including bona fide financial people. They could have been written by absolutely anybody and they would have made perfect sense, completely plausible and credible. If they were put up jobs that doesn't detract from their reasonableness and their credibility in terms of their substantive content, and that's why I was banging on about taking issue with the substantive content of them. Mr. Valentine couldn't.

So, was the WFO a cause or is it a likely cause of loss caused by a grant of the injunction? Yes, there's a good arguable case that it is.”

[40] This passage is a summary of the Judge's findings on causation. Mr. Cook submitted that the Judge erred by not finding that the WFO was the cause without which the losses would not have been sustained. This is a very restricted view of the judgment. Earlier in the judgment the Judge referred to **Jirehouse Capital (an**

unlimited company) and another v Beller and another²³ and Phoenix Group Foundation (a private interest foundation existing under the laws of Panama) and another v Cochrane and others²⁴ and passages from the judgments in those cases that referred to the cause as the cause without which the losses would not have been suffered. The Judge was therefore aware of the standard that was required to prove that there was a good arguable case that the WFO caused the loss. In the passage cited in the preceding paragraph the Judge referred to the 'without which' phrase, dealt briefly with the evidence that he accepted as showing the cause of the loss, and asked rhetorically at lines 19 to 21 on page 182 if the WFO was the likely cause of loss suffered by the grant of the WFO. He answered his own question by saying that '[t]here's a good arguable case that it is'. The Judge may not have used the language in the decided cases like 'effective' or 'without which', but it is clear from a reading of the judgment as a whole that he was aware that he was required to identify the WFO as the cause of the loss (even if there was an additional cause). His use of the words 'likely cause' was, in my opinion and in the context of the judgment, as effective as the use of the expression 'effective cause' by the Court of Appeal in **SCF Tankers Ltd and others v Privalov and others**.

Competing causes and the losses

- [41] In this case there are two competing causes of the loss suffered by Multibank. VDHI asserted that if Multibank suffered any loss, which is disputed, it was caused by the allegations of fraud in the underlying proceedings and not by the WFO. Further, even if they were caused by the WFO they were not caused by the coercive or preventive effect of the WFO, but by the fact of having a WFO made against Multibank (and the other Defendants in the proceedings in the lower court).
- [42] Multibank's case is that the loss was caused by the WFO and there was ample evidence before the court for the Judge to make a reasonable estimate of the

²³ [2009] 1 WLR 751.

²⁴ (2018) EWHC 2179.

amount of the loss as a basis for fixing the amount for the fortification for the undertaking in the WFO.

- [43] One view of this case is that the losses were not caused by one or the other of the two competing causes, but by a combination of them. The Judge dealt with the issue of concurrent causes in his judgment. His finding is at internal page number 181 of the transcript at lines 19-25 which is contained in the passage cited above at paragraph [39]. Briefly, the Judge found that there can be more than one cause for the loss and the existence of more than one cause does not mean that 'you have to discard the WFO as a potential cause'. Support for this finding can be found in **Alta Trading UK Ltd v Bosworth and others** where Peter Macdonald Eggers KC, sitting as a deputy High Court judge, in dealing with an application for fortification, made several findings about causation in fortification applications, including:

"That is not to say that the injunction must be the sole cause of the loss; the injunction can operate as a concurring cause of the loss along with the proceedings. If the proceedings and the injunction combine cumulatively to give rise to the loss, in the sense that the loss would not have been caused at all or to the same extent by the proceedings themselves, the respondent will have demonstrated to the requisite standard that the loss would be caused by the injunction."²⁵

This is no different from what the Judge said in the passage cited above and it does not detract from the requirement that an applicant for fortification is required to prove that it would not have suffered losses but for the injunction, and that the injunction must be the effective or likely cause of the losses, or the cause without which the losses would not have been suffered.

- [44] There were four items of loss mentioned in Multibank's evidence. These are:
- (a) Approximately €68.5 million annual loss of prospective profits on the cancellation of the €500 million bond.²⁶

²⁵ [2021] EWHC 1126 (Comm) at paragraph 42(5).

²⁶ Paragraph 4.8 of the sixth affidavit of Salem Kattoura.

- (b) An unspecified amount of loss of prospective profits on the withdrawal of two institutional investors who were interested in investing in Multibank.²⁷
- (c) USD \$30 million from an Indian owned gold trading company that withdrew its proposed investments on becoming aware of rumours that Multibank was involved in fraud proceedings in Luxembourg and the Territory of the Virgin Islands.²⁸
- (d) €100 million over five years of lost yearly returns from the withdrawal of the bond.²⁹

Item (d) was not pursued by Multibank and the Judge refused to include item (c) in his estimation of the amount of fortification.³⁰ Multibank did not counter-appeal against this part of the Judge's decision. This leaves items (a) and (b) to be considered.

The Bond

[45] The background to the bond is that during the period leading up to June 2021 Multibank was in the process of acquiring a bond for €500 million. As a part of the process the Multibank Group had to be rated by a top credit rating agency, in this instance S&P. Mr. Kattoura produced internal minutes dated 20th June 2021 of a meeting held on 17th June 2021 between representatives of S&P and Multibank Group. The minutes record that the S&P representatives enquired of the Multibank Group representatives whether the Multibank Group and its subsidiaries were involved in substantial litigation. The Multibank Group representatives then disclosed the existence of the WFO. Thereafter, S&P enquired about the reason for the WFO and 'what allegations have been advanced in the said litigation'. The S&P representatives were given a copy of the WFO. The S&P representatives then adjourned for ten minutes. On their return, the S&P representatives informed the

²⁷ Paragraph 22 of the twenty-second affidavit of Salem Kattoura.

²⁸ Paragraph 13.12 of the third affidavit of Salem Kattoura.

²⁹ paragraph 13.9 of the third affidavit of Salem Kattoura.

³⁰ Internal page 15 lines 13 to 21 of the transcript of the judge's judgment.

meeting that 'it would be impossible for S&P to grade the Multibank Group as a result of this Freezing Order'.

[46] The interpretation of the minutes is important. In interpreting the document I remind myself of the following:

- (a) This Court is in as good a position as the Judge to interpret a written document.
- (b) The burden of proving that there is a good arguable case that Multibank suffered losses as a result of the WFO must be done by 'a solid, credible evidential foundation that the claimed loss has or will be suffered' and that the 'mere assertion of a risk is insufficient'.³¹
- (c) The claim to have suffered loss ought ordinarily to be supported by some underlying material and ought not to be speculative. Without documentary evidence, a mere generalised assertion of loss will be scrutinised carefully by the court and is unlikely to be sufficient.³²
- (d) Only loss caused by the coercive or preventive effect of the WFO is recoverable. Loss that would have resulted from the effect of the proceedings is not recoverable.

[47] The minutes are an internal document produced by the Multibank Group. It is not supported by other documents and comes close to being a bare assertion by the Multibank Group of what transpired at the meeting. As Mr. Cook suggested, the meeting having happened over a year before the hearing, Multibank should have supported the assertions by additional evidence such as a letter from S&P stating that it had refused to rate the Multibank Group and the reason for its refusal. The minutes disclosed that after the WFO was presented to the S&P representatives they enquired about the reason for the WFO and the allegations that have been

³¹ PJSC National Bank Trust and another v Boris Mints and others [2021] EWHC 1089 (Comm) at paragraph 27(i).

³² Ibid at paragraph 27(iii).

advanced in the litigation. The minutes do not record what the representatives of the Multibank Group said to S&P about the allegations and it is inconceivable that there was no response. This is a rating exercise by a sophisticated rating agency carrying out its due diligence. It is unsurprising that they enquired about substantial litigation that the Multibank Group and its subsidiaries were involved in and later details of the allegations against Multibank. It must be that the S&P representatives were told about the allegations in the underlying proceedings (which includes allegations of fraud). It defies logic and common sense that the only document or fact that was disclosed to S&P was the WFO. If, in defiance of logic and common sense, the allegations were not disclosed this could be seen as withholding important and relevant information from the rating agency.

- [48] I also note that the WFO does not contain any allegations or findings of fraud or other wrongdoing. This is commonplace in freezing injunctions which are granted for a variety of reasons and generally do not include allegations or findings of fraud or other wrongdoing. The allegations are usually found in the underlying documents filed in the proceedings. As Briggs KC (as he then was) said in **Harley Street**, referring to persons who are normally affected by freezing injunctions:

“They are all bound to be sophisticated, or at least very well-advised entities, well capable of understanding that a without notice freezing order says little or nothing about the merits of the underlying allegations.”

S&P is undoubtedly a sophisticated and well-advised entity which would have appreciated the nature of a freezing injunction *per se*.

- [49] The nature of a freezing injunction is also illustrated by **Allen and others v Jambo Holdings Ltd and others**,³³ a decision of the Court of Appeal in England cited by VDHI. The defendant was restrained from removing its aircraft out of England because it was its only asset within the jurisdiction against which a judgment by the claimant could be enforced. There was no allegation of wrongdoing. The court simply wanted to preserve the defendant’s only asset in the jurisdiction.

³³ [1980] 1 WLR 1252.

[50] The Judge should not be faulted for finding that the WFO was a likely cause of the losses suffered by Multibank - this is what is recorded in the minutes and is the cause that has been asserted by Multibank in its evidence. Applying the well-known principles relating to appellate reluctance to interfere with findings of fact by the judge of the lower court, I would not interfere with his finding that the WFO was a likely cause of Multibank's loss. However, I find that the allegations in the underlying proceedings were an additional or concurrent cause of the loss. The finding of concurrent causes does not mean, as the Judge found, that the WFO had to be discarded as a cause of the loss.³⁴

The Emails

[51] Shortly before the start of the hearing in July Multibank produced two emails from institutional investors dated 27th January and 27th April 2022 respectively. The substance of the emails is that the investors had decided not to invest in Multibank because of the WFO. That said, I note that both emails contained links to the EC Court's website where copious details of the alleged fraud are set out in the judgment of Jack J dated 4th October 2021, as well as the finding by the learned judge that VDHI had established a good arguable case of fraud against Multibank and Mr. Taher. The authors of the emails are presumed to have visited the website and were aware of the allegations of fraud. In my opinion this would have been a likely cause, if not the only cause, of their decision not to invest with Multibank.

[52] The authenticity of the minutes and the two emails was challenged by Mr. Cook as being self-serving and possible concoctions. The Judge did not dismiss the challenges but noted, as he was entitled to do, that these challenges can be dealt with at the assessment of damages under the undertaking in damages. In his words this is '[a] battle for another day' referring to the bond³⁵, and '[an] issue for another

³⁴ The reference to the relevant passage in the Judge's judgment is set out in paragraph 39 above and the supporting case of *Alta Trading UK Ltd v Bosworth and others* [2021] EWHC 1126 (Comm) at paragraph 42(5).

³⁵ Internal page 177 of the transcript of the judgment.

day' referring to the emails³⁶. Again, the Judge cannot be faulted for not making a finding on the authenticity of the emails at this stage, leaving that exercise to the actual assessment (if it happens). Instead, he focused on the content of the messages in the emails. He noted that they referred to the WFO and that WFOs are usually granted to persons who are likely to dissipate their assets. Investors dealing with such persons are likely to avoid them and invest with other trading platforms that do not have 'red flags'. This he found was not a reputational risk, but a risk of losing (or not getting) business.³⁷

- [53] The Judge therefore found that the emails are evidence that could be considered as showing a real risk of loss flowing from the WFO and a cause of such loss. This is a finding of fact by the Judge and, consistent with the principles of appellate interference outlined in paragraphs [22]-[24] above, this Court is reluctant to interfere with the finding. However, it was a finding based on his evaluation of the written evidence which this Court is in as good a position to evaluate, paying due deference to the fact that he is the trial judge firmly immersed in the on-going proceedings in the lower court. That said, I am satisfied that the Judge erred as a matter of principle in not considering the underlying allegations of fraud as an effective cause of the loss suffered by Multibank, and that the loss suffered from the WFO included reputational loss from the effect of the WFO. These are matters that should have factored into the causes of the loss suffered by Multibank, and the assessment of that loss in fixing the level of the fortification.

Quantification of losses

- [54] The next element in the Malabu/Mints test is whether there was sufficient evidence to allow the court to make an intelligent estimate of the quantum of the loss.
- [55] In dealing with causation I referred to the principles that (1) the losses must be established by solid, credible evidence with supporting documents, and not merely

³⁶ Internal page 178 of the transcript of the judgment.

³⁷ Internal pages 176-181 of the transcript of the judgment.

by assertions by the applicant; (2) I found that there were two causes of the losses; and (3) only losses caused by the coercive or preventive effect of the WFO should be included in estimating the amount that should be provided for fortification. These matters must be borne in mind under the general principle that courts are accustomed to dealing with difficult questions of estimating quantum and value on limited evidence. A more detailed and precise estimate can, if necessary, be done at the enquiry as to damages.

[56] The only evidence of actual loss is the loss flowing from the withdrawal of the bond. Multibank estimated its losses from the bond at €68.5 million per year. The calculation of this loss is set out in paragraph 4.8 of the sixth affidavit of Salem Kattoura -

“The value of the MultiBank Bond was EUR 500 million with an interest rate of 3%. The MultiBank Group projected returns of 20% per annum on foot of the proceeds of the bond issuance. This means that the projected losses in respect of the MultiBank Bond failing to issue was 17% (i.e. 20%-3%). This places the annual losses to the MultiBank Group in the region of EUR 85 million (17% of EUR 500 million). Given that MBFX handles approximately 80% of the MultiBank Group trading volume, the annual losses to MBFX as a result of the cancellation of the bond stand at approximately EUR 68.5 million (80% of EUR 85 million).”

This evidence is not supported by any documents from Multibank. It is a mere assertion by Mr. Kattoura of how he said Multibank suffered loss from the WFO. The burden of proof of loss was on Multibank and they would have been in possession of the material to substantiate the loss. Mr. Malek KC said that it was for VDHI to challenge the evidence and then Multibank would have had a chance to supplement it. That is not how the system of proving an issue works. It is for the person asserting an issue to prove it by evidence to the required standard. That said, Mr. Kattoura's evidence was the evidence that was before the Judge and he was obliged to deal with it as best he could.

[57] The Judge described the Multibank evidence as an ‘informal calculation’ of a large amount of money that will be lost.³⁸ He acknowledged the criticism of counsel for VDHI that the loss is incapable of quantification but felt comfortable in estimating that it would have exceeded US\$20 million. The US\$20 million was a suggestion from counsel for Multibank as a minimum amount that would be lost using the calculation of Mr. Kattoura. This is an unusual way of estimating the amount to be put up for fortification. The estimate of loss was a specific amount of €68.5 million and if the Judge was satisfied that this was a reasonable estimate he should have used it, or explain why he was not using it. The only explanation for the reduction is his reliance on the suggestion of counsel. The reduction to US\$20 million underscores the court’s concern that the €68.5 million was not a reasonable estimate.

[58] The Judge’s assessment was made approximately one year after the bond was withdrawn and Mr. Kattoura had given his estimate. By the time of the assessment Multibank should have been able to provide the court with evidence of actual losses from the bond instead of relying on a one-year-old estimate of projected losses. Undoubtedly, the Judge would have done a more realistic estimate of the losses if Multibank (on whom the burden lies) had produced supporting evidence, and not mere assertions, of the amount of the losses. As it is, this Court was being asked to treat Mr. Kattoura’s estimate as reasonable and accept the more than threefold reduction of the estimated amount based on counsel’s submission as the lowest amount that could be recoverable under the undertaking.

[59] I have the following difficulties with accepting the Judge’s treatment of estimate of the amount of fortification:

- (i) The Judge’s analysis of the law took account of the possibility of concurrent causes of the losses, but his assessment treated the losses as being caused by the WFO exclusively. If I am correct that the allegations of fraud were a second or concurrent cause of the loss, it should have been factored

³⁸ Page 183 of the transcript of proceedings dated 15th July 2022.

into the assessment. Loss caused by the allegations of fraud should have been estimated and deducted from the amount to be provided for fortification.

- (ii) There is no satisfactory proof that the loss from the WFO, if any, was caused by the coercive or preventive effect of the WFO. The rating of the bond was not prevented by the WFO. What appears to have happened is that S&P stopped the process voluntarily because of the WFO, not that it prevented them from continuing with the rating process. Multibank then decided to stop the process.

[60] If, as I have found, there are concurrent causes of the losses, the exercise of disentangling the loss to show what portion thereof was caused by the claimant can be a difficult task. This much is conceded by Multibank in paragraphs 10 and 11 of their written submissions where they said –

“Similarly, while the Court will carry out the ‘but for’ test in terms of causation, it recognises that it can be difficult to disentangle whether the proceedings generally or the injunction is the cause of the loss, and will not take an overly forensic approach...The Court will take a ‘liberal assessment’ of the damage or likely damage.

The disentangling of the losses can be very important because as Calver J said in

Mints -

“If the loss would have been suffered regardless of the granting of the injunction, for example because of the bringing of the proceedings, then that is not covered by undertaking.”³⁹

[61] The burden of disentangling the loss and showing what portion of it was caused by the freezing injunction rests squarely on the applicant for fortification (Multibank)⁴⁰. This Court is not in a position on the state of the evidence to disentangle the losses, even applying a liberal approach, and come to an intelligent estimate of the loss

³⁹ Mints [2021] EWHC 1089 (Comm) at para. 27(ii)(d).

⁴⁰ Per Gibbs J in *Air Express Ltd v Ansett Transport Industries (Operations) Property Ltd* (1980-81) (1981) 146 CLR 249 para.4 approved in *Alta Trading UK Ltd v Bosworth and others* [2021] EWHC 1126 (Comm).

caused by the WFO that should be covered by fortification. Multibank has not assisted the court on this issue. Their position is that the loss was caused entirely by the WFO and, by extension, no disentangling is necessary.

[62] If I am wrong and this is not a case of concurrent causes of the loss but one where the loss was caused entirely by the WFO, the further issue is whether the loss, or any part thereof, was caused by the impact of the WFO on Multibank's reputation as a financial services company. If so, that portion of the loss would not be recoverable under the undertaking and should not be considered in fixing the level of fortification. Only the loss caused by the coercive or preventive effect of the WFO is recoverable and considered in fixing the level of fortification.

[63] I have already found that the allegations of fraud are a concurrent cause of the loss. I am also satisfied that the reputational effect of the WFO on Multibank was partly, if not entirely, responsible for the loss. Both S&P and the authors of the emails were aware of the allegations of fraud and the allegations must have affected their inclination to invest with Multibank and the Multibank Group. No account was taken of this in the quantification of the loss that makes up the amount of fortification.

[64] The effect of Multibank's failure to arm the Judge with sufficient evidence to estimate the loss and potential loss means that the Judge could not disentangle the loss. This caused the Judge to make an assessment that does not comport with the legal principles and I find that his assessment was not an intelligent estimate of the likely amount of loss that might result or which has resulted from the WFO.

[65] To sum up on the issue of quantification, I find that Multibank, on whom the burden lay, did not satisfy the third criterion of the Malabu/Mints test because:

- (i) the loss must be established by solid, credible evidence objectively assessed. The evidence of loss is contained in the evidence of Mr. Kattoura. It consists of assertions without supporting documents or other independent support. It was not updated to reflect the loss

actually suffered by Multibank during the year since the evidence was filed;

- (ii) the Judge did not take account in the assessment of the allegations of fraud as an additional cause of the loss;
- (iii) the Judge did not take account of the fact that some of the loss allegedly caused by the WFO was or could have been caused by the reputational effect of the WFO on Multibank. This type of loss is not recoverable under the undertaking. Only losses caused by the coercive or preventive effect of the WFO are recoverable;
- (iv) there was no attempt by Multibank to disentangle (a) the loss caused by the allegations of fraud (which they deny) from the loss caused by the WFO; and (b) the loss caused by the coercive or preventive effect of the WFO from the loss caused by the reputational effect of the WFO.

[66] The estimate by Multibank's counsel of a loss of US\$20 million does not have an evidential basis. It is simply counsel's estimate of a minimum loss. The Judge erred in accepting this figure without conducting his own estimate of the loss. In the circumstances I find that Multibank has failed to discharge the burden of showing an intelligent estimate of the loss from the WFO and the Fortification Order of US\$20 million by the Judge must be set aside.

[67] This takes me to the important question of whether this Court should assess the loss afresh based on the evidence and the applicable principles. The difficulty with doing this is that the Court would have to work with the same evidence that was before the Judge. This evidence is insufficient to make an intelligent estimate of the loss and the Court would have to grapple with the same difficulties that confronted the Judge. Remitting the matter to the Judge is even less attractive for any number of reasons including that he will have to work with the same evidence. This is sufficient

to allow the appeal and set aside the fortification order. However, for completeness, I will consider succinctly some of the remaining issues that were raised by VDHI and responded to by Multibank. These are the discretionary factors and my comments are necessarily obiter.

Discretionary factors

[68] If, contrary to my findings above, the Malabu/Mints test was satisfied, the Court would have to consider the discretionary factors and decide whether VDHI should be ordered to fortify the undertaking. Mr. Cook submitted that VDHI should not have been ordered to fortify the undertaking because:

- (a) The undertaking provided sufficient protection and fortification was not necessary.
- (b) VDHI is a representative party and should not be ordered to put up fortification.
- (c) Fortification will have the effect of stifling the further prosecution of the claim.
- (d) There is no prejudice to Multibank by not ordering fortification.\
- (e) Taking account of third party losses.
- (f) The merits of the underlying claim.
- (g) Multibank's failure to provide security for VDHI's claim by paying the amount of the claim into court.

[69] I reject entirely the first issue that the undertaking provides sufficient protection without fortification. This may have been the position when VDHI applied for the WFO in April 2021. VDHI's position was that Multibank would not suffer any loss from the WFO; it had sufficient assets to cover losses caused by the undertaking; it was then the subsidiary of a long established and reputable German bank, VDH KG; and it had the support of a fund of €30 million to fund the litigation provided by the

three funds that it managed. The situation has changed in many ways. The latest accounts of VDHI show that the company's financial position has deteriorated since the WFO was made. It is no longer a subsidiary of the German bank and does not receive support from it. The liquidators of the three managed funds who now control the €30 million have said that the money is not available for fortification. Finally, VDHI does not have, and has never had, any assets in the jurisdiction. In the changed circumstances the undertaking does not appear to have any real value and does not provide sufficient protection for Multibank.

[70] A representative party such as VDHI does not enjoy a special privilege of not providing fortification of its undertaking simply because it is a representative party. I made the point earlier that the purpose of an undertaking is to provide protection for the defendant if it turns out that the freezing injunction should not have been granted and the defendant has suffered loss as a result.⁴¹ The situation now is that the undertaking is unsupported by any value and Multibank may not have any way of enforcing an order for damages arising out of an enquiry. In the circumstances, it cannot be said that Multibank is protected against losses caused by the WFO. If the principles in the *Malabu/Mints* test were satisfied the court would have had the power to order fortification from VDHI, notwithstanding that it is a representative party.

[71] VDHI argued that its claim in the lower court will be stifled if it is ordered to post fortification of US\$20 million or any other amount. If the order for fortification were affirmed by this Court and not complied with, VDHI would probably lose the WFO. But that would not mean that the claim could not proceed. The WFO goes to the issue of enforcement of a money judgment ordered by the court which could become problematic if there is no WFO. That is an issue for another day and this Court will not have to resolve it because of the Court's proposed order.

⁴¹ See paragraphs [16] and [17] above.

- [72] On the issue of prejudice, an unsupported WFO can be prejudicial to Multibank if it is not fortified.
- [73] I do not agree with Mr. Cook's submission that the fortification is not necessary to cover losses by third parties. Third parties affected by the coercive or preventive effects of the WFO can claim damages at the enquiry and there is no reason in principle or in law why their potential losses should not be considered in making a fortification order. Michael Briggs KC (sitting as a deputy judge) said as much in **Harley Street**⁴². For example, if a defendant is restrained from selling his property to a third party, and it later turns out that the injunction should not have been granted, the third party could claim any loss he suffered as a result of changes in the market value of the property since the sale was restrained. The third party would be required to prove its loss in the enquiry and satisfy the Malabu/Mints test.
- [74] Mr. Cook made submissions to the effect that Multibank's delay in applying for fortification and not pursuing the application expeditiously should be considered as a discretionary factor. The delay was considered when I dealt with the fact that Multibank did not use the time between the filing of the application in June 2021 and the hearing in July 2022 to improve its evidence of the loss that it asserts that it had suffered.⁴³ Otherwise, the issue of delay does not have a significant impact on the case.
- [75] The merits of the underlying claim were considered only as background to this appeal.
- [76] Multibank should not be faulted for not providing security for VDHI's claim by paying the amount of the claim into court to secure the release of the WFO. The claim and the WFO are vigorously contested and Multibank is entitled to take the position that the WFO should be removed by an order of the court following a contested hearing.

⁴² [2005] EWHC 2471 (Ch) at paragraph [16].

⁴³ See paragraph [58] above.

The fresh evidence application

[77] On 27th January 2023, VDHI applied for permission to adduce fresh evidence in the appeal to be considered by the Court before the delivery of judgment in the Discharge Appeal and the Fortification Appeal. The application seeks leave to rely on the Eighteenth Affidavit of Olaf Priess filed on 17th January 2023 and the Nineteenth Affidavit of Olaf Priess filed on 25th January 2023, and it is supported by the Fourth Affidavit of Sarah Malik filed 30th January 2023.

[78] The Court dealt with the application in the Discharge Judgment delivered contemporaneously with this judgment. The application was dismissed. The main reason for dismissing the application in the Discharge Appeal was that it did not have an important influence on the decision of the Court in that appeal. That reason applies, a fortiori, in this appeal, because VDHI is relying on the new evidence to question the weight to be attached to the minutes of the meeting between representatives of the Multibank Group and VDHI on 17th June 2021, and the two emails from potential investors. These documents were analysed by this Court in paragraphs 46 to 53 above.

[79] The proposed new evidence is irrelevant to the issues in this appeal and has no important influence on the decision in the appeal. This finding is sufficient to dismiss the application. I would not make a separate order for costs because the costs of the application were awarded to Multibank in the Discharge Appeal. If Multibank has any discrete costs relating to the application in this appeal they should be included in the costs of the application in the Discharge Appeal.

Disposal

[80] Multibank has not satisfied the criteria in the Malabu/Mints test and therefore has not made out a case for an order for fortification of the undertaking. I would allow the appeal and set aside the Judge's order. VDHI will have its costs of the appeal

and of the proceedings in the court below, such costs are to be assessed by a judge of the Commercial Court if not agreed within 21 days.

[81] Finally, I acknowledge the assistance from leading counsel and those assisting them.

I concur.
Mario Michel
Justice of Appeal

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

By the Court

Chief Registrar