

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(COMMERCIAL DIVISION)**

**Claim No: BVIHC (COM) 2020/0215, 2021/0003 and 2021/0073
CONSOLIDATED CLAIM**

BETWEEN:

MEX CLEARING LTD

Claimant/Ancillary Defendant

-and-

(1) MEX SECURITIES SARL

First Defendant/Ancillary Defendant

(2) MULTIBANK FX INTERNATIONAL CORPORATION

Second Defendant/Ancillary Defendant

(3) VON DER HEYDT INVEST SA

Third Defendant/Ancillary Claimant

(4) NASER TAHER

Ancillary Defendant

(5) MEX ATLANTIC CORPORATION

Ancillary Defendant

Appearances:

Mr. Tim Penny QC, with him Mr. Alex Hall Taylor QC and Mr. Simon Hall of Carey Olsen for Von der Heydt Invest SA

Mr. Robert Nader of Forbes Hare for Mex Clearing Ltd

Mr. Hodge Malek QC, Mr Phil Hinks and Mr Caley Wright, and with them Mr. Oliver Clifton of Walkers for Multibank FX International Corporation, Mr. Taher and Mex Atlantic Corporation

Mex Securities SarL did not appear and was not represented

2022 March 8, 9 and 10
 March 28

JUDGMENT (REPRESENTATION ORDER AND DIRECTIONS)

[1] **JACK, J [Ag.]**: I shall use the abbreviations in the previous judgments I have delivered in this matter and will not repeat the factual background, which can be gleaned from my earlier judgments. There were, among other matters, the following applications before me for hearing over 8th, 9th and 10th March 2022, which was also the first case management conference in the case:¹

- (a) MBFX's application of 6th July 2021 to set aside the representative order dated 21st June 2021. By this order the Court appointed VDHI as representative of all holders of MultiBank Group Index Linked Notes and Alpha FX II Index Linked Notes, including Mr. Taher.
- (b) MBFX's application dated 13th December 2021, for an order directing VDHI to convey an open offer to the noteholders to settle their claims.
- (c) VDHI's application dated 21st February 2022, for permission to amend its Ancillary Statement of Claim and for service out of the jurisdiction on Mr. Taher and Mex Atlantic.

[2] In the event, some matters, including a recently issued application by the ancillary defendants for an adjournment of the trial fixed for July and an application for security for costs, were stood over to 18th March 2022. Application (c) was granted on the basis that it was not being conceded by the ancillary defendants. The making of the order sought under (c) would be challenged as part of the subsisting appeal in respect of MBFX's forum challenge. This judgment deals with (a) and (b) above.

The short answer

[3] I shall shortly deal with the detailed arguments presented by Mr. Hodge Malek QC for MBFX, Mr. Taher and Mex Atlantic and by Mr. Tim Penny QC on behalf of VDHI. Mr. Taher also raises a separate issue, which I shall consider below. There is, however, a straightforward means of resolving the first application. The Court has

¹ The hearing was not for three days: the 8th was the afternoon only and the case just trickled into 10th March.

“to deal with cases justly”: CPR 1.1(1). Various considerations to take into account in achieving this aim are set out in CPR 1.1(2). Underlying them all is, to use a colloquialism, the need to keep the show on the road. There is a trial listed to commence in July 2022, some four months away. If a fair trial cannot be achieved in July 2022, then the trial must go off. However, in an oral judgment delivered on 18th March 2022, I refused MBFX’s application for an adjournment. A fair trial can take place starting in July 2022. The Court must avoid the trial being derailed.

- [4] Now there are criticisms which are being made about VDHI’s appropriateness to be representative of the noteholders. I shall consider these detailed matters shortly. On the whole, however, VDHI has been doing a good job on behalf of the noteholders. In most of the extensive interlocutory skirmishing which has occurred in this case, it has been successful.
- [5] Mr. Malek QC had two alternative submissions. The first was that there should cease to be a representation order at all in respect of the noteholders appointed under CPR Part 21. Instead individual noteholders should apply to become ancillary claimants in solely personal capacity. The second was that a small group of noteholders could be substituted as representatives for the group as a whole instead of VDHI or its officers.
- [6] A general meeting of noteholders held on 27th July 2021 considered a resolution to appoint as representatives in place of VDHI, Mr. Priess and Mr. Frevel, both directors of VDHI and neither a noteholder. Of a total of sixty-six Multibank noteholders, fifty-nine voted, of whom 70.13 per cent were in favour, and of a total of fifty-nine Alpha noteholders, fifty-two voted, of whom 98 per cent were in favour. (There is a total of only seventy-six noteholders, because some noteholders hold both Multibank and Alpha notes.) The substitution of the two directors for VDHI itself never took place, but that is of little importance. The noteholders approved having VDHI through its officers running the litigation on their behalves. Now Mr. Malek says there were various imperfections in the way that meeting was called and

the will of the noteholders ascertained, however, there is no evidence that the noteholders would prefer either that the representation 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.

[7] MBFX's application was issued on 6th July 2021, over nine months ago. It was listed for the hearing which eventually lasted over 28th and 29th July and 21st, 22nd and 23rd September 2021, however, despite the extraordinary amount of Court time given to the outstanding applications, this application was not reached and was adjourned, first to December, then to 8th March 2022. Now I cannot say that in these circumstances the application has been abandoned, but it has not been pursued with any vigour. This seems to be a consequence of the unusual frequency with which the legal team representing MBFX has been changed, each team seeming to have had a different litigation strategy. 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.

[8] In the current case, Mr. Malek QC was emphatic that MBFX had no intention of derailing the trial. I do not need to make any findings of fact as to MBFX's state of mind. It suffices for me to conclude that changing the representative nature of the proceedings in these final stages of the action would be chaotic. Trying to find out which of seventy-six noteholders wish to be substituted as personal claimants, ensuring each had independent legal advice, negotiating with their legal expenses insurers (a form of insurance which many Germans have) and so forth is likely to wreak havoc with trial preparation. Likewise substituting a small group of noteholders as representatives in place of VDHI is very likely to lead to delay for much the same reason. Further negotiations would need to occur with KPMG, the liquidators of the Funds, as to the terms on which the liquidators would stand behind the new representatives.

- [9] In my judgment, case management considerations alone suffice to refuse MBFX's application of 6th July 2021.

The detailed grounds of objection

- [10] I turn then to the detailed submissions made by Mr. Malek QC. He says:

"2. MBFX relies upon five matters in support of its position that it is not just and reasonable for VDHI to act as the representative of the Noteholders or, to borrow the language used by the [UK] Supreme Court in [**Lloyd v Google LLC**]² at [71], VDHI cannot be relied on to conduct the litigation in a way which will effectively promote and protect the interests of all the Noteholders:

32.1. First, VDHI is (or may become) subject to a conflict of interest vis-à-vis the Noteholders.

32.2. Second, VDHI has — to date — failed to inform the Noteholders of material developments in the proceedings.

32.3. Third, the extraordinary general meetings held on 27 July 2021 at which the Noteholders purportedly resolved to appoint Olaf Priess and Carsten Frevel (both officers of VDHI) as a 'Committee' to pursue this action on their behalf were irregular.

32.4. Fourth, having regard to VDHI's regulatory failings and the other matters identified below, it is not an appropriate class representative.

32.5. Fifth, VDHI's recent application to substitute Messrs Priess and Frevel as the Ancillary Claimant does not cure these defects."

Conflict of interest

- [11] The skeleton points out that VDHI is not itself a noteholder; it is the manager. This itself is not fatal to the appointment of VDHI as a representative party, but VDHI must be suitable person for appointment, since the Court is exercising a discretion when appointing a representative. CPR 21.1 (which is in broader terms than the English procedural equivalent) so far as material provides:

² [2021] UKSC 50, [2021] 3 WLR 1268.

“(1) This rule applies to any proceedings, other than proceedings falling within rule 21.4, in which 5 or more persons have the same or a similar interest.

(2) The court may appoint —
(a) a body having a sufficient interest in the proceedings; or
(b) one or more of those persons;
to represent all or some of the persons with the same or similar interest.”

[12] Mr. Malek QC specifies two conflicts:

“35. ...First, the Noteholders are likely to have substantial claims against VDHI...

38. It is MBFX’s case that the request prematurely to withdraw funds from the Notes brought the MultiBank Group’s joint venture with VDH AG to an end. That request gave rise to claims by the MultiBank Group against Mex Securities and VDH AG, as particularised in section D14 of MBFX’s [statement of defence]. The request also resulted in negotiations taking place with Mex Securities which ultimately led to the making of the Consent Order.

39. 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.

40. Second, the Noteholders are likely to have substantial claims against VDH AG [which are then set out, including details of the claims against Mex Securities for which VDH AG acted as agent]...

43. 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, e.g., in connection with the €11.954m 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 (i.e., the Oaklet dispute...)

44. This latter conflict is, of course, not a direct conflict. It would be theoretically possible for VDHI to commence proceedings against VDH AG and/or to join VDH AG as a further defendant to this claim. However, the reality is that it is highly unlikely that VDHI would ever commence proceedings against another company in the Von der Heydt group or give serious consideration to doing so. On the contrary, it is apparent that VDHI is working in conjunction with VDH AG in respect of these proceedings. For instance, as regards the [27th July meetings], the resolutions specify that — save for the Funds — the Noteholders were all represented at the meetings by VDH AG.

45. For these reasons, VDHI is (or may become) subject to conflicts of interest as a consequence of which it cannot fairly or adequately act in the interests of the Noteholders.”

[13] There is in my judgment a simple answer to this submission. 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.

[14] This is sufficient to dispose of the conflict point, as can be seen from the English Court of Appeal authority of **Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd**.³ The plaintiff (“PARCO”) was the lead underwriter of a syndicate of reinsurers. The defendant (“Pine Top”) was the excess of loss reinsurer to the syndicate. A dispute arose and PARCO, as representative of the syndicate members, sued Pine Top under the excess of loss policy. Pine Top claimed that PARCO could not properly represent the syndicate because there was a conflict of interest.

[15] Lloyd LJ held that the rule allowing a representative action:

³ [1989] 1 Lloyd's Rep 568.

“was authoritatively expounded by Lord Macnaghten in the House of Lords in the case of **The Duke of Bedford v Ellis**⁴ as requiring three conditions to be fulfilled. First, the parties must have the same interest in the proceedings; secondly, they must have a common grievance; thirdly, the relief sought must be beneficial to all.

[Counsel for Pine Top] argues that the first of the three conditions is not fulfilled in the present case. PARCO and the members of the syndicate do not have the same interest. The liability in respect of which PARCO is covered by the excess of loss reinsurance contract is a liability to the insured, whereas the liability in respect of which the members of the syndicate are covered is a liability to PARCO. Furthermore, at the time of the issue of the writ 17 out of 35 members of the syndicate were in dispute with PARCO. They were all claiming to have rescinded their management agreements with PAG [the underwriting agent and manager] and their reinsurance obligations to PARCO. There was a multiplicity of proceedings pending in the United States in which very serious allegations were made by the 17 members of the reinsurance syndicate against PAG.

...
That PARCO and the members of the syndicate have suffered a common wrong by reason of Pine Top's failure to pay is manifest. But they have not only suffered a common wrong; they also enjoy a common right.

Does it make any difference that there were proceedings pending in the United States between PARCO and 17 out of the 35 members of the syndicate? I cannot see why this should make any difference. Take, by way of example, the arbitration proceedings brought by Alte Leipziger [one of the reinsurance syndicate] against PAG in which Alte Leipziger claimed rescission on the ground that they had been induced to enter into the management agreement by fraud. We know now that the proceedings ended in capitulation by Alte Leipziger. I put that on one side, even though it might be thought to shed light on what was the strength and weakness of the claim in the first place. But putting the subsequent events on one side, I ask myself again, what difference would it make that Alte Leipziger was seeking to avoid its liability to PARCO? If it had already succeeded in severing the link with PARCO, then perhaps the argument might be well founded, because it could then be said that Alte Leipziger, having no liability towards PARCO, would have nothing in respect of which it could claim against Pine Top. But rescission is one thing; a claim to rescind is another. So long as the United States proceedings were continuing, there was no more than a claim for rescission. The link between Alte Leipziger and PARCO was intact, even if under strain. It must follow that Alte Leipziger had as much to gain from successful proceedings against Pine Top as had PARCO. The antagonism between the parties has no more relevance than

⁴ [1901] AC 1.

if it arose out of a completely separate course of business. As [counsel for PARCO] put it, the question is whether the parties have the same interest as against the defendants; not whether they have the same interest as between themselves.”

- [16] In my judgment there is no relevant conflict of interest between VDHI and the noteholders. They all have “the same interest as against the [ancillary] defendants”.

Keeping noteholders informed

- [17] Mr. Malek QC’s second point is that VDHI has failed to keep noteholders informed of developments. He raises three matters in his skeleton:

“49. First, on 3 March 2022, VDHI belatedly disclosed the circulars which had been sent to the Noteholders in July 2021 in respect of the EGMs. The information contained in those circulars is, naturally, limited, given the confidentiality restrictions which were in place at the time (which were lifted in November 2021). In substance, the Noteholders (with the exception of Mr. Taher, who did not receive any of the circulars) were told that pursuant to an alleged compromise of proceedings, Mex Securities has paid away certain of its funds, and VDHI ‘believes that the compromise of those proceedings and the apparent payment away of fiduciary funds pursuant to that compromise was unjustified.’

...

51. Second, by letter dated 11 February 2022 (i.e., before VDHI sought to add him as an Ancillary Defendant), Mr. Taher — a substantial Noteholder — wrote to Mr. Priess asking him whether VDHI had informed the Noteholders of various matters, noting that no such information had been brought to his attention. Those matters included:

51.1. The substantial financial support that the MultiBank Group had provided to Mex Securities pursuant to promises made by the investment manager, VDH AG.

51.2. The untruthful reason which had been given by VDH AG in December 2020 (i.e. concerning ‘recent regulatory changes’) to justify the premature withdrawal of funds from the Notes and, relatedly, VDHI’s decision to procure the UCITS Funds to hold Notes in contravention of UCITS regulations.

51.3. The various regulatory deficiencies and legal investigations to which VDHI and/or its officers are (or were, during the material period) subject.

52. In that letter, Mr. Taher sought copies of ‘all VDHI communications with Noteholders in connection with the BVI Proceedings’ since its appointment as class representative.

53. [In] VDHI’s response to this letter..., VDHI (i) did not respond to any of Mr. Taher’s information requests and, instead, (ii) sought evidence from him that he is indeed a Noteholder. Such unconstructive behaviour, particularly on the part of a class representative, is to be deprecated. It is common ground that Mr. Taher is a Noteholder... Even now, VDHI is unwilling to answer the requests for information in this letter.

54. Third, it is apparent that it is not only Mr. Taher who is being kept in the dark. Since receipt of the letter from [Seith Miller Steinlein, a German law firm representing a Mr. Aufrecht], the MultiBank Group has spoken with SMS with a view to understanding what reports of these proceedings (if any) have been given by VDHI to Noteholders. SMS confirmed to the MultiBank Group that VDHI had not informed their client (i) of the fact 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. Further, SMS’s client has not been invited to any meeting of Noteholders to discuss the conduct of this litigation.”

[18] As to the first matter, as the skeleton rightly accepts, it was only in November 2021, when the Court of Appeal lifted all confidentiality restrictions, that unrestricted communication with the noteholders became possible. Until then the confidentiality provisions on which much weight was placed at the time by the MGW parties hamstrung VDHI’s ability to communicate with noteholders. The communication to noteholders prior to the EGMs was approved by me over the objections of Mr. Gee QC, who appeared for MBFX and wanted much *less* information to be given to the noteholders than was in fact given. This first matter has very little weight as a relevant consideration.

[19] As to the second matter, this litigation has been blighted by the parties’ failure to cooperate. This is an example of VDHI failing to engage as they should have done with MBFX and Mr. Taher. However, cooperation requires two sides to work together. The MGW parties understandably want to be able to put their case to the

noteholders. In particular, MGW has itself made an offer to settle to noteholders. Now VDHI do not think much of the offer, but VDHI should nonetheless in my judgment pass it to the noteholders for the noteholders to consider. Unfortunately the MGW parties sought to include with the offer a statement outlining their defence to the allegations made against them. There was nothing wrong with that in principle, but the statement contained inappropriate language and VDHI, not in my judgment unreasonably, refused to send it unaltered.

- [20] None of this reflects great credit on any of the parties. There is happily some sign that greater cooperation is occurring. As I indicated in an email I had sent on 16th March 2022, I considered and consider that it is right to:

“give directions that the noteholders be given up-to-date information, including information as to the offer made by MGW. The Mex side should also be entitled to have sent to the noteholders whatever they reasonably think is appropriate. This may include the defence and other documents setting out Mex’s case.

The documents should not include inappropriate comments. If the parties cannot agree on parts of a document which may or not be appropriate, the Court will of course determine those matters. However, this liberty to apply is not intended to give VDHI a power of censorship over documents which Mex reasonably want sent to noteholders.”

- [21] This in my judgment is a pragmatic way forward. Whilst this second issue raised by Mr. Malek QC is regrettable, in my judgment it is not sufficient to justify terminating VDHI’s representative function.

- [22] So far as the third matter is concerned, a German firm of lawyers, Seith Miller Steinlein, on behalf of their client, a Mr. Aufrecht, wrote to MGW on 15th February 2022 to complain that VDHI and VDH AG had only returned 50 per cent of the monies invested by Mr. Aufrecht. Mr. Aufrecht was not, however, a direct noteholder and thus was not entitled to attend the EGMs. He had invested in one of the Funds. What had happened was that KPMG, who were winding up the Funds, had returned

an initial 50 per cent of Mr. Aufrecht's investment to him. 20 per cent was being retained by KPMG to cover the litigation costs. The balance (and any recovery in the current litigation) would be paid in due course. There is in my judgment nothing in this third point.

The EGMs

[23] I turn then to alleged irregularities in the holding of the EGMs. What Mr. Penny QC submits in his skeleton is borne out by the evidence. He says:

“12. VDHI is the entity legally entitled to act on behalf of the 3 mutual funds..., which have no separate corporate personality. Indeed, VDHI is the only entity which can represent the Funds as noteholders of the Issuer, Mex Securities, including at general meetings and in any votes taken. The Funds as Noteholders collectively hold (and held) more than 10% of the MB Notes and the Alpha Notes. Accordingly, VDHI on behalf of the Funds was entitled to require the Issuer to convene a meeting of the Noteholders under clause 3.1 Schedule 6 of the Agency Agreement.

13. By emails and letters dated 24.6.21 VDHI on behalf of the Funds invited the Issuers to convene the general meetings for the MB Noteholders and the Alpha Noteholders. The written requests were binding on the Issuers because they took place before the termination of the domiciliation agreement concerning the Issuer was filed with the Trade and Companies Registry on 25.6.21.

14. The Issuer failed to convene the meeting within 7 days (or at all) and did not respond to the request. Accordingly, pursuant to clause 3.1 of Schedule 6 of the Agency Agreement, VDHI was entitled on behalf of the Funds (holding in excess of 10% of each of the Notes) to convene the EGMs. VDHI sought to do so by sending notices to the Common Depositary on 5 July 2021 in accordance with the relevant contractual documents... However, due to delays (not caused by VDHI and which was out of its hands) caused by confusion over the Issuer and the failure to appoint a new paying and transfer agent, the clearing system did not send out convening notices until 7 and 8 July 2021. There were typographical errors in the EGM notices but these were remedied on 15 July 2021. Mr Priess says that as the notices were received by his noteholders, he believes notices were sent to all noteholders, but, if they were not, it is the fault of clearing, or through them not having the correct details.

15. In the absence of a new manager of the Issuer, voting certificates were not issued for the purposes of the general meeting. [The fourth expert

report of Dr Philippe] confirms that it is possible to vote without the voting certificates because the Noteholders were validly represented, and their will was clearly expressed in their votes. The absence of certificates has no influence on the decision, and is not an indicator of fraud. Indeed, the events and documents described above demonstrate that there was every effort made to ensure that EGM notices were given to all noteholders, and there is no evidence of any fraudulent intent.

16. The EGMs took place on 27 July 2021, at which only Noteholders voted and their votes were counted according to their interest in the Notes...

17. Moreover, and fatally to MBFX's complaint, under Luxembourg law, resolutions are valid and effective unless and until the Luxembourg court declares them a nullity, at which point they become void *ab initio*. Accordingly, the simple position is that since Mr. Taher (*qua* noteholder) has not obtained an order from the Luxembourg court declaring the resolutions void, the resolutions are valid and fully effective."

[24] Accordingly, I reject the allegation that that EGMs were not validly held. VDHI seem to have done well under difficult circumstances with Mex Securities effectively having abandoned its duties to the noteholders.

VDHI's bad character

[25] I turn then to the fourth objection, VDHI's alleged bad character. This allegation comprised four elements. First, a previous chairman and director of VDHI, a Mr. Blohm, "was (and possibly remains) the subject of criminal investigation for fraud-related offences." Second, the ultimate beneficial owner of VDHI, a Mr. von Boetticher, had faced civil fraud proceedings in the United States. Third, KPMG resigned as the auditors of VDHI. Fourth, the Luxembourg regulator fined VDHI for twelve serious breaches of VDHI's regulatory obligations.

[26] Dealing with these in turn, it is (as Mr. Malek QC's skeleton makes clear) unclear whether Mr. Blohm was ever convicted of anything. In any event, however, he had left VDHI in 2016. He had no ongoing involvement. This historic matter cannot sensibly in my judgment affect VDHI's current suitability as representative.

[27] As to the second matter, the allegations in respect of Mr. von Boetticher go back to his involvement with an American company called Mills Corp which operated a real estate investment trust (or REIT) from the late 1990's. He was one of a number of defendants to a class action brought in respect of alleged fraud committed by distributing more by way of income than the company in fact earned. The plaintiffs described this as a Ponzi scheme. The matter, however, never came to trial, so that matter was never proved in court. As K2's report (obtained by MGW) on the matter shows:

"2.15 ...On 12 November 2008, the lead plaintiffs reached a USD 165 million settlement with Mills Corp, related entities and individuals. This included von Boetticher as an individual defendant. However, the lead plaintiffs continued the claims against Ernst & Young and the KanAm defendants. On 1 April 2009, a settlement was reached with Ernst & Young for USD 29.75 million and on 11 May 2009 a settlement was reached with the KanAm defendants and other related parties for USD 8 million."

[28] Mr. von Boetticher's involvement was to sign the allegedly misleading financial statements for 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. He also controlled the KanAm defendants.

[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 of 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.

[30] The size of the Mills Corp settlement is a concern. However, 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.

[31] As to the third matter, there is no evidence why KPMG resigned as VDHI's auditor. It is significant in my judgment that KPMG, as liquidators of the funds, are willing to fund the continuing litigation with VDHI as the noteholders' representative. That implies that KPMG have confidence in VDHI acting properly in the current litigation. In turn that suggests that their resignation as auditor was not due to any gross impropriety on VDHI's behalf.

[32] As to the fourth matter, it is true that CSSF fined VDHI for regulatory breaches. However, the fines were low, so low in fact that they did not have to be publicly disclosed by VDHI. So far as appears there are no further sanctions imposed on VDHI by CSSF. 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.

Substituting Messrs Priess and Frevel: conclusion on unsuitability

[33] I agree that, if VDHI were an otherwise unsuitable entity to be appointed as representative ancillary claimant, the substitution of Mr. Priess and Mr. Frevel would not, as Mr. Malek QC submits as his fifth and last point, cure the problem. However, in my judgment VDHI is a suitable representative. As I have said, they have been doing a good job.

Action oblique

[34] Mr. Malek QC devotes most of pages 20 to 23 of his skeleton to a submission that the noteholders had no claim in Luxembourgish law to an "*action oblique*" against the MGW ancillary defendants and Mr. Taher. Therefore, there was no point appointing a representative to represent them, because there was no viable cause of action. An *action oblique* has some similarities to a common law derivative action. If the elements of the cause of action were made out, then the noteholders might be able to sue in right of Mex Securities.

[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. That is sufficient in my judgment to dispose of this point.

Going *ex parte* and non-disclosure

[36] Mr. Malek QC complains about the manner in which the representation order was obtained and says there were material non-disclosures. He says:

“83. The Representative Order was sought by VDHI at an *ex parte* hearing on 21 June 2021 without any notice to the Ancillary Defendants (the application documents not having been served on the Ancillary Defendants ahead of the hearing)... As appears from [the] transcript, whilst Jack J expressed concern as why the application was being heard *ex parte*, he ultimately proceeded to hear the same on the basis that MBFX would have liberty to challenge at an *inter partes* return date. The CMC is that return date.

84. MBFX submits that the Representative Order should be set aside for two reasons. First, there was no reasonable basis for the application for the Representative Order to be made without notice to the Ancillary Defendants. As set out in **National Commercial Bank Jamaica Ltd v Olint Corp**,⁵ a without notice application should only be entered where: ‘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 Piller* order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act.’

85. Neither of these exceptions applies in the present case. Instead, the reason given for the ‘urgency’ of the application in VDHI’s skeleton of 18 June 2021 was (at para 3):

‘Pursuant to the Court’s order dated 28 May 2021, the Applicant was ordered to file and serve its Claim Form and Statement of Claim by 4pm on Monday 21 June 2021. It seeks to bring that claim, at least in part, in a representative capacity (although it also does so in other capacities). This application is brought before filing the claim so that there can be no unnecessary later argument from the Defendants over its capacity to act as a representative party (not precluding the possibility of noteholders objecting).’

⁵ [2009] UKPC 16, [2009] 1 WLR 1405 (Privy Council).

86. This is not an acceptable reason for not giving notice of the application to the Ancillary Defendants. Whilst VDHI may understandably have wanted to obtain the Representative Order as soon as possible and before it filed its claim, this was not a good reason for depriving the Ancillary Defendants of notice...

87. Second, material facts were not disclosed by VDHI at the *ex parte* hearing. These facts were either known to VDHI or they ought to have been known as a result of the inquiries that it should have been made ahead of the hearing. MBFX relies upon the following non-disclosures in this respect which, it is submitted, are all matters that (adopting the words used in **Paraskevaides**⁶) 'one reasonably should expect a court to consider to be material in the exercise of its discretion whether to grant the order being sought':

87.1. The conflicts of interest to which VDHI and VDH AG are subject, as set out... above.

87.2. The matters set out... above, as a result of which VDHI was not an appropriate class representative.

87.3. The fact that the Luxembourg law requirements for the admissibility of the underlying claims were not satisfied... At the very least, the Court ought to have been informed of the derivative nature of these claims and that it was seriously arguable that the conditions for bringing the same were not met.

88. If the Court is satisfied that the application for the Representative Order ought to have been on notice to the Ancillary Defendants and/or that material non-disclosure has been established, the Court is invited to set aside the Representative Order. No such order should be regranted in favour of VDHI (or Messrs Priess and Frevel)..."

[37] As to Mr. Malek QC's para 83, this does not in my judgment give the full picture of what occurred on Monday 21st June 2021. That was the date on which VDHI had to serve its pleadings. In order to do so, it needed to be appointed as representative of the noteholders. It had issued an application returnable that day. Mr. Gee QC, who was representing MBFX, was aware of the application and had indeed prepared

⁶ *Thelma Paraskevaides and another v Citco Trust Corp Ltd and others* [2020] ECSCJ No 107 (Court of Appeal) at [31].

a skeleton argument explaining why a representation order should not be made. However, VDHI had made a deliberate decision not to serve MBFX's legal representatives with the application and supporting documentation.

[38] Now it is right that CPR 21.2(5) provides that an "application to appoint a representative claimant may be made without notice." However, it is not obligatory to go *ex parte*. It seemed to me at the time and seems to me now that VDHI was simply being unhelpful to MBFX in not serving the documents.

[39] Mr. Gee QC not surprisingly complained that he was being ambushed by VDHI. I gave him a choice: either I would hear VDHI *ex parte* on the Monday with a return date of the case management conference, or I would extend time for VDHI to serve its pleading to Thursday 24th June 2021, so the application could be heard *inter partes*. The transcript from page 6 to page 14 shows Mr. Gee in turn not being cooperative in choosing between these options. Eventually, in the absence of any choice being made by him, I decided to deal with the matter *ex parte*. As I said in my *ex tempore* judgment that day:

"The case here has been blighted by the fact that the parties have been unable to cooperate, and I regret to say that that's something which has continued today when Mr. Gee has been unwilling to agree any sensible way forward on this question of the representative proceedings."

[40] In my judgment MBFX had the option of having the application for a representation order heard *inter partes*. They declined my invitation that the matter be adjourned to the Thursday on terms which were scarcely onerous. It does not lie in their mouth now to complain that the application was heard *ex parte*. Even if that is wrong, it is always a matter for the judge as to whether a matter should be heard *ex parte* or not. It is not something which can be blamed on a party.

[41] I reject the first submission made by Mr. Malek QC.

[42] As to the second submission, Mr. Penny QC accepted that the duties on counsel on an *ex parte* application were as stated in the well-known authorities of **Brink's Mat Ltd v Elcombe**,⁷ as applied in this jurisdiction in **Enzo Addari v Edy Gay Addari**⁸ and **Paraskevaides**. However, he submitted that the content of what had to be disclosed differed depending on the nature of the application. Where a *Mareva* injunction was sought, then the duties were those appropriate for a fully adversarial *ex parte* application. An application such as the present was more in the nature of an administrative exercise: how best were the numerous claimants to be represented? The content of the duty of full and frank disclosure was accordingly more circumscribed.

[43] I agree with this submission, but it is on the facts of this case of little relevance. I have rejected Mr. Malek QC's points on conflict of interest, on VDHI's suitability and on the *action oblique*. Accordingly nothing remains of the points raised in para 87 of his skeleton. There was in my judgment no material non-disclosure. Accordingly, I refuse to discharge the representation order on that ground.

[44] I should add that if I were wrong about this, the question of discharging and then regranting the representation order would have arisen. A material consideration in the current case is that VDHI were acting on behalf of the noteholders, who were innocent of any material non-disclosure. It is not the usual case in which solely the interests of the applicant and the respondent have to be balanced when deciding whether to discharge for non-disclosure. If there had been material non-disclosure, then in my judgment the interests of the noteholders would have weighed heavily. I would have reimposed the representation order in these circumstances.

Mr. Taher

[45] This leaves a minor point. When the representation order was made, Mr. Taher was not a party to the action. VDHI were appointed to represent all the noteholders,

⁷ [1988] 1 WLR 1350 at p 1356.

⁸ [2005] ECSCJ No 125, [2005] ECSCJ No 46, Civil Appeal No 2 of 2010 (determined 27th June 2005).

including him. He wants VDHI to cease to act as his representative and takes two points. The first is that he does not want to be represented by VDHI and there is no good reason why he should be. The second is that, since he is now a party to the action as an ancillary defendant, he cannot be represented by someone acting as the ancillary claimant. No one, Mr. Malek QC submits on his behalf, can be both a claimant and a defendant.

[46] As to the first point, Mr. Penny QC says:

“*Qua* Noteholder, Mr. Taher has precisely the same interest against the wrongdoers as all of the other Noteholders. Further, because the representative action jurisdiction does not depend upon the consent of all of the represented claimants but rather upon community of interest (**Lloyd v Google** at [77]), Mr. Taher’s personal view that he does not want to be represented as a claimant is irrelevant. Further, Mr. Taher should not be permitted to opt out as a case management issue, since he is not entitled to set off his actual or contingent entitlements under the Notes or his interest in the recovery of the €36.4m whether by damages or restitution, against his liability to pay damages to compensate for the damage his actions have caused.”

[47] I agree that the consent of the represented parties is not required, but it is nonetheless a potentially relevant consideration. The circumstances of each case need to be examined. In a case like **Google**, where the representative claimant is representing potentially millions of users of the defendant’s services, it would be disruptive to have opt-outs whereby individuals who are represented by the representative claimant could insist on being added as a defendant instead. However, that is long way from the present case, where the number of noteholders is comparatively limited. Mr. Taher does not want to be represented by VDHI. That in my judgment is readily understandable. He is already an ancillary defendant, so there is no inconvenience in removing him as one of those noteholders represented by VDHI. On case management grounds, it is appropriate to allow Mr. Taher to opt-out of the representation by VDHI.

[48] As to the second point, (although I did not hear full argument on this) there may be rare circumstances where a person can be both a claimant and a defendant, for example where they are parties in different capacities, say a claimant in a personal capacity and a defendant as an executor of a deceased person. As a general rule, however, I agree with Mr. Malek QC that a party cannot be both a claimant and a defendant. On this ground too, the representation order should be amended so as make clear that VDHI are acting on behalf of all the noteholders apart from Mr. Taher.

Conclusion

[49] Accordingly, I refuse MBFX's application of 6th July 2021, save that the representation order be varied so that VDHI shall represent all the noteholders save Mr. Taher. I have indicated my broad agreement with MBFX's application of 13th December 2021, so that the noteholders be sent MGW's offer to settle. I will hear counsel on whether a formal order is required, and if so in what terms, as well as any consequential matters.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar